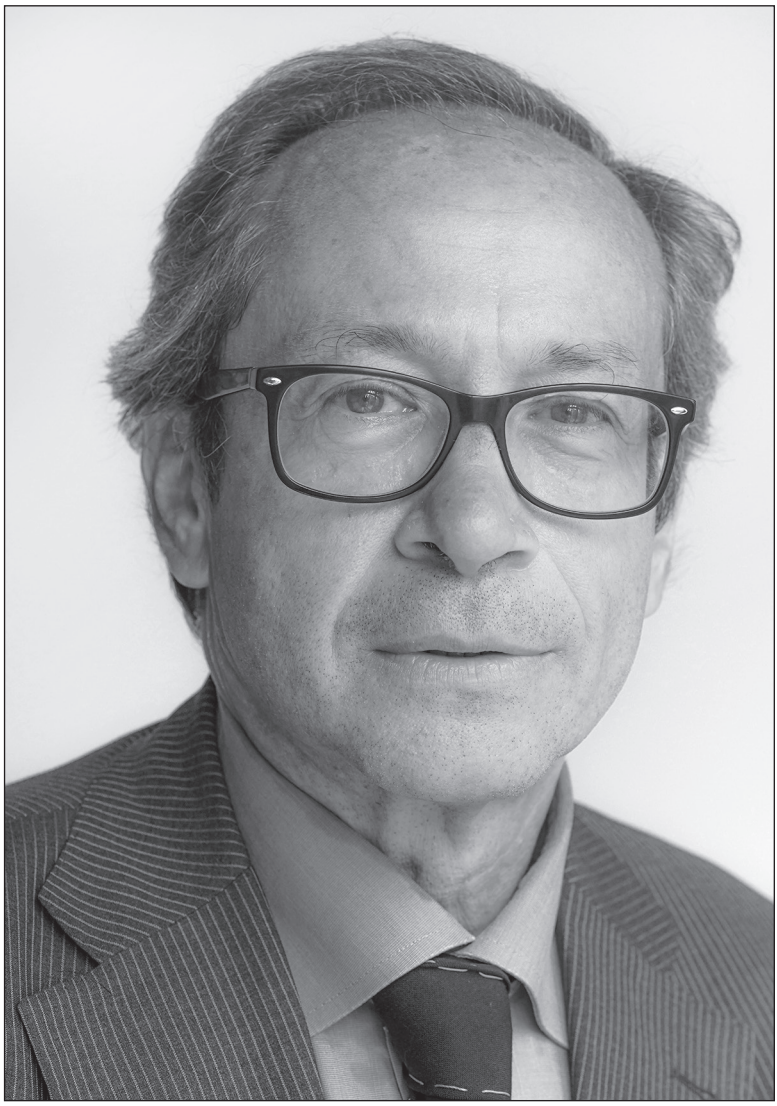
NEW TRENDS IN PRIVATE INTERNATIONAL LAW OF INSURANCE CONTRACTS

by

MARCO FRIGESSI DI RATTALMA



M. FRIGESSI DI RATTALMA

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BIOGRAPHICAL NOTE

Marco Frigessi di Rattalma, born on 13 October 1960 in Milan. Junior Scholarship, Deutsche Schule Mailand; Law Degree, University of Milan (1984); Researcher of International Law, University of Trieste (1990-1998); Visiting Professor, University of Trento (1996-1998).

Professor of Law, University of Sassari (1998-2000), University of Brescia (2000-).

Head of European Union Law Practice Group at the Scuola di Specializzazione per le Professioni Legali (SSPL), University of Brescia.

Member, Board of Directors, *Assicurazioni*; Member, Scientific Committee, *Diritto del mercato assicurativo e finanziario*; Member, Editorial Advisory Board, *Rivista di diritto internazionale privato e processuale*.

Councillor, International Insurance Law Association (Association Internationale de Droit des Assurances, AIDA), Italy National Section; Vice Chair, AIDA, International Climate & Catastrophic Events Working Party.

Missions and invitations abroad: Max Planck Institute for Comparative Public Law and International Law, Heidelberg; University of Connecticut.

Member, Comitato dei Provibiri, Associazione Nazionale delle Imprese di Assicurazioni (ANIA); Member, Società Italiana di Diritto Internazionale e di Diritto dell'Unione europea; Member, Associazione Italiana Studiosi di Diritto dell'Unione europea (AISDUE).

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CHAPTER I

INTRODUCTION

This course aims to highlight through an analysis of the leading judgments of the European Court of Justice (ECJ) the trends that may be detected in the private international law on insurance contracts. The chosen method is thus based on judgments and is, therefore, jurisprudential. This allows a better understanding of the living law than merely studying provisions. After all, everyone is aware of the interpretative *and* creative role assumed by the ECJ. This method was, however, not strictly observed. In some instances, the jurisprudential approach was supplemented with a more traditional one based on the analysis of provisions to provide a more complete picture.

Chapter II analyses the respective roles of national law and EU law in the definition of the civil liability regime deriving from the use of motor vehicles, which determines the compensation the civil liability insurer is due. As we will see, while the ECJ assigns the definition and characteristics of the civil liability regime deriving from the circulation of motor vehicles to national law, this assignment only takes place within limits. These limits will be examined, as well as the role of the ECJ in developing private international law.

The chapter subsequently analyses the increasing number of judgments by the ECJ aimed at correcting national jurisprudential approaches that tend to interpret the implementing rules of European directives on insurance from the perspective of national law. It will investigate the role of the concept of "autonomous notion" developed by the ECJ as a tool to maintain a balance in interpreting EU law on insurance matters. The ECJ has upheld an autonomous notion of "indirect consequences" of the tort contained in the Rome II Regulation, and whether the results of this have been convincing will also be discussed.

At a more general level, the chapter will discuss the interpretation of the rules laid down by the Rome II Regulation as applied to the compensation paid by insurers to victims of transnational road accidents. We will examine whether the application of the law of the State in which the accident occurred, rather than that of the residence of the victim, or the heirs, can lead to unfair results, either by excess or by default in terms of compensation for damages due by the civil liability insurer.

Chapter II will examine the extent to which the concept of autonomous notion has been relevant in the ECJ jurisprudence on compulsory insurance of civil liability deriving from the circulation of vehicles as regards the interpretation of the notion of "use of vehicles". We will also analyse which situations fall under the notion of use of vehicles according to the ECJ and whether the interpretation adopted by the ECJ stands in contrast to the position of the national referring courts. Finally, we will also explore how the interpretation of the notion of use of vehicles may reverberate on the level of premiums that consumers will have to pay to insure their vehicles against civil liability.

