Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 9 October 2013 [1]

Case C-371/12

Enrico Petillo
Carlo Petillov
Unipol

(Request for a preliminary ruling from the Tribunale di Tivoli (Italy))

(Insurance against civil liability in respect of the use of motor vehicles — Directive 72/166/EEC — Article 3 — Directive 84/5/EEC — Article 1 — Directive 90/232/EEC — Article 1a — Right to compensation — Limitation of the right to compensation — Non-material damage)

1. In the present case the Court is, in essence, asked to rule on whether a national provision which regulates the amount of compensation payable for damage other than financial damage or damage to property ('non-material damage') in the event of road traffic accidents is compatible with the European Union ('EU') rules on motor vehicle insurance.

2. That question raises a number of important interpretative issues in relation to those EU rules. The solution to those interpretative issues may, in fact, directly affect the over 1 500 000 individuals who, on a yearly basis, suffer personal injuries as a result of car accidents in the European Union. [2] In addition, the interpretation of those rules is particularly important for insurance undertakings, since insurance liability in respect of the use of motor vehicles represents an important part of the insurance business in the European Union.

I – Legal framework

A – *EU law*

3. Article 3 of 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 [3] ('the First Directive') provides:

'1. Each Member State shall, subject to Article 4, take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance. The extent of the liability covered and the terms and conditions of the cover shall be determined on the basis of these measures.

1 — Original language: English.

2 — See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Towards a European road safety area: policy orientations on road safety 2011-2020, COM(2010) 389 final, p. 2.

3 — OJ, English Special Edition 1972(II), p. 360; as amended.

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

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

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

4. Article 1 of Second Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles [4] ('the Second Directive') states:

'1. The insurance referred to in Article 3(1) of [the First Directive] shall cover compulsorily both damage to property and personal injuries.

…'

5. Under Article 1a of Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles [5] ('the Third Directive'):

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

6. The First, Second and Third Directives were, in substance, codified in 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 [6] which repealed them. Article 3 of Directive 2009/103, 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;

4 — OJ 1984 L 8, p. 17; as amended.

5 — OJ 1990 L 129, p. 33; as amended.

6 — OJ 2009 L 263, p. 11.

(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.'

B – *Italian law*

7. Article 139 of Legislative Decree No 209 of 7 September 2005 laying down the Private Insurance Code[7] ('the Private Insurance Code'), entitled 'Damage to health caused by minor injuries', provides:

'(1) Damage to health compensation for minor injuries arising from accidents resulting from the use of motor vehicles and waterborne craft shall be awarded in accordance with the following criteria and measures:

(a) by way of compensation for permanent damage to health, for the consequences of injuries which are equal to or less than 9%, an amount shall be paid which increases more than proportionally with respect to each percentage point of disability; this amount shall be calculated by applying the relevant coefficient to each percentage point of disability in accordance with paragraph 6. As the age of the individual increases, this amount shall decrease at the rate of 0.5% for each year of age starting from the eleventh year of age. The value of the first point shall be equal to EUR 674.78;

(b) by way of compensation for temporary damage to health, an amount of EUR 39.37 shall be paid for each day of complete disability; in the case of temporary disability which is less than 100%, the settlement shall be in proportion to the percentage of disability recognised for each day.

(2) For the purposes of paragraph 1, 'damage to health' means: temporary or permanent physical or mental injury to the person, verifiable through forensic assessment, which has a negative impact on the daily activities and social interaction in the life of the injured person, regardless of any consequences for that person's ability to produce income.

(3) The amount of compensation for damage to health paid pursuant to paragraph 1 may be increased by the court by no more than one fifth, following a fair and reasoned assessment of the physical and mental condition of the injured person.

(4) By decree of the President of the Republic ... a specific table shall be established setting out the various forms of physical and mental impairment, ranging from one to nine points of disability.

(5) The amounts referred to in paragraph 1 shall be updated annually by means of a decree ..., in proportion to the change in the national consumer price index for families of workers and employees established by ISTAT.

(6) For the purposes of calculating the amount referred to in paragraph 1(a): for a percentage point of disability equal to 1, a coefficient multiplier of 1.0 shall apply; for a percentage point of disability equal to 2, a coefficient multiplier of 1.1 shall apply; for a percentage point of disability equal to 3, a coefficient multiplier of 1.2 shall apply; for a percentage point of disability equal to 4, a coefficient multiplier of 1.3 shall apply; for a percentage point of disability equal to 5, a coefficient multiplier of

7 — GURI No 239 of 13 October 2005, Ordinary Supplement No 163.

1.5 shall apply; for a percentage point of disability equal to 6, a coefficient multiplier of 1.7 shall apply; for a percentage point of disability equal to 7, a coefficient multiplier of 1.9 shall apply; for a percentage point of disability equal to 8, a coefficient multiplier of 2.1 shall apply; for a percentage point of disability equal to 9, a coefficient multiplier of 2.3 shall apply.'

II – Facts, procedure and the question referred

8. The applicant in the main proceedings, Mr Enrico Petillo, was the victim of a road traffic accident on 21 September 2007. He initiated legal proceedings before the Tribunale di Tivoli (Tivoli District Court) to obtain compensation from Unipol Assicurazioni S.p.a. ('Unipol') for the material and non-material damage which, in his view, he had suffered as a result of the accident. In particular, Mr Petillo claimed from Unipol the amount of EUR 14 155 for non-material damage, but Unipol, on the basis of the criteria laid down in Article 139 of the Private Insurance Code, paid him only EUR 2 700 as compensation for that type of damage.

