

OPINION OF ADVOCATE GENERAL

STIX-HACKL

delivered on 5 October 2006¹

I — Introduction

1. In these preliminary ruling proceedings the Court is led to answer the question whether, in relation to compulsory insurance against civil liability in respect of the use of motor vehicles, a person is to be regarded as a ‘passenger’, within the meaning of Article 1 of Council Directive 90/232/EEC,² if she suffers a road traffic accident when travelling in a vehicle which was neither designed for the carriage of passengers nor fitted with seats for that purpose. In its second question the national court goes on to ask the Court whether individuals may, before the national courts, rely directly on the rights conferred on them by Article 1 of Directive 90/232.

¹ — Original language: French.

² — 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 (OJ 1990 L 129, p. 33, ‘the Third Directive’).

II — Legal framework

A — Relevant provisions of Community law

2. Under Article 1 of Council Directive 72/166/EEC,³ “vehicle” means any motor vehicle intended for travel on land and propelled by mechanical power, but not running on rails, and any trailer, whether or not coupled’.

3. Article 3(1) of the First Directive provides:

‘Each Member State shall ... take all appropriate measures to ensure that civil liability

³ — 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 1972(II), p. 360, ‘the First Directive’).

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.'

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

4. Article 2(1) of Second Council Directive 84/5/EEC⁴ provides:

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

'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:

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.

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

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.

⁴ — 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, as amended by the Third Directive (OJ 1984 L 8, p. 17, 'the Second Directive').

Member States shall have the option — in the case of accidents occurring on their territory — of not applying the provision in the first subparagraph if and in so far as the victim may obtain compensation for the damage suffered from a social security body.'

Whereas motor vehicle accident victims should be guaranteed comparable treatment irrespective of where in the Community accidents occur;

5. According to the second, third, fourth and fifth recitals in the preamble to the Third Directive:

Whereas there are, in particular, gaps in the compulsory insurance cover of motor vehicle passengers in certain Member States; whereas, to protect this particularly vulnerable category of potential victims, such gaps should be filled;

'Whereas Article 3 of Directive 72/166/EEC requires each Member State 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; whereas the extent of the liability covered and the terms and conditions of the insurance cover should be determined on the basis of those measures;

...'

6. Article 1 of the Third Directive provides:

Whereas Directive 84/5/EEC ... reduced considerably the disparities between the level and content of compulsory civil liability insurance in the Member States; whereas significant disparities still exist, however, in such insurance cover;

'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.

For the purposes of this Directive, the meaning of the term 'vehicle' is as defined in Article 1 of Directive 72/166/EEC.'

become liable to pay to any person (exclusive of the excepted persons) by way of damages or costs on account of injury to person or property caused by the negligent use of the vehicle at that time by the user ...'

B — *Relevant provisions of national law*

7. Section 56 of the Road Traffic Act 1961 (the 1961 Act) prescribes as follows the obligation to take out insurance covering the use of a vehicle:

'(i) A person ("the user") shall not use in a public place a mechanically propelled vehicle unless either a vehicle insurer or an exempted person would be liable for injury caused by the negligent use of the vehicle by him at that time or there is in force at that time either:

- (a) an approved policy of insurance whereby the user or some other person who would be liable for injury caused by the negligent use of the vehicle at that time by the user, is insured against all sums without limit ... which the user or his personal representative shall

8. Section 65(1)(a) of the 1961 Act, as inserted by Regulation 7 of the European Communities (Road Traffic) (Compulsory Insurance) (Amendment) Regulations 1992 ('the 1992 Regulation') defines 'excepted person' in the following terms:

'(a) Any person claiming in respect of injury to himself sustained while he was in or on a mechanically propelled vehicle ... to which the relevant document relates other than a mechanically propelled vehicle or vehicles forming a combination of vehicles of a class specified for the purposes of this paragraph by regulations made by the Minister provided that such regulation shall not extend compulsory insurance for civil liability to passengers to:

- (i) any part of a mechanically propelled vehicle, other than a large public

service vehicle, unless that part of the vehicle is designed ... and constructed with seating accommodation for passengers;

(b) cycles designed and constructed with seating accommodation for passengers.

...'

(2) Subparagraph (a) of paragraph (1) of this Article shall come into operation on the 31st day of December 1995.

9. Pursuant to the powers conferred on the Minister by Section 5 and Section 65(1)(a) of the 1961 Act, the Minister adopted the 1992 Regulation, Article 4 of which inserted a new Article 6 into the Road Traffic (Compulsory Insurance) Regulations 1962 ('the 1962 Regulations') in the following terms:

(3) Subparagraph (b) of paragraph (1) of this Article shall come into operation on the 31st day of December 1998.'

'(1) The following vehicles are hereby specified for the purposes of paragraph (a) of subsection (1) of section 65 of the Act:

(a) vehicles, other than cycles, designed and constructed with seating accommodation for passengers;

10. The referring court states that a reading of section 56 in conjunction with section 65(1)(a) of the 1961 Act means that a person using a vehicle must have an approved policy of insurance to cover liability for personal injuries caused to persons travelling in the vehicle other than excepted persons. Excepted persons are those claiming in respect of an injury sustained while in a vehicle other than a type of vehicle specified by ministerial regulation. Consequently, in respect of vehicles specified by the Minister under the Regulations, a compulsory insurance obligation exists in respect of liability

for injury to individuals travelling in those vehicles. However, in specifying a vehicle or class of vehicles, the Minister does not have power to extend the compulsory insurance obligation in respect of liability for injury to individuals travelling in any part of that vehicle or class of vehicles not designed and constructed with seating for passengers.