Chapter III begins by discussing one of the fundaments of the law of all EU Member States in contractual matters, the freedom of contract, which implies the freedom to enter into any agreement with any person in any form. Italian law imposes on insurance undertakings the obligation to provide third-party liability motor insurance at the request of any potential customer. In the ECJ judgment of 28 April 2009 in case C-518/06, *Commission* v. *Italian Republic*, the Court had to decide whether the obligation to contract causes a restriction to both the right of establishment and the freedom to provide services and subsequently to rule whether this restriction was justified. We will discuss the central role that the need for protection of the car owner who may drive the car only after having signed a third-party liability motor insurance has in the reasoning of the ECJ. As we will see, the ruling was criticised for wholly ignoring private international law aspects. We will see if this critique is founded and explore whether the Court's judgment, had it considered the conflict of laws, would have been influenced by this or not.

Chapter III resumes the concept of the autonomous notion and the underlying need to keep a uniform approach in interpreting EU law provisions and a national one in implementing European directives. This prompted the Court to pronounce significant judgments on not only non-life insurance but also life insurance.

We will explore the interesting case of unit-linked policies, which some national courts tend to classify not as non-insurance contracts but as financial investment contracts. We will discuss to which extent this is in contrast with the jurisprudence of the ECJ, which has stressed, starting with the judgment of 1 March 2012 in the *González Alonso* case, that unit-linked contracts are life insurance contracts. The chapter will also look at unit-linked policies from the Rome I Regulation

perspective. As we will see, depending on whether a unit- or index-linked policy is characterised as an insurance contract or a financial investment contract, different conflict of laws provisions apply, with the consequence that the law applicable to the contract may differ.

Chapter III will emphasise the leitmotiv of ECJ jurisprudence on insurance matters of identifying "autonomous notions". This will be noted in respect of a case that concerned the difference in the level of premiums according to the gender of the insured. In the judgment of 1 March 2011 in *Test-Achats*, the Court ruled unlawful the provision that allowed Member States to postpone indefinitely the application of the right to the unisex premium enshrined in Council Directive 2004/113/EC of 13 December 2004 and configured by the European legislature as a human right protected by Articles 21 and 23 of the European Charter of Fundamentals Rights which enshrine the right to equality between men and women.

In defining the intertemporal regime – that is, in identifying to which contracts the new unisex premium regime applies – the European Commission has issued Guidelines that allow for the identification of such new contracts subject to the regime of unisex premiums and contracts that remain subject to the previous regime of differentiated premiums based on the gender of the insured. Here the Commission was inspired by the principles expressed by the ECJ, whose jurisprudence is, as mentioned, pervaded by the concept of autonomous notion aimed at ensuring uniformity in the application and interpretation of EU law in Member States.

Chapter IV deals with the Brussels I bis Regulation and the protection of the rights of the policyholder, the insured and the damaged third party *vis-à-vis* the insurance undertaking. We will see that this protection is at the heart of the regime provided by Section 3 of Chapter III on jurisdiction in insurance matters.

We will discuss the autonomous notion of "matters relating to insurance" – which may not be interpreted in the light of the *lex fori* of the court seized – and see how it was clarified by ECJ case law. Moreover, to illustrate the specific regime on jurisdiction in insurance matters, we must first provide a systematic framework of the discipline of jurisdiction in the Brussels I bis Regulation, analysing in particular what can be defined as the "ordinary regime" arising from both ection 1 ("General provisions") and Section 2 ("Special jurisdiction") of Chapter II on the one hand, and "Exclusive jurisdiction" governed by Section 6 of Chapter II on the other.

Pursuant to the analysis carried out, we will examine the nature of the regime that Section 3 provides on jurisdiction and how far it is inspired by the ordinary regime enshrined in Sections 1 and 2 and the "mandatory" regime envisaged for exclusive jurisdiction. The protection afforded by Section 3 to the policyholder, the insured and the damaged third party *vis-à-vis* the insurance undertaking is made dependent on the condition that the counterpart of the insurance undertaking is domiciled in the European Union. This has been discussed in legal doctrine, and the double standard has triggered criticism.

Finally, it will be shown how the European private international law on insurance has been traversed for some decades by free market impulses and dirigiste tendencies. We will focus on positions that favour greater recognition of party autonomy in the choice of the law applicable to the contract as well as the competent jurisdiction and on positions that want to limit party autonomy. We will explore how these contrasts found a definitive composition in the European regimes provided by the Brussels I bis and Rome I Regulations.

CHAPTER II

PRIVATE INTERNATIONAL LAW AND CIVIL LIABILITY INSURANCE

Section I. Issues of EU private international law on civil liability and its insurance: The principle of legal certainty and insurance law

A. The rule of private international law created by the ECJ subjecting civil liability to national law: The control by the ECJ on the adequacy of the compensation awarded to victims of accidents under national law

EU law does not yet contain a corpus of rules and principles that regulate the matter of compensation for bodily or pecuniary damage, nor the insurance contract that provides for such compensation by the insurer. However, it would be premature, indeed wrong, to affirm that EU law does not intervene in any way in regulating these aspects, from the point of view of both civil liability and insurance. Therefore, this part of the course aims to shed light on which aspects and with what consequences EU law intervenes in regulating these matters.

EU law leaves it in principle to the national legislature to frame the regime of civil liability deriving from the use of vehicles. However, it is wrong to suppose that EU law does not impact this regime, which is strictly connected to the compulsory insurance of the mentioned civil liability. Instead, EU law intervenes as a parameter on the adequacy of the compensation awarded by national law to the injured party and due by the insurer in the form of an insurance indemnity.

For this purpose, we will examine the judgment of the ECJ, issued on 23 January 2014, in case C-371/12, *Petillo* v. *Unipol*. This decision reviewed the compensation parameters provided by Italian law. It may be related to the ruling of the Italian Constitutional Court, No. 235 of 16 October 2014, which had to assess the compliance of the same provision with the Italian Constitution. There are several reasons to believe that the European Court and the Constitutional Court have made a right and appropriate jurisprudential choice, affirming the compatibility of Article 139 of the Italian Private Insurance Code (PIC) with both European and Italian constitutional law.