9. Entertaining doubts as to the compatibility of Article 139 of the Private Insurance Code with EU law, the Tribunale di Tivoli decided to stay the proceedings and to refer the following question for a preliminary ruling:

'[I]n the light of Directives 72/166/EEC, 84/5/EEC, 90/232/EEC and 2009/103/EC governing compulsory insurance against civil liability arising from the use of motor vehicles, is it permissible for the domestic legislation of a Member State effectively to provide – by imposing, solely in the case of damage arising from road traffic accidents, a compulsory method for quantifying the damage – a limitation (in terms of quantification) of the liability for non-material damage lying with the persons (insurance companies) obliged under those directives to ensure compulsory insurance for damage caused by the use of vehicles?'

10. Written observations in the present proceedings have been submitted by Unipol, by the Italian, German, Greek, Spanish, Latvian and Lithuanian Governments, and by the Commission.

11. On 29 April 2013, the Court requested certain clarifications from the referring court regarding the scope of Article 139 of the Private Insurance Code and, at the same time, asked the parties participating at the hearing to take a position on the referring court's answer.

12. The Tribunale di Tivoli responded to the request from the Court on 23 May 2013. Unipol, the Italian, German, Greek, Spanish and Latvian Governments, as well as the Commission, presented oral argument at the hearing on 3 July 2013.

III – Analysis

A – *Admissibility*

13. Unipol and the Italian Government submit that the question referred is inadmissible since the Tribunale di Tivoli has not presented any reasons why an answer from the Court would be necessary for it to give judgment. In addition, Unipol argues that the question is inadmissible as, in its view, no doubt exists as to the compatibility of Article 139 of the Private Insurance Code with EU law.

14. In this regard, I would call to mind the fact that, in preliminary ruling proceedings, the questions referred enjoy a presumption of relevance. Owing to the spirit of judicial cooperation which underpins Article 267 TFEU, the Court only refuses to answer such questions in certain specific situations: where it is quite obvious that the interpretation of EU law sought is wholly unrelated to the actual facts of the main proceedings or to its purpose; where the problem is hypothetical; or where the Court does not

have before it the factual or legal material necessary to give a useful answer to the questions referred.[8]

15. It does not seem to me that, in the present case, the interpretation sought is wholly unrelated to the actual facts of the main action or to its purpose. On the contrary, in its order for reference, the referring court illustrates the grounds on which it raises the question of compatibility of Article 139 of the Private Insurance Code with the relevant EU provisions and why it finds it necessary to refer that question to the Court for a preliminary ruling.

16. Furthermore, as concerns the argument put forward by Unipol alleging the inexistence of any doubt, it is sufficient to point out that under Article 267 TFEU national courts have the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving interpretation, or consideration of the validity, of provisions of EU law, necessitating a decision in that regard. Article 267 TFEU gives national courts the power – and, where appropriate, imposes on them the obligation – to refer one or more questions for a preliminary ruling; this is also possible where the court perceives of its own motion that the substance of the dispute raises an issue of interpretation, or uncertainty as to the validity of EU law.[9] The fact that one of the parties in the main proceedings, in this case Unipol, does not have any doubt as to the compatibility of the relevant national law has no bearing on the admissibility of a request for a preliminary ruling.

B – *Substantive issues*

17. By its question, the referring court seeks guidance as to whether a national rule such as Article 139 of the Private Insurance Code is compatible with the First, Second and Third Directives, and with Directive 2009/103.

18. As a preliminary point, I must observe that – as several parties which submitted observations to the Court have argued – Directive 2009/103 is not applicable to the facts of the main proceedings *ratione temporis*. Indeed, the accident which ultimately gave rise to the main proceedings occurred in 2007. In any event, as I will explain later, the entry into force of Directive 2009/103 did not result in any relevant changes to the EU legal framework applicable in the present case.

19. That said, before examining in detail the substance of the legal issues which arise from the present proceedings, I think that it is important to place those issues in the right legal and factual context. To that end, I will first briefly present the reasons why the referring court has doubts concerning the compatibility of Article 139 of the Private Insurance Code with EU law. Subsequently, I will provide an overview of the relevant case-law of the Court with regard to the First, Second and Third Directives.

1. Concerns of the referring court

20. The Tribunale di Tivoli explains that, by virtue of Articles 2043 and 2059 of the Italian Civil Code, in the Italian legal order both material and non-material damage must, in principle, be compensated where extra-contractual liability is incurred. The Corte costituzionale and the Corte di cassazione have consistently emphasised the unitary notion of 'non-material damage' as encompassing '*all damage arising as a result of the impairment of aspects intrinsic to personhood*'.[10] Nonetheless, according to the referring court, in their usual practice, Italian courts normally consider non-material

8 — See, inter alia, Case C-119/05 *Lucchini* [2007] ECR I-6199, paragraphs 43 and 44 and case-law cited, and Joined Cases C-509/09 and C-161/10 *eDate Advertising and Martinez* [2011] ECR I-10269, paragraphs 32 and 33 and case-law cited.

9 — See, for example, Case C-261/95 *Palmisani* [1997] ECR I-4025, paragraph 20, and Joined Cases C-290/05 and C-333/05 *Nádasdi and Németh* [2006] ECR I-10115, paragraph 32.

10 — See, in particular, judgment of the Corte costituzionale in Case 233/2003 (GURI 16/07/2003) and judgments of the Corte di cassazione Nos 8827 and 8828.

damage as comprising different subtypes of damage: (i) 'damage to health' ('*danno biologico*', meaning physical or mental injury); (ii) 'psychological damage' ('*danno morale*', meaning mental suffering caused by the injury); and (iii) 'residual damage' (often referred to as '*danno esistenziale*', a category covering damage consisting, broadly speaking, in the impairment of the individual's ability to enjoy to the full the rights normally available in a free society). This categorisation is used, in combination with other factors, to determine an appropriate amount of compensation to be paid to the injured party. In general, national courts seised of a case of extra-contractual liability would not be bound by any statutory parameters when deciding the amount of compensation payable for non-material damage.