III — The facts, progress of the case and questions referred for a preliminary ruling

11. Ms Farrell suffered a road traffic accident on 26 January 1996 when a passenger in a vehicle. Mr Whitty, the owner and driver of the vehicle, lost control of the vehicle which collided with a wall. That vehicle was a van which was neither designed nor constructed to carry passengers in the rear, and so it was not fitted with rear seats. When the accident occurred, Ms Farrell was sitting on the floor of the rear of the van, that is to say, in the part of the vehicle not fitted with seats.

12. Following the accident it was confirmed that Mr Whitty was not insured. For that reason Ms Farrell sought to obtain compen-

sation from the Motor Insurers Bureau of Ireland ('the MIBI'), pursuant to an agreement entered into with the Minister for the Environment in 1988 ('the Agreement'). In the Agreement the MIBI undertook to compensate the victims of road accidents involving drivers who had failed to comply with the compulsory insurance obligation imposed by the 1961 Act.

13. The MIBI refused, however, to compensate Ms Farrell on the ground that she had travelled in a part of a vehicle that was neither designed nor constructed to carry passengers. It considered that liability for the personal injuries suffered by the plaintiff in the main proceedings was not, therefore, a liability for which insurance was compulsory under the 1961 Act. In consequence, the Agreement was not applicable and the MIBI was obliged neither to compensate Ms Farrell nor to satisfy any judgment that she might obtain against Mr Whitty.

14. In September 1997 Ms Farrell brought proceedings against all the defendants in the main proceedings. In July 2001 she obtained judgment against Mr Whitty. The assessment of damages was adjourned to the trial of the action.

15. In her pleadings, the plaintiff sought to obtain declaratory relief indicating that the

domestic legislation in force at the time of the accident did not correctly transpose all the relevant provisions of the First Directive, as amended by the Third Directive, in particular, by its first article. Before the national court the authorities which are parties to the action and the MIBI rejected the idea that the domestic measures in force at the time of the accident did not make correct transposition of Article 1 of the Third Directive. Those authorities also argued that, in so far as the provisions of domestic law did not prescribe compulsory insurance to cover civil liability in respect of passengers in any part of a mechanically propelled vehicle other than a large public-service vehicle unless that part was designed and constructed with passenger seats, they did implement in a proper and permissible manner the relevant provisions; in point of fact, it was permissible under the relevant provisions of Community law not to extend the obligation to insure against civil liability in respect of passengers in such part of a vehicle.

the provisions of the Third Directive in respect of passengers on vehicles other than motorcycles, did Article 1 of the 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, is Ireland obliged to render insurance compulsory in respect of civil liability for injury to individuals travelling in that part of a motor vehicle not designed and constructed with seating accommodation for passengers?

- (2) If the answer to question 1 is in the positive, does Article 1 of the third directive confer rights on individuals that may be relied upon directly before the national courts?

16. Those were the circumstances in which the High Court of Ireland has referred the following questions to the Court for a preliminary ruling:

IV — Analysis

A — *Introductory remarks*

(1) As of 31 December 1995, the date by which Ireland was obliged to implement

17. This case relates to the Community framework of compulsory insurance of civil

liability in respect of motor vehicles. This framework has been created by a series of directives intended to render easier the movement of vehicles between Member States.

Second Directive requires the setting up of a guarantee body responsible for compensating damage to property or personal injuries caused by an unidentified or uninsured vehicle.⁶

18. So, with regard to motor vehicles, the First Directive laid down the obligation to take out civil liability insurance in respect of their use in order to cover personal injuries. Insurance cover must extend to injury caused in the territory of other Member States in accordance with the laws in force in those States.

20. The Third Directive too is intended to lessen the disparities between Member States, especially by filling gaps in the compulsory insurance cover of passengers.⁷ The Third Directive also contains provisions concerning the territorial extent of the guarantee and access to the guarantee fund.

19. The Second Directive is intended to lessen the disparities between Member States so far as the level and content of compulsory liability insurance are concerned by, *inter alia*, fixing minimum guaranteed sums. Furthermore, compulsory insurance must cover both personal injury and damage to property. In addition, the Second Directive provides that contractual terms excluding the guarantee when the vehicle is used or driven by unauthorised persons, or persons without a driving licence or persons in breach of statutory technical requirements concerning the condition and safety of the vehicle concerned, may not be invoked against injured third parties.⁵ Finally, the

21. The Fourth Directive,⁸ which is not applicable to the facts of the case in the main proceedings, deals essentially with the settlement of claims arising from traffic accidents occurring outside the claimant's country of origin. In order to make it easier for an injured person to make a claim, this directive enables him to bring proceedings in his State of residence against the claims

5 — Article 2(1) of the Second Directive.