The judgment in *Petillo* v. *Unipol* derives from a reference to a preliminary ruling issued by the Court of Tivoli, the same court that referred the question of constitutionality to the Constitutional Court, which later resulted in its judgment No. 235. In particular, the Court of Tivoli raised whether Article 139 PIC – which contains limitations on compensation for damage in the case of the so-called micro-injuries – was compatible with EU law. The case concerned a road accident in which Unipol was the insurer of the person responsible for the accident.

The Court of Tivoli asked the ECJ to clarify whether the limitation of compensation for so-called biological damage in cases of micro-injuries – that is, injuries in the range of 1 to 9 per cent of disability – complies with EU law. However – and this was the crucial point of the national reference – this limitation does not apply in the cases of accidents involving identical injuries that do not originate from motor car accidents and where the broader "Milanese tables" apply instead.

Almost all Italian courts use these tables for the quantification and consequent settlement of damages to health in its two primary forms of "non-pecuniary damage" and "biological damage" [1]. Despite not having the same regulatory rank, the application of the criteria contained in the Milanese tables has been a consolidated practice of all Italian judges since the turn of the twenty-first century. Said judges are bound to decide on compensation for damages to the person, deriving from accidents on the work, road accidents, accidents in general and cases in which it is necessary to quantify the so-called biological damage, understood as a permanent injury not susceptible to complete recovery, suffered by the injured party.

The Court of Tivoli carried out a suggestive operation. It compared the amount of compensation that, in the case of the accident at issue, would be due by applying the Milanese tables and that resulting from the table under Article 139 PIC. The difference was around 5,485 out of about 10,000 euros, which appears significant. Thus, the Court of Tivoli brought before the European Court a calculation of the compensable quantum in a case of a car accident, which it deemed to be incompatible with EU law. However, the ECJ found no infringement of EU law. In arriving at this conclusion, it developed a reasoning that should be analysed briefly.

At the outset, it should be stressed that when we talk about EU law here, we are talking about "directives". Indeed, the law relating

1. In March 2021, the new Milanese tables were promulgated and published.

to compulsory civil liability insurance deriving from the use of motor vehicles and boats is governed by directives, with the relevant ones here being No. 103 of 16 September 2009. Already in the oldest directive – Council Directive 72/166/EEC of 24 April 1972, the so-called First Directive on motor liability insurance – the principle was affirmed according to which "Each Member State shall … take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance" (Art. 3.1). In the Directive there is, thus, an obligation of result to ensure that the use of motor vehicles and ensuing liability are covered by insurance. It should be clarified that under EU law, there is no bilateral obligation of the parties to contract insurance, as it exists in Italy. Instead, there is only an obligation that national law ensures that motor vehicles are insured, regardless of the methods and techniques used to ensure that. Those methods and techniques are left to the legislative choices of each Member State, provided that they are effective from an EU law perspective.

It should be emphasised that the European directives want civil liability to be covered by insurance but do not, in principle, deal with civil liability *in re ipsa*. This means that the directives deal with the insurance level and impose the result of insurance coverage. However, they do not prescribe which model of civil liability (fault or no-fault) to adopt, which damages must be compensated, which may not, and so on. In this respect, there is a lack of EU legislation, which entails that the same claim is often assessed differently regarding compensation of bodily damage and patrimonial damage from one Member State to another. As a result, there are glaring disparities, of which Italy represents the peak concerning bodily damage. This reflects the current legal situation in EU law: Member States have not yet given up their legislative competence in this field, and therefore the ECJ needs to cope with the absence of harmonisation of national laws.

Against this background, the ECJ affirmed in *Petillo* that the directives do not aim at the harmonisation of the civil liability regimes of the Member States, as the latter remain, in principle, free to establish what damages are to be compensated, the extent of compensation, and so on. All this is further clarified by the finding of the Court that the obligation of insurance coverage imposed by the directives is different from the scope of compensation for civil liability; the first is guaranteed by EU legislation, while the second – the regime and extent of compensation – is governed by domestic law. Thus, the Court sets

out a jurisprudential rule of private international law, which subjects the civil liability regime to national rather than EU law. One may also read the decision as a consequence of the delimitation of competencies between the EU and its Member States.

This would, however, be a reductionist perspective that needs to consider the context in which the judgments are pronounced on this point. First, the rule of private international law created by the Court is limited to indicating national law as applicable in general, while the Rome II Regulation establishes specifically which national law is applicable in the relevant case. Thus, the rule created by the Court operates at a macro-systemic level, while the provisions of the Rome II Regulation intervene at a micro-systemic level.

Another interesting aspect of the *Petillo* ruling is that the Court deems it necessary to assess whether Article 139 PIC excludes or disproportionately limits the victim's right to compensation from the insurer. In doing so, the Court confirms another leitmotiv of its jurisprudence, namely that – despite the reference above to national law as regards the civil liability regime – this regime must not circumvent the purpose of the EU motor insurance directives. Therefore, the reference to domestic law exists but is not unconditional. Certain principles derived from European law need to be respected; compensation must be awarded to the victim and may not be disproportionately limited. Otherwise, the motor insurance directives would be deprived of their *effet utile*.

The latter conclusion had already been reached in an earlier ECJ judgment of 30 June 2005, in case C-537/03, *Candolin* v. *Pohjola e Ruokoranta*. There, the Court addressed the compensation for damage in a traffic accident involving persons in the car who were aware of the driver's drunkenness. According to the applicable Finnish law, no compensation was due from the driver's insurer as the injured persons had accepted the risk knowing that the driver was drunk. Accordingly, the Court ruled that the relevant Finnish rules were contrary to EU law because they deprived the victims of the accident of the right to compensation for damages in an excessive and disproportionate way.

Conversely, in the *Petillo* case, the Court ruled that the compensation cap contained in Article 139 PIC was adequate and unlikely to deprive the insurance directives of their useful effect. To reach this conclusion, the Court assessed the merits of the dispute underlying the preliminary reference, which reaches the limits of its jurisdiction. The Court stated that:

> "In the present case, nothing in the documents submitted to the Court indicates such an automatic exclusion or disproportionate limitation. It is apparent from those documents, first, that compensation is granted, secondly, that the more restrictive method of calculating that compensation is applicable only to damage arising from minor physical injuries and, lastly, that the amount resulting from that calculation is proportionate, inter alia, to the seriousness of the injuries suffered and the duration of the disability suffered. Moreover, that scheme allows the court to adjust the amount of compensation to be granted, by increasing it by up to one fifth of the calculated amount." (para. 45)

The judgment, although entirely sound, could have drawn more widely on the brilliant Opinion of Advocate General Wahl. Dealing with Article 139 PIC, the Advocate General stated that:

> "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."