21. However, extra-contractual liability arising from road traffic accidents is regulated by the Private Insurance Code, which constitutes a *lex specialis* with respect to the Civil Code. In particular, as regards non-material damage in the event of car accidents leading to minor physical injuries, Article 139 of the Private Insurance Code lays down the parameters which national courts must respect when quantifying the compensation for damage to health payable by the civil liability insurer.

22. The referring court doubts that Article 139 of the Private Insurance Code is compatible with the obligation to compensate any loss or injury, as laid down in the First, Second and Third Directives. In the view of that court, Article 139 actually places three important limitations on the power of the national court to award adequate compensation for damage caused in the context of road accidents resulting in minor physical injuries. First, national courts are obliged to respect specific parameters when calculating compensation for 'damage to health', in contrast with other cases of extra-contractual liability. Second, that compensation can be adapted to the specific circumstances of the case only to a limited extent.[11] Third, Article 139 of the Private Insurance Code does not seem to permit the award of any compensation for 'psychological damage' suffered by the injured party (although the national court explains that its approach to the interpretation of that provision is not shared by all Italian courts).

2. The Court's case-law

23. The provisions of the First, Second and Third Directives which are relevant in the present case have already been interpreted by the Court in a number of judgments.

24. In its case-law, the Court has indicated that the common aims of the First, Second and Third Directives are, first, to ensure the free movement of vehicles normally based on EU territory and of persons travelling in those vehicles and, second, to guarantee that the victims of accidents caused by those vehicles receive comparable treatment irrespective of where in the European Union the accident occurred.[12] These directives do not, however, seek to harmonise the rules of the Member States governing civil liability and, as EU law stands at present, the Member States are free to determine the rules of civil liability applicable to road accidents.[13]

25. On that basis, the Court has distinguished between the obligation to provide insurance coverage against civil liability for damage caused by motor vehicles, which is defined and guaranteed by EU legislation, and the extent of the compensation to be afforded to the victims on the basis of the civil liability of the insured person, a matter which is, essentially, governed by national law.[14]

11 — See Article 139(3) of the Private Insurance Code.

12 — See, among many, Case C-409/09 *Ambrósio Lavrador and Olival Ferreira Bonifácio* [2011] ECR I-4955, paragraph 23 and case-law cited, and Case C-442/10 *Churchill Insurance Company Limited and Evans* [2011] ECR I-12639, paragraph 27 and case-law cited.

13 — See, among others, Case C-484/09 *Carvalho Ferreira Santos* [2011] ECR I-1821, paragraph 32, and Case C-300/10 *Marques Almeida* [2012] ECR, paragraph 29.

14 — *Marques Almeida*, paragraph 28; *Carvalho Ferreira Santos*, paragraph 31; and *Ambrósio Lavrador and Olival Ferreira Bonifácio*, paragraph 25.

26. Regarding the obligation to provide insurance cover, the Court has stated that Member States 'must ensure that the civil liability arising under their domestic law is covered by insurance which complies with the provisions of the three directives in question'. [15] In particular, Article 3(1) of the First Directive, as amplified and supplemented by the Second and Third Directives, specifies, inter alia, according to the Court, 'the types of damage and the third parties who have been victims of an accident to be covered by that insurance'. [16]

27. With regard to the matters which are, in principle, governed by national laws on civil liability, the Court has nonetheless made it clear that Member States 'must exercise their powers in compliance with EU law'. In this regard, the Court has specified that 'the national provisions which govern compensation for road accidents may not deprive the [First, Second and Third Directives] of their effectiveness'. [17]

28. The Court has applied these principles in cases which concerned national rules precluding or limiting compensation where the victim of the accident had contributed to his own loss or injury. In *Ambrósio Lavrador*, the Court held that the First, Second and Third Directives would be deprived of their effectiveness if 'national rules, established on the basis of general and abstract criteria, either denied the victim the right to be compensated by the compulsory insurance against civil liability in respect of the use of motor vehicles or limited such a right in a disproportionate manner'. [18] Similarly, in *Candolin and Others*, and in *Farrell*, the Court disapproved, as incompatible with those directives, national rules which allow the disproportionate refusal or restriction of the compensation to be offered to a passenger through compulsory insurance against civil liability in respect of the use of motor vehicles. [19]

29. Against that background, I will now turn to the question referred by the national court.

3. Consideration of the question referred

30. The referring court, as explained above, seems to be of the opinion that Article 139 of the Private Insurance Code cannot be reconciled with the provisions of the First, Second and Third Directives. The Commission, to some extent, shares that view.

31. Conversely, Unipol and all the governments which submitted observations in the present proceedings consider that a provision such as Article 139 of the Private Insurance Code is compatible with EU law. In their opinion, that provision merely regulates the extent of the compensation to be afforded to the victims of car accidents, a matter which is governed by national laws.

32. I believe that a two-step legal analysis is necessary to answer the question referred.

33. In the first place, it must be examined whether Article 139 of the Private Insurance Code is compatible with the obligation to provide insurance coverage pursuant to Article 3(1) of the First Directive, as supplemented by the Second and Third Directives. Even if that is the case, it remains to be determined, in the second place, whether Article 139 of the Private Insurance Code has the effect of depriving the First, Second and Third Directives of their effectiveness, by denying the victims the right to be compensated or by limiting such a right in a disproportionate manner.