6 — Article 1(4) of the Second Directive.

7 — See, in particular, the fifth recital in the preamble to the Third Directive: '... there are, in particular, gaps in the compulsory insurance cover of motor vehicle passengers in certain Member States; whereas, to protect this particularly vulnerable category of potential victims, such gaps should be filled'.

8 — 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) (O) 2000 L 181, p. 65, 'the Fourth Directive'.

representative appointed in that State by the insurance undertaking of the person responsible.

secondly, to avoid the need for motorists to obtain insurance cover at each of the frontiers of the countries which they visit.

22. Finally, Directive 2005/14/EC⁹ brings up to date and improves the Community system of motor insurance, in particular by extending to all victims the right of direct action provided for by the Fourth Directive.

24. The basis of the green card system is that the national bureaux¹⁰ assume responsibility for handling and settling claims arising from accidents caused by visiting motorists and guarantee certificates of Motor Insurance ('Green Cards') issued by member insurance companies to their policyholders.

23. It is to be remarked that the Community system has from the beginning formed part of an older system, that of the green card, set up on 1 January 1953 under the aegis of the United Nations Economic Commission for Europe and managed by the Council of Bureaux, a body established in London in 1949. The purpose of that system is, first, to ensure that third party victims of road traffic accidents do not suffer from the fact that injuries or damage sustained by them were caused by a visiting motorist rather than a motorist resident in the same country and,

25. To sum up, it is to be held that Community law has provided for the introduction of compulsory insurance against civil liability in respect of the use of motor vehicles. Injured third parties are able to initiate proceedings directly against the civil liability insurer, failing which against the automobile guarantee body with territorial competence. On the other hand, Community law has not undertaken any approximation of the rules of civil liability in respect of road traffic accidents. That being so, the question that arises is whether, and if so to what extent, the insurer of liability or the guaran-

9 — 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 (OJ 2005 L 149, p. 14).

10 — See the definition given in Article 1 of the First Directive: 'a professional organisation which is constituted in accordance with Recommendation No 5 adopted on 25 January 1949 by the Road Transport Sub-committee of the Inland Transport Committee of the United Nations Economic Commission for Europe and which groups together insurance undertakings which, in a State, are authorised to conduct the business of motor vehicle insurance against civil liability.'

tee body can invoke, against the injured third party, not only the absence of liability on the part of the insured but also the actions of the injured third party or exceptions contained in the contract of insurance.¹¹

oblige Member States to make insurance compulsory in respect of civil liability for personal injuries to persons carried in a part of a vehicle neither intended for the carriage of passengers nor equipped to that end. In addition, she emphasises that Article 1 of the Third Directive has altered the obligations imposed on the Member States in the sphere of compulsory insurance, by requiring them to guarantee that insurance covers all passengers in vehicles. She argues that the Third Directive therefore affords the States no discretion on that point.

B — Concerning the first question referred

1. Summary of the parties' arguments

26. *Ms Farrell* and the *Commission* take the view, in substance, that Article 1 of the Third Directive requires compulsory insurance to cover in every Member State injury caused to persons travelling in a part of a vehicle neither designed for the carriage of passengers nor fitted with seats for that purpose, whilst *Ireland* and the *MIBI* take the contrary view.

27. Referring to *Withers*,¹² *Ms Farrell* notes that the First and Second Directives did not

28. *Ms Farrell* states that the term 'passenger' contained in Article 1 of the Third Directive has not been defined at all. It is clear from the order in *Withers*¹³ that passengers are individuals travelling in a vehicle, whether seated or not. In her opinion, if the term 'passenger', used in the Third Directive, had been interpreted as covering only seated persons, there would have been no need for the Court to have used the adjective 'seated' in that order. In addition, *Ms Farrell* remarks that the Court also mentions passengers in the passage concerning the part of a vehicle not fitted with seats. It is clear that if the Court had wished to distinguish passengers from other persons travelling in a vehicle, it could have used the word 'person' or 'individual' rather than 'passenger'.

11 — See, in this regard, the abovementioned rule laid down in Article 2(1) of the Second Directive, and also, as regards the guarantee body, the third subparagraph of Article 1(4) of that directive.

12 — Order of the Court (First Chamber) of 14 October 2002 in Case C-158/01 [2002] ECR I-8301.

13 — Cited in footnote 12, paragraph 21.

29. According to Ms Farrell, it follows that Article 1 of the Third Directive must be interpreted as obliging the Member States to render insurance compulsory in respect of civil liability for injury to individuals travelling in a part of a vehicle neither designed for the carriage of passengers nor fitted with seats for that purpose. That conclusion is not shaken by the passage in the Council's minutes concerning the adoption of the common position in respect of the Third Directive, according to which '[t]he Council and the Commission state that the provisions of Article 1 do not prejudice provisions in Member States' legislation concerning compensation of passengers incurring liability in respect of the accident, passengers whose numbers exceed the permitted limits or passengers who are carried in a vehicle which is not designed to carry persons other than the driver'. Ms Farrell in fact observes that, according to the case-law,¹⁴ in the absence of an express reference in the directive to the declaration recorded in the Council's minutes, the latter cannot constitute an aid to the construction of the directive.