These are perceptive and convincing principles, which the Court should have better taken up in the grounds of the judgment.

Judgment No. 235/2014 of the Italian Constitutional Court, the national "twin" of the ECJ's *Petillo* ruling [2], is also important. Indeed, it concerns a high number of accidents, namely approximately 70 per cent of all road accidents, which cause (only) micro-injuries. Therefore, it constitutes a relevant precedent confirming the constitutionality of caps established by Italian law to the compensation due by the insurer for damage suffered through road accidents – even in the case of prejudice to fundamental rights, such as that to physical integrity and health.

Article 139 PIC focuses on establishing a damage compensation table that guarantees the economic viability of the compulsory insurance system for motor vehicles in terms of costs and for insured persons in terms of premiums. As mentioned, the table based on Article 139

2. With respect to Article 139 PIC, the Court of Tivoli ordered a preliminary reference to the ECJ and simultaneously referred the question of constitutionality to the Constitutional Court.

PIC provides compensation parameters lower than those developed by case law, particularly those established by the Tribunal of Milan. Precisely for this reason, the judges of Tivoli, Turin and Orvieto raised the question of whether the smaller compensations for micro-injuries in road accidents as compared to similar injuries caused by other accidents infringed the principle of equality enshrined in Articles 2 and 3 of the Italian Constitution.

In this respect, the Court replied that the victim of a car accident enjoys a privileged situation in the Italian legal system. Indeed, only such victims can avail themselves of the mandatory insurance coverage, which guarantees effective compensation by the insurance company, even when the person who caused the damage cannot pay. Though this conclusion is convincing, the Court could have given more detailed reasons, given the importance of the question. At any rate, it is evident that the Court focuses on the important protections offered by the compulsory insurance system, which the victims of other accidents do not enjoy – such as the direct action *(action directe)* against the civil liability insurer, the patrimonial guarantee that the insurance company offers to victims of road accidents and the guarantee of compensation for damage by the Road Victims Guarantee Fund [3] (in case the person responsible for the car accident did not comply with the obligation to take out insurance). This protective system leads the Constitutional Court to consider that the provision of reduced compensation for road accidents causing micro-injuries compared to that granted by Courts for accidents of different natures does not place the victim of a road accident in a disadvantaged position.

In another plea, the referring courts challenged the compensation ceiling established by the table based on Article 139 PIC. This was criticised for not allowing an equitable judicial adjustment of the compensation to the individual case and, more generally, for impeding full compensation, particularly regarding the so-called moral damage deriving from an injury.

However, the Court rejected the complaint on the basis that Article 139 PIC allows, in its third paragraph, a limited judicial adjustment of the compensation, namely an increase of up to one fifth of the amount fixed by the table. By doing so, the Court correctly interpreted Article 139 PIC in light of the principles affirmed by the twin sentences

3. CONSAP – Fondo di Garanzia per le Vittime della Strada.

of the Joint Sections of the Court of Cassation of 11 November 2008 [4]. These confirm the principle of the unity of compensation for damage, which also applies to Article 139 PIC. Indeed, whereas this provision expressly refers only to so-called biological damage and does not mention non-pecuniary damage (*danno morale*), the quoted decisions affirm that the concept of biological damage includes *all* items of the damage, including bodily and moral.

Finally, regarding the compensation ceiling, the Court affirmed that it is legitimate to set reasonable limits to the award of personal damage, even when the violation of the fundamental rights of the person is at stake. However, such limits presuppose that the interest of the damaged individual conflicts with a public interest, as in this case, the economic viability of the compulsory liability insurance system for motor vehicles. On this point, the Constitutional Court referred to its judgment No. 132 of 1985, which concerned the limits to the liability of air carriers provided for by the Warsaw Convention of 12 October 1929. This decision recognised the need to protect the private economic initiative of air carriers. In this context, the Court had stated that:

> "In the Court's opinion, it must be a normative solution capable of ensuring the balanced settlement of the interests at stake: and therefore, on the one hand supported by the need not to unduly compress the sphere of economic initiative of the air carrier, for the other devised according to criteria which, in relation to the imputation of liability or the determination of the consistency of the limit of compensation, entail suitable and specific safeguards of the right asserted by the person who suffered the damage."

Against this background, the Constitutional Court confirmed the constitutionality of Article 139 PIC, as this provision establishes an acceptable balance between the private interest and the opposing public interest. This underlying reasoning is important: the Court rejects an absolute and mandatory principle of full compensation for personal damage. Instead, it acknowledges that the right to compensation must be balanced with the insurance system's economic viability requirements.

B. The European law principle of legal certainty and its impact on insurance law

EU law is relevant to insurance matters in a different, more general respect. For insurance companies, legal certainty is of paramount

4. Judgment Nos. 26972 and 26975, 11 November 2008.

importance. EU law incorporates legal certainty in a compelling way among its general principles of law, which have primary law rank and are thus placed at the same level as the European Treaties.

The ECJ has repeatedly recognised the principle of legal certainty. It requires that legal rules be clear, precise and predictable in their effects, particularly if they may entail adverse consequences for individuals and businesses [5]. This has been confirmed even by the Grand Chamber of the Court [6]. More specifically, the ECJ has used the principle to blame the implementation of EU directives into national law by the Member States through legislation that was not sufficiently clear or equivocal in its wording. Moreover, the implementation must be carried out through suitable regulatory measures that need to be consistent with the EU acts [7]. The principle of legal certainty is connected to the protection of legitimate expectations, which also requires that legislation that has adverse consequences for individuals be clear and precise and that its application be foreseeable for individuals [8].