15 — Case C-348/98 *Mendes Ferreira and Delgado Correia Ferreira* [2000] ECR I-6711, paragraph 29, and Case C-356/05 *Farrell* [2007] ECR I-3067, paragraph 33.

16 — See, inter alia, *Churchill Insurance Company Limited and Evans*, paragraph 28, and *Marques Almeida*, paragraph 27.

17 — See, inter alia, *Marques Almeida*, paragraph 31, and *Ambrósio Lavrador and Olival Ferreira Bonifácio*, paragraph 28.

18 — *Ambrósio Lavrador and Olival Ferreira Bonifácio*, paragraph 29.

19 — See Case C-537/03 *Candolin and Others* [2005] ECR I-5745, paragraphs 29, 30 and 35, and *Farrell*, paragraph 35.

34. In the following, I will illustrate why, like Unipol and the governments which submitted observations in the present proceedings, I believe that a provision such as Article 139 of the Private Insurance Code is compatible with the First, Second and Third Directives.

a) Is Article 139 of the Private Insurance Code compatible with Article 3(1) of the First Directive?

35. As mentioned above, the Court has consistently held that the First, Second and Third Directives require Member States to ensure that civil liability in respect of the use of motor vehicles normally based in their territory is covered by insurance, and specify, inter alia, the types of damage to be covered by that insurance.

36. Accordingly, I could envisage two ways in which a provision such as Article 139 of the Private Insurance Code could contravene that principle. First, if it were to exclude from compulsory insurance a type of damage which, under those directives, must be covered. Second, if it were to permit the abstract possibility of obtaining compensation for that type of damage, while at the same time confining that possibility to compensation from the driver (or car owner), thereby completely or partially excluding compensation from the insurer.

i) Exclusion of certain types of damage from insurance coverage

37. On the first point, I consider that non-material damage must be among the types of damage and injury which have to be covered by compulsory insurance. Consequently, a Member State is not entitled to exclude *in toto* from insurance cover any compensation for non-material damage suffered by the victims of a car accident.

38. By 'non-material damage' I refer, generally speaking, to losses which do not relate to a person's assets, wealth or income and, as such, cannot be quantified in an objective manner by reference to a market price or value. [20]

39. At the outset, I would emphasise that it seems an almost universally accepted principle that the damage that an individual may suffer as a result of an unlawful act on the part of another individual, and which must be compensated, may in principle also include damage which goes beyond mere pecuniary loss.

20 — Cf. Horton Rogers, W.V. (ed.), *Damages for Non-Pecuniary Loss in a Comparative Perspective*, European Centre of Tort and Insurance Law, Springer Verlag, Wien New York: 2001, p. 246.

40. That principle exists, to my knowledge, in the vast majority of the legal systems of the Member States, although with great variations as to the terms used to refer to that concept and its precise scope, the conditions that must be fulfilled, as well as the amount of compensation due.[21] Moreover, it is settled case-law that, within the EU legal order, damage which must be compensated by the European Union in cases of extra-contractual liability includes *non-material* damage.[22] A very broad concept in respect of damage or injury which is to be compensated in the case of wrongful acts, encompassing non-material damage, is also generally accepted in public international law.[23]

41. After all, the origin of that principle can be traced back to the most ancient legal texts discovered, at least with regard to compensation for personal injuries. For example, the well-known Codex of Hammurabi (the 'Codex'), the Babylonian law code dating back to about 1772 BC, contained extensive provisions on compensation for personal injuries. Those provisions were designed to punish the person responsible for causing injury, while at the same time providing compensation to the victim or his family.[24] Ancient Roman laws followed similar principles. Thus, the Twelve Tables Law, dating from 451 to 449 BC, regulated different types of personal injuries compensation which had to be paid to the victims of those injuries. The later *Lex Aquilia de Damno*, dating from 286 BC, further refined those principles. Importantly, the action brought by the injured person against the person responsible for the injury was based on outraged feeling, not on economic loss, and the ensuing compensation could thus be payable not only for pecuniary expenses, but also for pain and distress of mind or body.[25]

42. For our purposes, it is unnecessary to delve any further into the historical origins of today's civil laws on liability. What I meant to stress is that, since the earliest days of our civilisation, the idea has persisted that civil wrongs may give rise to damage which must be compensated and which goes beyond mere wealth or monetary loss. That was especially true if the damage was connected to physical and psychological suffering.

43. The principle of compensation for non-material damage has evolved over time and nowadays has become widely accepted and of great significance. The idea that a person who is the victim of another person's unlawful conduct has the right to be compensated for all the damage suffered, irrespective of whether the interests harmed have a material or non-material dimension, and whether or not it is possible to establish an objective economic value for them, is firmly established in today's society.

21 — For a good overview: Horton Rogers, W.V., op. cit., and Bona, M., and Mead, P., *Personal Injury Compensation in Europe*, Kluwer Law, Deventer: 2003.

22 — See, for example, Case C-198/07 P *Gordon* v *Commission* [2008] ECR I-10701, paragraphs 19 and 60; judgment of 16 July 2009 in Case C-481/07 P *SELEX Sistemi Integrati* v *Commission*, paragraph 38; and Case C-239/12 P *Abdulrahim* v *Council and Commission* [2013] ECR, paragraphs 72 and 76.

23 — In the seminal 'Case Concerning the Factory at Chorzow', the Permanent Court of International Justice (Judgment of 13 September 1928, Series A – No 17), stated: 'The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice … – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law'. More recently, Article 31(2) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts states that reparation for the injury caused must cover 'any damage, whether material or moral, caused by the internationally wrongful act of a State'.