30. *Ireland* is of the opinion that it has correctly implemented the Third Directive, given that that act does not oblige the Member States to ensure that compulsory civil liability insurance covers personal injuries sustained by persons travelling in a part of a vehicle neither designed for the carriage

of passengers nor fitted with seats for that purpose.

31. Since the concept of 'passenger' is not defined in the Third Directive, Ireland considers that it is for the Member States to determine what persons travelling in or on vehicles are to be regarded as 'passengers' for the purposes of the Third Directive. In its view, the concept of a 'passenger' necessarily presupposes a vehicle fitted with seats and the presence of a seat for that passenger. That approach is in keeping with the Council's intention when it adopted the directive in question. Moreover, Ireland argues that the Commission has indicated that the Third Directive did not prevent the Member States from providing exclusions from cover such as those contained in the 1992 Regulations.¹⁵

32. Ireland believes that the word 'passenger' within the meaning of Article 1 of the Third Directive must be distinguished from

¹⁴ — Case 143/83 *Commission v Denmark* [1985] ECR 427, paragraphs 12 and 13, and Case C-292/89 *Antonissen* [1991] ECR I-745, paragraphs 17 and 18.

¹⁵ — On this subject, Ireland refers to a letter of 4 May 1990 from the Director of the Direction Générale institutions financières et droit des sociétés de la Commission européenne (European Commission DG XV, Financial Institutions and Company Law), which states in particular that it is quite clear that in the absence of a definition in the directive of the concept of 'passenger', it is clearly left to the Member States to decide in what cases a person riding dangerously in or on a vehicle in a manner not foreseen by the vehicle manufacturer is deemed no longer to count as a 'passenger'.

the word 'passenger' used in a broader sense to denote anyone in or on a vehicle other than the driver. Because of the discretion enjoyed by the Member States, as shown in *Mendes Ferreira*,¹⁶ a certain scope is clearly, in the absence of any definition of the concept of 'passenger' in the Third Directive, left to the States to decide the cases in which a person riding dangerously in or on a vehicle in a manner not foreseen by the vehicle manufacturer is deemed no longer to count as a passenger within the meaning of Article 1 of that directive.

33. Furthermore, Ireland claims that its approach is fully in keeping with the requirements of safety. In its view, one of the purposes of a vehicle is the safe carriage of persons other than the driver. On this point, it refers to continued endeavours to improve vehicle safety and to the requirements of both domestic and Community law relating to the fitting and use of seat-belts in vehicles.¹⁷ Ireland's decision not to require compulsory insurance in respect of passen-

gers travelling in parts of vehicles which were not designed to carry passengers (for instance, in the shovel of a mechanical digger) is therefore entirely consistent with domestic policy on road safety.

34. It argues that it would be inconsistent with that approach for Ireland to accept that passengers may travel in parts of vehicles which were not designed to carry passengers and are not fitted with appropriate restraint systems. From the point of view of Community law too, it would be inconsistent to introduce directives on the construction, equipment and use of vehicles to standardise vehicle safety and at the same time to insist that persons travelling in any part of a vehicle, including on top of or underneath it, should be compensated though insurance when it is they who have placed themselves in danger.

16 — Case C-348/98 *Mendes Ferreira* [2000] ECR I-6711.

17 — Ireland mentions, by way of example, Council Directive 76/115/EEC on the approximation of the laws of the Member States relating to anchorages for motor-vehicle safety belts (OJ 1976 L 24, p. 6); Council Directive 77/541/EEC of 28 June 1977 on the approximation of the laws of the Member States relating to safety belts and restraint systems of motor vehicles (OJ 1977 L 220, p. 95), as amended by Commission Directive 90/628/EEC of 30 October 1990 adapting to technical progress Directive 77/541/EEC (OJ 1990 L 341, p. 1) and Council Directive 91/671/EEC of 16 December 1991 on the approximation of the laws of the Member States relating to compulsory use of safety belts in vehicles of less than 3.5 tonnes (OJ 1991 L 373, p. 26).

35. The *Commission*, for its part, considers that the key issue is, essentially, the extent of the obligation to ensure compulsory insurance cover for personal injury to passengers under Article 1 of the Third Directive. It states that the situation of vehicle passengers was not specifically regulated at Community level before the adoption of that directive. In

contrast, the Commission maintains that that article expressly extended the compulsory insurance cover imposed by Article 3(1) of the First Directive to personal injuries to ‘all passengers other than the driver’, as is clear from paragraph 34 of *Mendes Ferreira*.^{18 19}

level of protection for consumers in the motor insurance sector, and that a broad definition of ‘passenger’ would better achieve such an aim by providing protection for all those travelling in a vehicle. It adds that the word ‘vehicle’ is given a very broad definition in Article 1(1) of the First Directive. The Commission notes that the legislation contains a specific exclusion in relation to persons who voluntarily and with full knowledge enter a stolen vehicle. In contrast, the text is silent about the situation of a person occupying a vehicle in a manner not envisaged by the vehicle manufacturer, although that could obviously be thought to raise similar issues of public policy.