The European Court of Human Rights has also stressed the importance of legal certainty [9]. Like in the jurisprudence of the ECJ, the principle of legal certainty, inherently linked to the principle of legality, requires that the law responds to specific qualitative requirements; in particular, it must be formulated in sufficiently clear and precise language to limit the discretion of public authorities. While a law can confer discretionary powers on public authorities, the extent and methods of exercising that power must be specified with sufficient clarity in consideration of its

5. ECJ judgment, 17 July 2008, C-347/06, *ASM Brescia SpA* v. *Comune di Rodengo Saiano*.

6. ECJ judgments: 7 June 2005, C-17/03, *Vereniging voor Energie and Others* v. *Directeur van de Dienst*, referring to judgments 15 December 1987, C-325/85, *Ireland* v. *Commission*; 13 February 1996, C-143/93, *Gebroeders Van Es Douane Agenten* v. *Inspecteur der Invoerrechten en Accijnzen*, para. 27; 15 February 1996, C-63/93, *Duff and Others* v. *Minister of Agricolture and Food and Attorney General*, para. 20.

7. ECJ judgment, 21 June 1988, C-257/86, *Commission* v. *Italian Republic*: "12. Moreover, the Court has consistently held (see *inter alia* the judgment of 30 January 1985, C-143/83, *Commission* v. *Kingdom of Denmark*) that the principles of legal certainty and the protection of individuals require, in areas covered by Community law, that the Member States' legal rules should be worded unequivocally to give the persons concerned a clear and precise understanding of their rights and obligations and enable national courts to ensure that those rights and obligations are observed."

8. ECJ judgments: 7 June 2005, C-17/03, *Vereniging voor Energie and Others* v. *Directeur van de Dienst*, para. 80; 12 December 2013, C-362/12, *Test Claimants* v. *Commissioners of Inland Revenue, Commissioners for Her Majesty's Revenus and Customs*.

9. See especially P. Mori, "La 'qualità' della legge e la clausola generale di limitazione dell'art. 52, par. 1, della Carta dei diritti fondamentali dell'UE", *Diritto dell'Unione europea* (2014), p. 243 *et seq*.

desired objective; and individuals need to be protected against arbitrary interventions [10]. According to the European Court of Human Rights, the requirements of clarity, accessibility and predictability of the law are to enable interested parties to foresee reasonably, also by resorting to lawyers, the consequences that the law links to a given conduct or act [11].

The requirements of legal certainty must also be respected by insurance legislation, including the national implementation measures of European directives. If this is not clear and predictable in its scope for the insured, the victim or the insurance company, the usual EU law remedies apply: a preliminary reference to the ECJ by a national court, the infringement procedure before the Commission, conforming interpretation or, in the event of an irremediable conflict with EU law, the non-application of the equivocal provisions by national courts on the basis of the supremacy principle.

Section II. Cross-border accidents and the law applicable to compensation by the civil liability insurer of motor vehicles

A. Traffic accidents and the applicable law – cross-border claims: increasing figures and problems

A further aspect in which EU law intervenes in a relevant way is the relationship between compulsory civil liability insurance of motor vehicles and compensation for cross-border damage. The topic is of considerable interest from an economic and social point of view given that the process of globalisation of the economy involves increased cross-border activity and thus increased cross-border transport and, inevitably, cross-border accidents; that is, accidents that have connections with several national jurisdictions. In particular, the cross-border element of an accident may derive from the fact that the victim of the accident is not a resident in the State of the forum, that the person

10. European Court of Human Rights (ECHR) judgments: 25 February 1992, *Margareta and Roger Andersson* v. *Sweden*, para. 75; 25 March 1983, *Silver and Others* v. *United Kingdom*, para. 88.

11. ECHR judgments: 29 October 2013, *Varvara* v. *Italy*, para. 56; 28 March 2000, *Baranowski* v. *Pologne*, paras. 50-52; 17 February 2004, *Maestri* v. *Italy*, para. 31; 30 May 2005, *Belvedere Alberghiera* v. *Italy*, paras. 57-58; 2 May 2013, *Barjamai* v. *Greece*, para. 37. On the issue, see S. Leturcq, "Vers l'élaboration d'un standard du 'bon législateur' devant le Conseil constitutionnel français et la Cour européenne de droit de l'homme", available at www.droitconstitutionnel.org; P. Wachsmann, "De la qualité de la loi à la qualité du système juridique", *Liberté, justice, tolérance. Mélanges en l'honneur du doyen Gérard Cohen-Jonathan*, Vol. 2, Brussels, Bruylant, 2004, p. 1687 *et seq*.

who caused the accident does not reside there or that the civil liability insurer is not established in that State [12].

The legal framework for all accidents occurring after 11 January 2009 is given by Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [13]. However, this is not a regulation laying down uniform substantive rules on civil liability; Rome II is, instead, a classic instrument of private international law. In other words, it only guides the judge and the lawyers of the parties to the dispute in establishing which law applies to the case.

As stated [14], the ECJ has developed a jurisprudential conflict of laws rule that operates at a macro-systemic level and assigns the definition and characteristics of the civil liability regime applying to motor vehicles to national laws. It is then up to the Rome II Regulation to establish which national law applies in the specific case. Thus, the provisions of the Rome II Regulation intervene at a micro-systemic level.

It is also important to observe that under Article 3 of the Regulation, entitled "universal character", the law designated by the Regulation applies even if it is not that of an EU Member State; therefore, it could be the law of any third State. From an Italian perspective, the Rome II Regulation substantially replaces, except for some marginal issues, Article 62 ("Liability for unlawful acts") of law No. 218 of 1995, reforming Italian private international law. The Regulation currently constitutes the reference point for twenty-six EU Member States (as Denmark has opted out of it).

Article 4 of the Regulation establishes that:

> "1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur."

12. Every year, more than 400,000 accidents occur in Europe between motorists originating from different countries on the Green Card system. https://www.cobx.org/article/3/green-card-system.

13. On Rome II: J. Ahern and W. Binchy, *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: A New International Litigation Regime*, Boston/Leiden, Brill, 2009; A. Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations*, Oxford, Oxford University Press, 2008; E. Guinchard (ed.), *Rome I and Rome II in Practice*, Cambridge, Intersentia, 2020.

14. Para. I.1.

This article provides for the application of the so-called *lex loci damni* – in other words when the place where the wrongful conduct was committed does not coincide with the place where the damage occurs, the latter determines the law applicable to the tort. The findings of the ECJ in *Bier* v. *Mines de potasse d'Alsace* of 30 September 1976 have thus become obsolete [15]. In that decision, the ECJ had left the plaintiff the choice between the court of the place of the wrongful conduct and the court of the place of the damage, albeit (only) to establish which jurisdiction was competent in a multi-localised offence case [16]. This option to choose the applicable law continues to exist only with respect to environmental liability according to Article 7 Rome II Regulation.