24 — Interestingly, the Codex also included provisions which concerned road accidents, such as Section 251 according to which the owner of cattle that kill a free man on the road was to pay half a mina of silver in the event that he was aware of the wild character of the cattle but had neither tied the cattle up nor shortened their horns. See Magnus, U., 'Compensation for Personal Injuries in a Comparative Perspective', 39 (2000) *Washburn Law Journal*, pp. 347 to 362, at p. 348.

25 — O'Connell, J., and Carpenter, K, 'Payment for pain and suffering through history', (1983) *Insurance Counsel Journal*, pp. 411 to 417, at p. 411.

44. The current practice of the European Court of Human Rights ('the ECtHR') is exemplary in that regard. The ECtHR usually awards compensation for both 'pecuniary' and 'non-pecuniary' damage sustained by applicants as a consequence of the infringement of their fundamental rights, on the basis, in particular, of Article 41 of the European Convention on Human Rights, [26] non-material damage often being more significant than pecuniary damage. [27]

45. It would thus be rather odd if the First, Second and Third Directives were to contemplate any circumstances in which Member States were free to exclude from insurance cover a type of damage which is recognised as deserving protection in virtually all current legal systems, both at national and supranational level, as well as under general principles of international law.

46. As it is, the terms used in those instruments seem to me broad enough to cover also non-material damage. Article 3(2) of the First Directive states that Member States are to take all appropriate measures to ensure that the contract of insurance also covers 'any loss or injury' caused. [28] Likewise, Article 1 of the Second Directive provides that the insurance referred to in Article 3(2) of the First Directive 'shall cover compulsorily both damage to property and personal injuries'. A similar terminology is also employed in Article 1a of the Third Directive.

47. For me, the effect of the adjective 'any' which qualifies the nouns 'loss or injury' in Article 3(2) of the First Directive, in its English language rendition, is that those concepts must be broadly construed. Even if the adjective 'any' is not reproduced in other language versions of the same provision, they nevertheless seem to be phrased in a rather general manner.

48. Furthermore, the term 'personal injury' in Article 1 of the Second Directive and in Article 1a of the Third Directive inevitably relates to both the physical and the psychological integrity of victims. [29] Any impairment of that integrity must be compensated, independently of any negative economic repercussions which the victims may experience as a result of the accident. As Advocate General Jääskinen observes in his Opinion in *Haasová* and *Drozdovs*, a comparison of the different language versions of those provisions, as well as the *travaux préparatoires* for the Second Directive, in particular, seems to lend further authority to that interpretation. [30]

49. In that context, I would also point out that, when asked to interpret equivalent concepts referred to in other EU legislative instruments or in international conventions to which the European Union is a signatory, the Court has consistently opted for an interpretation of those concepts which also covers non-material damage. [31]

26 — That provision, entitled 'Just satisfaction', provides: 'If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.'

27 — See, for example, *McMichael v. the United Kingdom*, 24 February 1995, Series A no. 307-B, and *Riccardi Pizzati v. Italy* [GC], no. 62361/00, 29 March 2006.

28 — See also the definition of 'injured party' in Article 1 of the First Directive.

29 — See, to that effect, the Opinion of Advocate General Tizzano in Case C-168/00 *Leitner* [2002] ECR I-2631, point 30.

30 — Opinion of Advocate General Jääskinen in Case C-22/12 *Haasová* and Case C-277/12 *Drozdovs*, pending before the Court, paragraphs 73 and 89 to 91.

31 — Admittedly, those cases concerned legal instruments which are not entirely comparable to the First, Second and Third Directives, to the extent that the amount of compensation for non-material damage potentially involved under those instruments is generally lower than that which can be claimed in the context of road traffic accidents. However, it is common to all those decisions that the Court recognised the principle that non-material damage is covered by the notion of 'damages'. It is submitted that the Court's reasoning in those decisions may, *mutatis mutandis*, be relevant also in the context of the present proceedings.

50. In *Leitner*, the Court interpreted the term 'damage' in Article 5 of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours [32] as extending to non-material damage. The Court relied on a textual reading of that provision, as well as on a teleological interpretation of the directive. [33] In *Walz*, [34] the referring court sought clarification as to whether the term 'damage' underpinning Article 22(2) of the Convention for the Unification of Certain Rules for International Carriage by Air ('the Montreal Convention' [35]), which sets the limit of an air carrier's liability for the damage resulting, inter alia, from the loss of baggage, had to be interpreted as covering both material and non-material damage. The Court examined that notion of damage in the light of the rules of general international law and answered the question in the affirmative. [36] In *Sousa Rodríguez and Others*, [37] the Court came to the same conclusion when interpreting the notion of 'further compensation' as referred to in Article 12 of Regulation (EC) No 261/2004 [38] (the 'Air Passengers Rights Regulation'). The Court held that the term 'further compensation' was to be interpreted in such a way as to allow national courts to award compensation for damage which includes non-material damage. [39]

51. It is true that, in *Veedfald*, [40] the Court held that the producers' obligation to compensate the victims for damage caused by defective products, under Article 1 of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, [41] did not extend to non-material damage, 'whose reparation is governed solely by national law'. [42] However, unlike the cases previously examined, and unlike the legal instruments at issue, Directive 85/374 lays down an explicit rule on non-material damage. Indeed, in defining the notion of 'damage' for the purposes of that directive, Article 9 thereof states: '[t]his Article shall be without prejudice to national provisions relating to non-material damage'.

52. It thus seems to me that both the text of the First, Second and Third Directives and the Court's past decisions support a wide interpretation of the concept of 'damage'. There are, moreover, three additional considerations which, to my mind, further support that conclusion.