36. According to the Commission, Article 1 of the Third Directive was intended to bring about a uniform approach in relation to passenger cover, with the necessary corollary that the concept of ‘passenger’ must have a Community law definition. That notion not, however, being expressly defined in the Third Directive, a ‘passenger’ is simply a ‘traveller in or on a public or private conveyance; any occupant of such a conveyance other than the driver, pilot or crew’.²⁰

38. With regard to the statement entered in the Council minutes when the Council’s Common Position was adopted, the Commission argues that such a general statement which is not referred to in the wording of a provision of secondary legislation may not be used for the purposes of its interpretation.²¹ In particular, a statement which contradicts the wording or structure of a directive cannot alter the class of persons to be covered by compulsory insurance.²²

37. The Commission observes that the Third Directive was intended to provide a high

18 — Cited above, footnote 16.

19 — ‘However, although Article 1 of the Third Directive extended the compulsory insurance cover imposed by Article 3(1) of the First Directive, as amplified and supplemented by the Second Directive, to personal injuries to passengers other than the driver, it is clear ... that it does not specify the type of civil liability to be covered by the compulsory motor-vehicle insurance.’

20 — Definition given by the *New Shorter Oxford Dictionary*, 1993, and supported by the Commission.

39. Furthermore, the Commission takes the view that the statement was not expressly

21 — *Antonissen*, cited above in footnote 14, and Case C-402/03 *Skov and Bilka* [2006] ECR I-199.

22 — See, analogously, *Skov*, paragraph 43.

designed to clarify the concept of ‘passenger’ as such or, in consequence, the scope of the compulsory insurance obligation. It understands rather that the statement envisages certain situations in which compensation might be restricted by reason of considerations of the victim’s contributory liability.

40. With regard to that restriction, the Commission refers to *Candolin*²³ in which the Court was led to examine a provision of Finnish law allowing a passenger’s compensation to be reduced on the ground of his own contributory fault if the driver of the vehicle was intoxicated. It stresses that in that case the Court rejected the contention that Community law does not impose any limits on the appraisal under national law on civil liability of the extent to which the passenger contributed to the occurrence of his injuries and states that it is only in exceptional circumstances that the amount of compensation may be limited on the basis of an individual assessment (and not on the basis of general and abstract criteria).²⁴ Here the Commission mentions the amendment to the Third Directive made, after the events of the case in the main proceedings, by Directive 2005/14/EC,²⁵ which added a new indent to Article 1 of the Third Directive.²⁶

41. Furthermore, the Commission believes that the situation of a person who merely accepts or chooses to travel in a part of a vehicle containing no accommodation for passengers cannot be equated to the very particular and serious circumstances justifying exceptions to compulsory insurance. One such exception is provided for in the Third Directive in respect of passengers who voluntarily and with full knowledge travel in a stolen vehicle, and in the Second Directive, which lays down a derogation from the obligation to compensate in respect of persons who voluntarily entered the vehicle that caused the damage or injury, when it is proved that they knew that the vehicle was not insured.

42. The Commission is therefore of the opinion that the concept of passenger for the purposes of Article 1 of the Third Directive is very broad and covers all persons conveyed in a vehicle.

2. Assessment

(a) Wording and legislative context of Article 1 of the Third Directive

23 — Case C-537/03 *Candolin* [2005] ECR I-5745.

24 — *Candolin*, paragraphs 29 and 30.

25 — Footnote 9.

26 — ‘Member States shall take the necessary measures to ensure that any statutory provision or any contractual clause contained in an insurance policy which excludes a passenger from such a cover on the basis that he knew or should have known that the driver of the vehicle was under the influence of alcohol or of any other intoxicating agent at the time of an accident shall be deemed to be void in respect of the claims of such passenger.’

43. Although the concept of vehicle is defined in Article 1 of the First Directive, the same cannot be said of the concept of passenger. Moreover, Article 1 of the Third Directive refers to ‘all passengers, other than the driver’, which means that the status of passenger excludes that of driver.²⁷

44. Ireland does not deny that in a broad acceptance of the word the concept of passenger includes any person ‘in or on’ a vehicle.

45. The question which now arises is whether it is appropriate to remove from the circle of passengers in the broad sense those who are carried on board a vehicle when it is not designed to carry them and/or is not fitted out to that end.

46. Ireland, with the support of the MIBI, declares itself in favour of a narrower definition of passenger that would exclude from compulsory insurance cover third

parties injured while travelling in a vehicle that was neither designed to carry them nor equipped to that end. To justify that approach, Ireland advances the aim of consistency with the rules relating to road safety, claiming that to include such persons in the ambit of the compulsory insurance guarantee would be tantamount to making insurance cover deliberate dangerous conduct.

47. While Ireland’s wish for consistency deserves to engage the Court’s attention, the fact remains that the interpretation thus propounded of Article 1 of the Third Directive would lead to the introduction of a distinction among injured third parties that is not to be inferred from the wording of the directive. The Commission is fully entitled to observe that the relevant Community law expressly provides an exception to the insurance obligation, with regard to those passengers who of their own free will and with full knowledge of the facts ride in a stolen vehicle,²⁸ and a derogation from the obligation to compensate in respect of persons who voluntarily entered the vehicle which caused the damage or injury when it is proved that they knew that the vehicle was not insured.²⁹ It therefore appears inadvisable to introduce implicit restrictions into the insurance cover afforded to passengers.