Moreover, the second paragraph of Article 4 Rome II Regulation introduced an exception when the person claimed to be liable and the person sustaining the damage have their habitual residence in the same country at the time when the damage occurs. In this case, the law of that country shall apply. The European legislature has thus considered the common residence of the parties to represent a more relevant link than the law of the place of the accident. This provision follows continuous US jurisprudence since the 1960s, starting with the *Babcock* v. *Jackson* case [17], which dealt with road accidents involving persons residing in the same federal state, irrespective of where the accident occurred.

However, the most relevant exception to the *lex loci damni* principle may be found in paragraph 3 of Article 4 of the Rome II Regulation, which reads:

> "Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paras. 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question."

This exception clause aims to introduce an element of flexibility, allowing the judge to adapt the rule to the specific case and thus apply

15. 30 November 1976, C-21/76, *Handelskwekerij G. J. Bier BV* v. *Mines de potasse d'Alsace SA*.

16. Similarly, also Article 62 of Italian Law No. 218 of 1995 – which allows the plaintiff, the victim of the offence, the option between the *lex loci damni* and the law of the place of the wrongful conduct that caused the damage – is superseded.

17. *Babcock* v. *Jackson*, 191 NE 2d 279 (NY 1963), 9 May 1963.

the law that coincides with the actual centre of gravity of the non-contractual claim. The judge, therefore, applies a law different from the *lex loci damni* whenever the case has a greater link to another country's law.

B. The law applicable to the compensation of damages suffered by the victim who is not resident in Italy for an accident that occurred in Italy

In the field of insurance, the provisions mentioned above also select the applicable law regarding cross-border torts, in relation to which there is compulsory or voluntary insurance coverage. This means that, in principle, it is the *lex loci damni* also that determines the amount of compensable damage in the case of injuries covered by civil liability insurance. This applies, too, to cases in which the insurer of the wrongdoer is summoned with a direct action *(action directe)* by the victim injured in the accident or the heirs of the victim.

Concerning road accidents, the *lex loci damni* rule implies that *prima facie*, it is Italian law that must be applied when the accident takes place in Italy, even if the victim is a person who does not reside in and has no significant connection to Italy. To give an extreme example, compensation would thus be governed by Italian law even if the victim of the accident is a motorist driving a vehicle for a few kilometres only on Italian soil.

This approach is not convincing. In fact, concerning road accidents, the *lex loci damni* is not the law that has the closest connection to the claim. Instead, the residence of the victim, or of her successor in title, should be decisive. This assessment finds support in the Rome II Regulation. Recital 33 states that:

> "According to the current national rules on compensation awarded to victims of road traffic accidents, when quantifying damages for personal injury in cases in which the accident takes place in a State other than that of the habitual residence of the victim, the court seized should take into account all the relevant actual circumstances of the specific victim, including in particular the actual losses and costs of after-care and medical attention."

The Opinion of Advocate General Nils Wahl, delivered on 10 September 2015 in case C-350/14, *Lazar* v. *Allianz SpA*, underlines that, in determining the damage suffered by a person not resident in the country where the accident occurred, the judge must take into account

as far as possible "the differences in the standard of living", as well as the expenses incurred by the victim in his country of residence [18]. In paragraph 81 of the same Opinion, the Advocate General points out that the rule of Article 4 (1) Rome II Regulation can be derogated, under Article 4 (3) of the same, when it leads to unreasonable results. The Opinion specifies that when the injured person does not habitually reside in the country where the accident occurred, the exception clause allows applying the law of the country to which the claim is most closely connected:

> "Such a clause would prove its usefulness if it were established, for example, that, unlike the situation at issue in the main proceedings, the residence of the immediate victim of the accident, the residence of the person presumed to be responsible or any other circumstance surrounding the occurrence of that accident are outside the country in which the accident occurred and relate to another country."

The Advocate General affirms that the victim of the accident should be compensated according to the law of the country of her residence if the victim does not reside in the State in which the accident occurred and if there are no other relevant factors that link the tort to the State where the accident occurred. This approach is also reflected in the Proposal for a regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("Rome II"), COM/2003/0427 final. In the Proposal, the choice of the law of the place where the damage occurred as the law governing compensation is justified on the ground that the place of the damage usually coincides with the place of the victim's residence. The relevant passage reads:

> "Article 3 (1) takes as the basic rule the law of the place where the direct damage arises or is likely to arise. In most cases this corresponds to the law of the injured party's country of residence." [19]

As a result, the law of the victim's country of residence must prevail when it does not coincide with the law of the place of the accident, as it has the manifestly closest links to the wrongful act in the sense of Article 4 (3) Rome II Regulation. There are good reasons for this

18. Para. 82.
19. Proposal for a regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("Rome II") COM/2003/0427 final, p. 11.

result: awarding damages to the victim based on the law of the place of the accident can lead to unfair and even absurd consequences. For example, imagine the case of an individual residing in Italy who becomes a victim of a car accident during a short-term visit to a developing country with a modest standard of living. It would then be unfair to award damages according to the legal and economic standards of the developing country. Instead, it is appropriate to apply the Italian standards in this case. In other words, the paramount connection is with the victim's country of residence and not the country of the accident.

Incidentally, the public order (*ordre public*) clause contained in Article 26 Rome II Regulation – which allows discarding a foreign law contrary to the forum's public order principles – would not seem to provide a reliable antidote in such cases. Whereas it may justify corrective measures in extreme settings, it would not, given its inevitably vague character, allow the developing of balanced and predictable exceptions to an automatic application of the law of the foreign place of the accident.

Let us return to our hypothetical person residing in a developing country who travels to Italy for a few days and suffers a road accident there. In this case, it would not seem appropriate to base the compensation on the legal and economic standards applied by Italian courts in domestic cases. Proceeding differently – that is, applying Italian law as *lex loci damni* – would transform the insurance claim into a lottery win or "windfall profit". Yet such an outcome would clash with the very nature and purpose of the insurance, as the insurer must pay the damage suffered by the victim and not an arbitrarily fixed higher sum.