53. In the first place, according to the fifth recital in the preamble to the Second Directive, and the fourth recital in the preamble to the Third Directive, one of the aims of the First, Second and Third Directives is to guarantee that the victims of accidents caused by motor-vehicles receive 'adequate compensation' and 'comparable treatment', irrespective of where in the European Union an accident occurs. [43] If Member States were to be allowed to exclude from insurance cover such an important type of damage, the treatment of car accident victims throughout the Europe Union would hardly be 'comparable', and compensation not always 'adequate'. Depending on where the road accident occurred, the type and amount of compensation granted would differ enormously.

32 — OJ 1990 L 158, p. 59.

33 — *Leitner*, paragraphs 19 to 24.

34 — Case C-63/09 [2010] ECR I-4239.

35 — Signed by the then European Community on 9 December 1999 and approved by Council decision of 5 April 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention) (OJ 2001 L 194, p. 38).

36 — *Walz*, paragraphs 17 to 39.

37 — Case C-83/10 [2011] ECR I-9469.

38 — Regulation of the European Parliament and of the European Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, p. 1); as amended.

39 — *Sousa Rodriguez and Others*, paragraphs 36 to 46.

40 — Case C-203/99 [2001] ECR I-3569.

41 — OJ 1985 L 210, p. 29; as amended.

42 — *Veedfald*, paragraph 27.

43 — See also the case-law mentioned above in footnote 12.

54. In the second place, to the extent that the intention of the EU legislature is to protect victims of car accidents as a particularly vulnerable category of persons,[44] that goal would be served rather poorly if some insurers were permitted to limit the extent of their coverage to material damage only.

55. That difference in treatment as between insurers could, in the third place, have negative consequences on the correct functioning of the internal market. Indeed, claims for compensation for non-material damage are frequently put forward in proceedings relating to car accidents and they may, at times, involve substantial amounts. A significant disparity between insurers active in different parts of the EU internal market, in terms of the civil liability which those insurers could incur, might provoke distortion of competition on the insurance market.[45]

ii) Limitation of the insurer's joint liability

56. As regards the second possible contravention mentioned in point 36 above, I would observe that it follows quite clearly from existing case-law that a Member State cannot exclude or limit the liability of insurers for damage to such an extent that compensation for that damage must (in whole or in part) be sought directly from the driver or the car-owner.

57. Indeed, that would result in a limitation of insurance cover which would be in flagrant defiance of the principle that compulsory insurance must enable victims of accidents caused by vehicles to be compensated for all the damage sustained by them, up to the amounts fixed in the First, Second and Third Directives.[46] As Advocate General Mengozzi stated when referring to Directive 2009/103, that directive 'is founded on the idea that the insurer must, in principle, *always* compensate the victims, unless one of the exceptions expressly mentioned in the Directive is applicable'.[47] I believe that that statement is applicable also with regard to the First, Second and Third Directives. I would add that these directives are also founded on the idea that the insurer must, in principle, compensate the victims *in full*, within the limits and under the conditions laid down in the First, Second and Third Directives.

58. It is, in fact, for that reason that the EFTA Court concluded, in *Nguyen*, that Norwegian provisions limiting the extent to which the victims could seek compensation for non-material damage only from the driver, and excluding such compensation from compulsory insurance cover, were not compatible with the First, Second and Third Directives.[48]

iii) The case under consideration

59. That said, it seems to me that Article 139 of the Private Insurance Code does not infringe the obligation to provide insurance cover pursuant to Article 3(1) of the First Directive in either of the ways described above.

44 — See, in this regard, the fifth recital in the preamble to the Third Directive. See also the Opinion of Advocate General Trstenjak in *Carvalho Ferreira Santos*, point 66, and the Opinion of Advocate General Stix-Hackl in *Farrell*, points 52 and 53.

45 — In this respect, it should be recalled that the First, Second and Third Directives were adopted on the basis of either what is now Article 114 TFEU or what is now Article 115 TFEU, which allow the approximation of national provisions affecting the establishment or functioning of the internal market.

46 — See, to that effect, Case C-129/94 *Ruiz Bernáldez* [1996] ECR I-1829, paragraph 18.

47 — Opinion of Advocate General Mengozzi in *Churchill Insurance Company Limited and Evans*, point 50.

48 — Judgment of 20 June 2008, Case E-8/07 *Celina Nguyen* v *Staten v/Justis- og politidepartementet*, in particular paragraphs 3 and 4, and 19 to 29. This judgment is available at URL http://www.eftacourt.int. A summary of the judgment has been published in the Official Journal (OJ 2008 C 263, p. 4).

60. On the one hand, it is evident that Article 139 of the Private Insurance Code does not exclude *in toto* compensation for non-material damage caused by car accidents. Paragraph 2 of that provision, in fact, states that the type of damage regulated concerns 'physical or mental injury … which has a negative impact on the daily activities and social interaction in the life of the injured person, regardless of any consequences for that person's ability to generate income'.

61. On the other hand, the referring court indicates that the injured party cannot seek additional compensation directly from the policy-holder on the basis of other domestic legal provisions. This means that the insurance cover mirrors the relevant civil liability obligations. As the Italian Government confirmed at the hearing, the aim of Article 139 of the Private Insurance Code is merely to quantify the extent of compensation to be afforded to the victims for non-material damage, and not to limit the liability of insurers vis-à-vis the victims of car accidents, thereby shifting part of that liability to the individuals insured. [49]

62. On those grounds, I take the view that a provision such as Article 139 of the Private Insurance Code is not incompatible with the obligation to provide insurance cover, pursuant to Article 3(1) of the First Directive, as supplemented by the Second and Third Directives.

b) Does Article 139 of the Private Insurance Code deprive the First, Second and Third Directives of their effectiveness?

i) General observations

63. The next step of my legal analysis in this case deals with the question as to whether a provision such as Article 139 of the Private Insurance Code has the effect of depriving the First, Second and Third Directives of their effectiveness, by denying the victims the right to be compensated or by limiting such a right in a disproportionate manner.