27 — Concerning problems in the actual identification of the driver, see the highly instructive study by the Consumer Law Centre of the University of Louvain dealing with the situation in Belgian law: ‘La notion de conducteur sous l’empire de la loi du 21 novembre 1989’, Forum de l’assurance 2006.

28 — The second subparagraph of Article 2(1) of the Second Directive.

29 — The third subparagraph of Article 1(4) of the Second Directive.

48. As regards the absence of cover for persons who of their own free will expose themselves to a danger of which they ought to have been aware, in accordance with the position adopted by Ireland, reference may appropriately be made to *Candolin*,³⁰ which dealt with a provision of Finnish law permitting a passenger's compensation to be reduced — on the ground of his own contributory fault — when the driver was drunk. After emphasising that the three first motor insurance directives had not undertaken harmonisation of the rules of civil liability for road traffic accidents, the Court held that such rules could not prejudice the effectiveness of those directives. It considered that their effectiveness was indeed so prejudiced where the victim's right to compensation was reduced on the basis of general and abstract criteria and not on the basis of an individual assessment of his conduct. Transposed to the instant case, notwithstanding the fact that the provisions of domestic law at issue are not pertinent to the law of civil liability, that reasoning might mean that insurance cover for certain classes of persons carried cannot be reduced or excluded on the basis of considerations depending on the hazardousness in the abstract of their conduct.

49. Finally, although the directive in question is not applicable to the case in the main proceedings, the fact remains that Directive 2005/14 too adopted a restrictive approach to restrictions of the insurance cover

afforded to passengers. In point of fact, Article 1 of the Third Directive, as amended by Directive 2005/14,³¹ provides that 'Member States shall take the necessary measures to ensure that any statutory provision or any contractual clause contained in an insurance policy which excludes a passenger from such cover on the basis that he knew or should have known that the driver of the vehicle was under the influence of alcohol or of any other intoxicating agent at the time of an accident, shall be deemed to be void in respect of the claims of such passenger'. The reason underlying that provision is that the passenger 'is not usually in a position to assess properly the intoxication level of the driver'.³²

(b) Purpose of Article 1 of the Third Directive

50. It would be well to inquire whether the purpose of Article 1 of the Third Directive confirms the objections set out above on the basis of the wording of that article and of its legislative context.

51. With regard to compulsory motor insurance cover for passengers, the Third Direct-

30 — Cited in footnote 23.

31 — Footnote 9.

32 — 15th recital in the preamble to Directive 2005/14.

ive made considerable changes to the state of Community law. In *Withers*, which dealt with facts similar to those in the case in the main proceedings, the Court held, à propos of the First and Second Directives, that they must be interpreted as meaning that they 'do not preclude a Member State from maintaining national legislation which does not require compulsory insurance against civil liability arising from the use of motor vehicles to cover personal injuries to passengers carried in a part of a vehicle other than a large public service vehicle, unless that part of the vehicle was designed and constructed with seating accommodation for passengers', for the Member States remained competent to determine the extent of passenger cover.³³

52. That decision does not appear to matter in the instant case, given that the aim of the Third Directive is to fill the gaps in the compulsory insurance cover of motor vehicle passengers in certain Member States³⁴ by extending the compulsory insurance cover provided for by Article 3(1) of the First Directive to 'all passengers, other than the driver'.³⁵

53. Here it may be observed that that extension was intended to protect a particu-

larly vulnerable class of potential victims.³⁶ Now, as the Commission has correctly noted, all persons carried are thus vulnerable. On the other hand, the Commission's considerations concerning the need of a high level of consumer protection, as expressed in the 13th recital in the preamble, scarcely carry conviction, for the overriding requirement of consumer protection cannot treat as nothing the actions of the person carried, if he deliberately exposes himself to danger.

54. In light of the fact that the Third Directive carried on the task of harmonising the content and scope of compulsory insurance of civil liability in respect of motor vehicles, there are grounds for considering that the concept of passenger, referred to in Article 1 of the Third Directive, must be interpreted uniformly at Community level. Indeed, the want of such uniform interpretation would lead to permitting the continued existence of just those gaps that the Third Directive is intended to fill.

55. In this connection, it may be noted that the construction suggested by Ireland could well introduce new divergences from one Member State to another. Indeed, if the

33 — See paragraph 18 of that order, cited in footnote 12.

34 — Fifth recital in the preamble to the Third Directive.

35 — On this point, see *Mendes Ferreira*, cited above in footnote 16, paragraph 34.

36 — Fifth recital in the preamble to the Third Directive.

concept of passenger is to be restricted to passengers using seats provided for their carriage, disparities might arise to the disadvantage of such passengers.³⁷

56. In this context it seems difficult to make the concept of passenger for the purposes of Article 1 of the Third Directive depend on the conduct of a victim of a road traffic accident. In actual fact, taking into account the hazardousness of the conduct of a victim of a road traffic accident, whether or not it occurred on board a vehicle subject to compulsory insurance, is a matter falling within the ambit of the law of civil liability and not within the ambit of a victim's direct action against the civil liability insurer or, failing him, the body referred to in Article 1 (4) of the Second Directive. It is permissible for the insurer or the body to bring an action against the person whose conduct has contributed to causing the injury.