From a general economic perspective, the *lex loci damni* rule may entail even higher disbursements for insurance companies than those calculated based on domestic standards. Inevitably, such additional costs may reverberate on insurance premiums to the detriment of consumers. However, such an increase would contradict the findings of the Italian Constitutional Court in judgment No. 235 of 16 October 2014. There, the Court rightly held that the compensation payable by insurers under the applicable law must enable an equitable settlement of the interests at stake; that is, a fair balance between the victim's right to compensation and the economic viability of the system of compulsory motor vehicle liability insurance, on which the community of the insured drivers depends. Therefore, to impose on insurance companies operating in Italy the payment of high and disproportionate

compensations to victims who did not suffer damages equivalent to the indemnities claimed is in contrast with the rationale of this decision.

For these reasons, the judgment of the Court of Cassation No. 12221 of 12 June 2015, which rejected the appeal against a decision of the Milanese Court of Appeal, raises doubts. The latter Court applied the parameters for compensation in force in Italy even with regard to damages suffered by persons residing abroad and living in a different socio-economic context. According to this ruling, this different socio-economic reality of the victim (in this case, from Russia), in which the sum to be paid by the insurer was presumably intended to be spent, would be irrelevant for the purposes of awarding damages, for the Court characterised it as an element outside the scope of the offence, which – if taken into consideration – would determine an unequal treatment and an infringement of the principle of full compensation.

However, this reasoning is not convincing. As shown above, the Rome II Regulation confirms that the victim's residence is by no means extrinsic to determining the tort's main connection. More importantly, the apodictic assertion that taking into account the economic standards of the victim's country of residence would lead to an unreasonable difference in treatment to the detriment of the victim is not acceptable. The opposite is true: not taking into account the economic parameters of the victim's country of residence would result in an unjustified enrichment of the victim not resident in Italy and an unreasonable difference in treatment to the detriment of victims resident in Italy in other cases. Indeed, awarding the same amount in both cases would be insufficient for victims who live in economic contexts with higher average prices and excessive for victims who live in economic contexts with lower average prices.

Equally unpersuasive is the reference to an alleged infringement of the principle of full compensation by adjusting the compensation to the purchasing power and value of the currency in the victim's State of residence. Indeed, in the judgment mentioned above, No. 235 of 2014, the Constitutional Court stated that the Italian legal system does not provide for an absolute right to full compensation and that this right must be interpreted in light of the principle of the economic viability of the insurance system. As shown, this result has also been affirmed by the ECJ in the context of EU law.

As a result, it may therefore be confirmed that when the victim of a road accident in an EU country does not reside in that country, the judge

should, in principle, apply the law of the victim's State of residence for the purpose of compensation by virtue of Article 4 (3) Rome II Regulation.

C. The law applicable to the compensation of damages suffered by successors non-resident in Italy of victims who died in an accident in Italy

Let us turn to the law applicable to the compensation for damages suffered by the successor, non-resident in Italy, of the victim who died in a road accident in Italy. This was addressed by the previous judgment of the ECJ of 10 December 2015 in *Lazar* v. *Allianz SpA*.

The ECJ was addressed by the Court of Trieste with a reference for a preliminary ruling to interpret the notion of "indirect consequences" contained in Article 4 (1) Rome II Regulation. This establishes that the law applicable to the wrongful act is the law of the place of damage, regardless of the country in which the "indirect consequences" of this damage occur.

In the case before the Court of Trieste, the plaintiff was Mr Florin Lazar, a Romanian citizen residing in Romania, and the father of Mrs Florin, a Romanian citizen living in Italy. Mrs Florin had died there after being hit on the road by an unidentified vehicle. Consequently, the Guarantee Fund for road victims – and Allianz SpA as the insurer designated by the Fund – were obliged to handle the claim. In its referral for a preliminary ruling to the ECJ, the Court of Trieste asked whether the moral and pecuniary damage suffered by the father for the death of his daughter should be qualified as autonomous damage or rather as an "indirect consequence" of the damage sustained by his daughter.

The answer to this question bears important legal consequences given that if one holds that the damage suffered by the father is an autonomous damage – different from that suffered by the daughter – Romanian law applies in order to determine the compensable damages and to quantify the compensation. This is so as an autonomous prejudice of the father must necessarily be connected to the father's country of residence, namely Romania. Conversely, if one holds that the damage suffered by the father is to be qualified as an "indirect consequence" of the tort against the daughter, the law of the place of the accident applies, in this case, Italian law.

The ECJ made the second choice. It held that the notion of "indirect consequence" constitutes an autonomous concept of EU law [20] detached from national law, which is subject to uniform interpretation in all Member States. Accordingly, it was to be construed by reference to its wording, systematic context and purpose defined by EU law. On this basis, the Court decided that the prejudice suffered by the father constitutes an "indirect consequence" of the prejudice suffered by the daughter.

To arrive at this surprising result, the Court made the following arguments based on the Rome II Regulation: recital 16 evokes the concept of "direct damage"; recital 17 specifies that: "The law applicable should be determined on the basis of where the damage occurs, regardless of the country or countries in which the indirect consequences could occur. Accordingly, in cases of personal injury or damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively"; and, finally, Article 15 lit. *f)* establishes that the applicable law identifies "persons entitled to compensation for damage sustained personally".

Yet none of these arguments appears convincing: recital 16 does not allow for any conclusions on "indirect damages"; recital 17 is of no relevance since it does not resolve the question of which person is to be considered injured in the present case, the father or the daughter; and, finally, Article 15 lit. *f)* is not at all conclusive either.

On closer inspection, the ECJ appears to have adopted too proactive an approach when it stated that "indirect consequences" can constitute an autonomous notion of EU law. Instead, the Court should have recognised that this notion needs to be borrowed from the *lex fori* because there is no corresponding autonomous notion in EU law. More specifically, the Court should have referred to its consolidated jurisprudence on the insurance of civil liability deriving from road accidents, reaffirmed in the judgment of 23 January 2014 in *Petillo*, described above.

There, the Court repeated for the umpteenth time that the regime of civil liability deriving from the use of vehicles is not regulated by EU law but left to national law. Correspondingly, the Court confirmed that the European directives on motor insurance do not aim at the

20. See ECJ judgments: 30 April 2014, C-26/13, *Kásler et Káslerné Rábai* v. *OTP Jelzálogbank Zrt*; 16 July 2015, C-237/15, *Minister for Justice and Equality* v. *Lanigan*, para. 35.

harmonisation of the civil liability regimes of the Member States, as States remain free to determine the compensation regime. This division line is accentuated in the next step when the Court affirmed that the insurance coverage obligation imposed by the European directives differs from compensation for civil liability; the first is constituted by EU legislation, while the second is governed by domestic law.