64. Indeed, as mentioned above, the general rules and principles governing the civil liability of insurers, as well as the extent of the compensation payable by such undertakings to the victims, are matters governed by national law. [50] It is, furthermore, obvious to me that Member States must enjoy a significant degree of discretion in this area of law.

65. It must be borne in mind that, despite certain common features, some aspects of the law relating to civil wrongs are regulated in a profoundly different manner in the various Member States. The relevant national rules may, in fact, be based on a range of substantive and procedural principles which differ, inter alia, according to the legal tradition of each country. In that context, it is hardly necessary to draw attention to the fact that rules relating to civil wrongs are quite central to the private law systems of the Member States. The EU legislature has explicitly stated that it is for the Member States to regulate these matters and has consciously chosen not to undertake any harmonisation in that regard. The Court, in turn, should also carefully consider the consequences for those systems as a whole when giving rulings that affect this field.

49 — For the sake of completeness, it must be pointed out that Unipol and the Commission suggested a different reading of the relevant Italian laws, whereby it was not excluded that the victims of car accidents could lodge an action for extra-contractual liability against the driver alone, on the basis of Articles 2043 and 2059 of the Italian Civil Code, for the possible damage which goes beyond what is recognised under Article 139 of the Private Insurance Code. However, in the absence of any more detailed factual information on that issue, I do not see any reason why, in the present proceedings, the Court should depart from its consistent case-law, according to which 'it is not for the Court, in the context of a reference for a preliminary ruling, to rule on the interpretation of national provisions or to decide whether the referring court's interpretation thereof is correct. The Court must take account, under the division of jurisdiction between the [EU] courts and the national courts, of the factual and legislative context, as described in the order for reference, in which the questions put to it are set'. See, among many, Case C-153/02 *Neri* [2003] ECR I-13555, paragraphs 34 and 35, and Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, paragraph 42.

50 — See, especially, Article 3(1) of the First Directive, the second recital in the preamble to the Second Directive, as well as Article 1a of the Third Directive and the second recital in the preamble thereto. See also the case-law cited above in footnote 13.

66. It is therefore only when the obligation to provide insurance coverage against civil liability for damage caused by motor vehicles, as defined and guaranteed by the First, Second and Third Directives, is ensured on a theoretical level, but not in practice, that the relevant national provisions are to be considered incompatible with EU law. In other words, EU law precludes national rules on civil liability from applying in the context of road traffic accidents only in so far as those rules jeopardise the effectiveness of the system established by those directives.

ii) The case under consideration

67. The issues raised by the referring court with regard to Article 139 of the Private Insurance Code are essentially threefold: first, is a Member State entitled to introduce statutory parameters which are binding upon the national courts in determining the extent of the damage caused by a car accident? Second, do the parameters laid down in Article 139 of the Private Insurance Code result in a disproportionate limitation of the compensation due to the victims? Third, can a disproportionate limitation of such compensation stem from the fact that, as alleged, 'psychological damage' cannot be taken into account by the national court?

68. On the first legal issue raised, it is my view that the fact that a Member State, like Italy, decides to introduce legislation fixing binding parameters for the determination of non-material damage caused by car accidents does not, by itself, breach any provision of EU law.

69. Certainly, the Italian legislature could have made a different policy choice, leaving the amount of compensation due for non-material damage to be determined by the national courts, on the basis of the evidence produced by the parties and/or on the basis of equity. This was, as far as I understand, the system applicable in Italy before the enactment of the Private Insurance Code and the system seemingly deemed more appropriate by the referring court.

70. However, both regulatory choices are, to my mind, equally legitimate from the angle of EU law. The First, Second and Third Directives clearly do not impose any of those systems, or favour one over the other. Each of them, moreover, appears to have certain advantages.

71. The main benefit of leaving it entirely to the national courts to determine the extent of damage lies in the fact that those courts are capable of taking into account all the circumstances and particular features of a case. The compensation awarded is thus likely to reflect what, at a given moment in a given place, is recognised as appropriate, in terms of monetary value, to the damage suffered by the victim.

72. On the other hand, other benefits may be obtained by choosing to introduce statutory parameters which are binding upon national courts, despite the fact that this inevitably curbs the discretion of those courts, thereby impinging on their ability to establish the amount of compensation which they consider just in the circumstances of each case. For example, it may make compensation levels more predictable, thereby enhancing legal certainty and reducing the need to resort to litigation. By the same token, it may enable insurance undertakings to make more accurate estimates of their financial exposure over time. Such a limitation of the potential risks could have favourable repercussions on the level of premiums charged to car owners.

73. In that regard, I agree with Unipol and the Italian Government who emphasised that there is an inevitable and direct correlation between the level of compensation awarded for damage and injury suffered as a result of car accidents, and the level of the premiums generally charged by insurance undertakings. Accordingly, it may be a legitimate policy choice for a Member State to determine and, as the case may be, to limit *ex ante* the monetary value to be attributed to non-material damage, so as to permit insurance undertakings to lower their premiums, to the benefit of car owners as a whole.

74. I think that it is not for this Court to review policy choices made by the Member States in this field. The Court may only assist national courts so that they can assess whether, *in concreto*, the parameters laid down in provisions such as Article 139 of the Private Insurance Code result in a disproportionate limitation of the compensation due to the victims.