57. Finally, Ireland's reference to the joint statement of the Council and the Commission entered in the Council minutes at the

time of the adoption of the Council's Common Position, repeated in the letter of 4 May 1990, hardly seems relevant. According to the Court's settled case-law, a general statement entered in the Council minutes which is not referred to in the wording of a provision of secondary legislation may not be used for the purposes of its interpretation;³⁸ in any case, the statement in question contemplates the restriction of 'compensation of passengers' only when the latter have contributed to their own injuries. The statement seems, therefore, to be aimed at the rules of civil liability and cannot limit the scope of provisions of Community law that ensure the uniform operation of the insurance guarantee — to the exclusion of any restriction, save exceptions expressly provided for and depending on the passengers' conduct.

(c) Conclusion

58. On a proper construction of Article 1 of Council Directive 90/232/EEC, it is contrary to that provision for a Member State to maintain in force domestic legislation which provides for an exclusion from the compulsory insurance obligation in respect of civil liability for personal injuries sustained by individuals travelling in parts of a vehicle

³⁷ — See, for example, in France, Article A211-3 of the Code des assurances (Insurance Code): 'carriage shall be regarded as performed in conditions of sufficient safety: (a) so far as private cars are concerned, ... if passengers are carried inside the vehicle; (b) so far as commercial vehicles are concerned, if the persons carried have taken their places, in the cab, or on a flat bed fitted with rails, or within an enclosed coach-body, and there are not more than eight persons in addition to the driver; ... For the application of the foregoing provisions, a child of less than ten years of age shall count as half a person ...' (emphasis added).

³⁸ — See the judgments cited in footnote 21.

neither designed nor constructed with seats for passengers.

C — Concerning the second question referred

59. By its second question the national court seeks to ascertain whether Article 1 of the Third Directive confers on individuals rights that they may invoke before national courts.

1. Summary of the parties' arguments

60. *Ms Farrell* and the *Commission* argue that Article 1 of the Third Directive confers rights which individuals may rely on directly before national courts. In contrast, *Ireland* and the *MIBI* contend that, the directive having been correctly implemented, the issue does not even arise.

61. *Ms Farrell* emphasises that when obligations imposed on the Member States are sufficiently clear and precise, a directive may have direct effect. It is her opinion that the

fact that the Court considers that to be the case in respect of the Third Directive follows from the wording of *Withers*. In her view, the circumstance that, in paragraph 20 of that order,³⁹ the Court did not declare that the Third Directive did not possess the features necessary to produce direct effect demonstrates that it was only the date on which the accident took place that made it impossible to rely on the Third Directive. *Ms Farrell* considers that there are, therefore, grounds for replying to the second question that 'Article 1 of the Third Directive, being designed to confer rights on individuals in sufficiently clear and precise terms, is capable of having direct effect'.

62. *Ireland*, supported by the *MIBI*, considers that since it has correctly implemented the Third Directive it is not necessary to invoke the direct effect of that act. However, without prejudice to that position, it maintains that such direct effect cannot follow from the order in *Withers*. The *MIBI* denies being an emanation of the State within the meaning of the yardsticks referred to in *Foster*.⁴⁰ It refers on this point to the facts that it has a private-law form and that it performs its functions in the sphere of compulsory motor insurance pursuant to an agreement freely stipulated with the State.

39 — 'However, the accident which gave rise to the main proceedings occurred ... before the date on which the period laid down by the Third Directive for transposition by Ireland expired ... That directive cannot therefore be relied on by individuals before the national court.'

40 — Case C-188/89 *Foster* [1990] ECR I-3313, paragraph 18.

63. For its part, the *Commission* remarks that individuals may rely directly on the provisions of a directive against a Member State inasmuch as those provisions are unconditional and sufficiently precise. As a result, the preliminary issue arising is, in its view, whether the MIBI is an emanation of the State within the meaning of the yardsticks referred to in *Foster*.⁴¹ In order to be so classified, the MIBI must be an organisation or body subject to the authority or control of the State or having special powers beyond those which result from the normal rules applicable to relations between individuals. The Commission maintains that, having regard to the MIBI's special public function, there is reason to consider it to be an emanation of the State. It mentions, in addition, a judgment of the Circuit Court, Ireland, which reached a similar conclusion.⁴²

considers that the article in question makes it possible to identify both the beneficiaries and the kind of responsibility to be covered by compulsory insurance. It goes on to say that Article 3(1) does indeed leave some discretion to the Member States as to how they organise their compulsory insurance system, but that that discretion is purely a matter of organisation and does not extend to the scope of the fundamental insurance obligation. The Commission therefore proposes that the Court should rule that Article 1 of the Third Directive may be directly relied upon by individuals before the national courts.