75. This leads me to the second issue raised by the referring court.

76. At this juncture, I have to admit that it is no easy task to establish a general rule or principle for testing whether or not a specific level of compensation awarded is proportionate to the damage suffered, where the aim is to redress a type of damage which – as mentioned above – cannot be objectively determined by reference to any market benchmark or economic proxy.

77. The only principle that can be found in the text of the First, Second and Third Directives is that of 'adequacy' in respect of compensation. The fifth recital in the preamble to the Second Directive states that 'the amounts in respect of which insurance is compulsory must in any event guarantee victims adequate compensation irrespective of the Member State in which the accident occurred'.

78. However, it seems to me that what may be considered adequate or appropriate in one Member State may not necessarily be so in another Member State. This is particularly true with regard to forms of damage which relate to interests of personal value to an individual and which cannot be quantified in terms of pecuniary loss.

79. In my view, the adequacy of compensation in a specific case can only be determined with reference to the specific value attached within the national legal order to the affected interests of an individual. Accordingly, it is rather difficult for the Court to assess the adequacy of the compensation due for non-material damage under the legal system of a Member State.

80. All the more so when, as in the present case, the damage suffered by the victim originates from minor physical injuries. In that respect, I would again point out that Article 139 of the Private Insurance Code merely regulates the amount of compensation to be payable for non-material damage in the case of road traffic accidents entailing minor physical injuries. Other legal provisions apply in the case of accidents which cause more significant physical injuries.

81. Under these circumstances, I see nothing in the case-file to suggest that the compensation due on the basis of the parameters laid down in Article 139 of the Private Insurance Code is inadequate. The amounts stated therein are certainly not insignificant or minimal. The compensation which, according to the referring court, Unipol has already paid to Mr Petillo, in application of that rule, does not seem to me to be negligible for the type of damage described in the order for reference.

82. The referring court takes issue with the fact that these parameters are different from those developed in the case-law of the Italian courts for cases of extra-contractual liability, which do not concern car accidents. However, that is at most an issue to be examined under national law, in the light of, for example, the principle of equality.

83. Extra-contractual liability may arise in a particularly wide and diverse set of circumstances. There is no provision in the First, Second and Third Directives which, as a matter of principle, prevents national legislatures from setting up specific systems of extra-contractual liability adapted to the particular features of road traffic accidents.

84. For the reasons stated in the preceding sections, I cannot see that application of the parameters laid down in Article 139 of the Private Insurance Code results in a disproportionate limitation of the compensation due to the victims of motor vehicle accidents.

85. With regard, finally, to the third legal issue raised by the referring court, relating to an alleged failure to redress 'psychological damage', I believe that that issue, too, is not relevant in the context of the present analysis.

86. As I understand from the explanations provided by the referring court, which were confirmed during the hearing by the Italian Government and by Unipol, there seems to be some disagreement among Italian courts as to the precise meaning of Article 139 of the Private Insurance Code. Some national courts consider that 'psychological damage' (a concept somewhat similar to what is known as 'pain and suffering' in some legal systems) is not covered by the compensation determined pursuant to Article 139 of the Private Insurance Code. This has the consequence that additional compensation may be awarded when the existence of that further damage is duly proved by the victims. According to another line of authority, on the other hand, redress for 'psychological damage' is already taken into account in the compensation provided for in Article 139 of the Private Insurance Code, since the text of that provision refers to 'physical or mental injury … which has a negative impact on the daily activities and social interaction in the life of the injured person'.

87. In that respect, I would merely observe that, whatever the correct interpretation of the national provision (which is a matter for the Italian courts to decide), the relevant Italian laws do provide for compensation for physical or mental injuries suffered by persons who are victims of accidents, independently of how those injuries may affect the concerned person's ability to generate income.

88. In consequence, the only real issue is, in my view, whether or not that compensation can be considered 'adequate'. How the damage to be compensated is labelled under national law is irrelevant in this regard. As stated above, I do not see any indication that Article 139 of the Private Insurance Code lays down parameters resulting in inadequate compensation for non-material damage.

89. Therefore, I conclude that a provision such as Article 139 of the Private Insurance Code does not have the effect of depriving the First, Second and Third Directives of their effectiveness by denying the victims the right to be compensated or by limiting such a right in a disproportionate manner.

C – *Considerations* rationae temporis

90. Finally, I would add that, in my view, the answer to be provided to the referring court would be no different if Directive 2009/103 were to apply to the case under consideration.

91. That directive merely codifies the First, Second and Third Directives in the interests of clarity and rationality.[51] Moreover, the provisions of the First, Second and Third Directives which are relevant in the present proceedings have not been amended to any significant extent.

92. In particular, Article 1 of Directive 2009/103 sets out a definition of 'injured party' which is identical to that set out in Article 1 of the First Directive. In addition, Article 3 of Directive 2009/103 states that both damage to property and personal injuries must be covered by compulsory insurance, as already specified in Article 1a of the Third Directive. Lastly, recital 3 in the preamble to Directive 2009/103, and Article 3 thereof confirm that 'the extent of the liability covered and the terms and conditions of the insurance cover' continue to be matters falling, in principle, within the competence of the Member States.

51 — See recital 1 in the preamble to Directive 2009/103.

IV – Conclusion

93. In the light of the foregoing, I propose that the Court answer the question referred for a preliminary ruling by the Tribunale di Tivoli (Italy) as follows:

Article 3 of 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, Article 1(1) of Second Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, and Article 1a of Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, must be interpreted as not precluding national provisions, such as Article 139 of Legislative Decree No 209 of 7 September 2005 laying down the Private Insurance Code, which determine criteria for the quantification of the compensation payable by the insurer for non-material damage suffered by victims of motor vehicle accidents.