2. Assessment

64. According to the Commission, it then remains only to be ascertained whether the terms of Article 1 of the Third Directive are unconditional and sufficiently precise in order for them to be relied upon against the MIBI. That article states that the compulsory insurance obligation is to cover liability for personal injuries to all passengers, other than the driver, arising out of the use of a vehicle, with the sole express exclusion of those who knowingly travel in a stolen vehicle. The Commission therefore

65. Having regard to the facts of the case in the main proceedings, it appears that the national court seeks to ascertain whether the plaintiff may invoke Article 1 of the Third Directive in order to set aside the provisions of domestic laws excluding from the benefit of the compulsory insurance guarantee persons travelling in any part of a vehicle neither designed nor constructed with seats for passengers.

41 — Cited above in footnote 40.

42 — Judgment of 29 October 1989 in *Dublin Bus v MIBI*.

66. According to the case-law,⁴³ it is only unconditional and sufficiently precise provisions that may be relied on by an individual against a State.

whom is a matter for Community law alone, their legal situation may be defined in the light of three successive generations of directives.

67. Article 1 of the Third Directive provides that compulsory insurance is to 'cover liability for personal injuries to all passengers, other than the driver, arising out of the use of a vehicle', with the sole exception of those travelling in a vehicle they know to have been stolen. Given that the article in question makes it possible to identify both the beneficiaries and the kind of responsibility to be covered by compulsory insurance, it appears to confer on individuals a right that is unconditional and sufficiently precise. This conclusion cannot be shaken by the circumstance that Article 1 of the Third Directive refers back to Article 3(1) of the First Directive which obliges every Member State 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'. In fact, if later directives have left the Member States a certain leeway in the implementing of their provisions in the sphere of compulsory motor insurance, the fact nevertheless remains that they have specified the content and extent of compulsory insurance of civil liability arising out of the use of a vehicle; with regard to passengers, the definition of

68. One particular difficulty remains, caused in this case by the fact that the vehicle involved in the accident was not insured and that the victim, Ms Farrell, sought compensation from the MIBI, as the authorised body for the purposes of Article 1(4) of the Second Directive.

69. With regard to a body governed by private law, the members of which are insurance companies operating on the vehicle insurance market in Ireland, linked to the State by a private-law agreement⁴⁴ with a view to undertaking the functions of the body provided for in Article 1(4) of the Second Directive, it is to be determined whether the MIBI may be regarded as an emanation of the State for the purposes of the yardsticks referred to in *Foster*.⁴⁵ According to the Court, 'unconditional and sufficiently precise provisions of a directive [can] be relied on against organisations or bodies ... subject to the authority or control of the State or [having] special powers beyond those which result from the normal rules applicable to relations between individuals.' It follows that 'a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State,

43 — See, for example, Case 8/81 *Becker* [1983] ECR 53.

44 — Agreement of 21 December 1988 linking the MIBI to the Minister for the Environment.

45 — Cited above in footnote 40, paragraph 18.

for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon.⁴⁶

outset that the latter is subject to the State's authority or control and it is uncertain whether it possesses special powers beyond those which result from the normal rules applicable to relations between individuals. On the other hand, it is not denied that the MIBI performs the functions of a body authorised for the purposes of Article 1(4) of the Second Directive, charged with compensating victims of accidents caused by unidentified or uninsured vehicles. This responsibility is public in nature, for it is provided for by the Second Directive itself, State control being exercised by means of the authorisation — in this case contained in an agreement — of the body in question.⁴⁸

70. The question is thrown into particular relief in so far as the Community motor insurance provisions form part of an older system,⁴⁷ in which insurance professionals were given a great deal of latitude for the purpose of setting up the national bureaux and national motor guarantee bodies, so that the implementation of the Community provisions in the Member States was to a considerable extent effected through structures governed by private law.

72. In conclusion, it seems to me that the MIBI may, as a body authorised for the purposes of Article 1(4) of the Second Directive responsible for the function entrusted to those bodies by that directive, be put on the same footing as the State, with the result that Article 1 of the Third Directive may be directly relied upon by individuals before the national courts.

71. Considering how little information was supplied by the national court concerning the MIBI, it seems difficult to claim at the

48 — With regard to the issue of putting a private body which is a kind of professional or trade body on the same footing as the State, see Wernicke, S., *Die Privatwirkung im Europäischen Gemeinschaftsrecht*, Baden-Baden 2002, p. 186 et seq. For a situation of equiparation the author chooses that in which an individual has been entrusted with performing a public duty imposed on the State by Community law, whilst, under domestic law, the performance of that duty belongs to the individual in question alone (op. cit., p. 190). However, the author accepts equiparation only in so far as it is necessary for the purposes of performing the public duty. This solution compels agreement, for it ensures that precise and unconditional provisions of secondary law may be relied upon in all Member States, whatever the nature of the body chosen by the State for the purpose of performing the public duty provided for by Community law.

46 — Paragraph 20.

47 — See above, point 23 et seq.

V — Conclusion

73. In the light of the foregoing reflections, I suggest that the Court should give the following answers to the questions referred by the national court:

- (1) On a proper construction of Article 1 of Council Directive 90/232/EEC, it is contrary to that provision for a Member State to maintain in force domestic legislation which provides for an exclusion from the insurance obligation in respect of civil liability for personal injuries sustained by individuals travelling in parts of a vehicle neither designed nor constructed with seats for passengers.

- (2) Article 1 of Council Directive 90/232/EEC may be relied upon directly by individuals before the national courts.