The *Lazar* ruling surprisingly ignores this consolidated case law and therefore errs in affirming that the notion of "indirect consequence" is an autonomous notion of EU law. But how can there be an autonomous notion of EU law – especially on a technical issue such as the concept of "indirect consequence" of a tort – if the whole field of civil liability pertains to national and not to EU law? The Court should thus have conceded that the question is subject to the applicable national law and, as it is a question of characterisation, to the *lex fori* of the court seized; that is, Italian law. According to Italian law, there is no doubt that the prejudice claimed by the father, Mr Florin Lazar, constitutes autonomous damage distinct from that suffered by the deceased daughter. Therefore, it cannot be interpreted as an "indirect consequence" or reflected damage.

The leading Italian case is the landmark judgment No. 2128 of the Court of Cassation, Section III, 31 January 2006. This dealt with a plane crash at Havana airport in which 113 Italian citizens died. The Cuban airline company insisted on the application of Cuban law, assuming that the plane accident and the death of the passengers had occurred in Cuba – and that, therefore, Cuba was both *locus damni* (death of passengers) and *locus delicti* (conduct that caused the damage). The Italian Supreme Court stated that

> "this complaint is unfounded. In fact, there is no doubt that the obligation from a wrongful act arises in the place where the fact producing damage occurred, but the notion of wrongful act contains … in addition to the wrongful conduct, also the harmful event deriving from it. In the matter of liability from wrongful acts, it is necessary to distinguish the damages constituting further manifestations of a single injury, produced entirely from the beginning, from the harmful effects which, adding to the initial harmful effect, themselves integrate damage and can be asserted in court through a separate action for compensation. Indeed, it is quite possible that the same fact, whether intentional or negligent, produces, after a first damaging event, further damaging

> consequences, which do not constitute a mere development and aggravation of the damage that has already occurred, but integrate new and autonomous damages. The event, the death of Italian citizens occurred in Cuba, but this event in turn caused damage to the relatives that necessarily occurred in the place where they reside, that is, in Italy. Therefore, Italian law applies to the case in point".

On these grounds, the damage caused to the heirs due to the loss of the parental relationship with the deceased family members must be characterised under Italian law as autonomous, direct and immediate; hence not as an "indirect consequence" or reflected damage. In the *Lazar* case, too, the Italian judge would therefore have had to apply the Romanian State's law to compensate for the damage suffered by the father, Mr Lazar.

It should be noted that the Milan Court of Appeal reached a similar conclusion in judgment No. 3223 of 2015. There, the Court had to quantify the damages suffered *jure proprio* by the Romanian mother and brother, resident in Romania, of the victim who died in a road accident in Italy. The Court awarded the damages by attributing to the victim's relatives a sum equal to that resulting from the tables drawn up by the Court of Milan but reduced by 30 per cent. On this point, the Court observes that

> "the compensation cannot take place on the basis of the parameters in force in the Italian reality, but must find an elective and priority index of reference in the place of habitual and effective residence of the injured parties, as the damage to the person, which takes on a monetary connotation, is related to the social and economic reality in which the damaged persons live".

The Court added that compensation would therefore be commensurate with the value of the currency and the price level in Romania, which diverge significantly from the Italian ones. The Court continues by observing that

> "the unfavorable exchange rate existing for the Romanian leu against the euro is well known, so that, in general, the purchasing capacity that the Romanian citizen can use in his own country is significantly higher to that existing in Italy".

This judgment [21] is persuasive as it fully responds to the rationales emphasised above: the need for compensation to be adjusted to the cost of living in the victim's State of residence or in that of the successors in title. Moreover, this result is confirmed by the Rome II Regulation, which expressly provides in recital 33 that: "According to the current national rules on compensation awarded to victims of road traffic accidents, when quantifying damages for personal injury in cases in which the accident takes place in a State other than that of the habitual residence of the victim, the court seised should take into account all the relevant actual circumstances of the specific victim." These include the cost of life and the correlated purchasing power in the victim's State of residence.

Section III. The interpretation of the notion of "use of vehicles" and its impact on the protection of the victims

A. The main objective of the evolution of EU law on compulsory motor insurance: The protection of the victims of accidents

This part of the course aims to highlight, from the EU law perspective, the principles that can be considered by now settled and consolidated – but also questions still open in the field of compulsory insurance of civil liability deriving from the use of motor vehicles.

The fundamental principle of the entire development of EU law on motor insurance is to protect the victims of road accidents to the maximum extent possible [22]. Directive 2009/103/EC [23], the so-called motor insurance directive – which repealed the previous five directives on motor insurance by merging them with slight modifications into a single EU act – has "crystallised" the evolution of the law of the EU

21. Judges from other countries have also long since applied similar compensation techniques. For example, see the judgment of the Court of Brussels of 14 May 1973, in *Journal des Tribunaux* (1973), p. 731 *et seq*. It was a question of quantifying the damages suffered by Belgian citizens residing in Belgium in relation to an accident in Lebanon: the Court decided that the compensation should take place not taking into account the parameters used by Lebanese jurisprudence and in particular the average purchasing power of that developing country but on the basis of those elaborated by Belgian jurisprudence, as it is precisely the damage suffered by individuals residing in Belgium. On this ruling see M. Frigessi di Rattalma, *Il contratto internazionale di assicurazione*, Padova, CEDAM, 1990, p. 229 *et seq*.

22. M. Rossetti, *L'assicurazione obbligatoria della RCA*, Turin, Utet giuridica, 2010, p. 16.

23. 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.

aimed at increasing the protection of road traffic victims. This directive is the final point of this evolution, which the ECJ (Third Chamber) reconstructed in its judgment of 4 September 2014 in case C-162/13, *Damijan Vnuk* v. *Zavarovalnica Triglav*.

This ruling concerns the notion of "use of vehicles" and contains a concise and precise description of the evolution of EU law on compulsory motor car insurance. This autonomous notion and its compatibility with Article 122 PIC deserve attention. The Luxembourg Court proceeds to analyse the framework and purposes of EU legislation on compulsory insurance, of which Article 3 (1) of the First Directive, 72/166/EEC of 24 April 1972, is part. According to that provision, each Member State is to take all appropriate measures to ensure that civil liability in respect of the use of vehicles typically based in its territory is covered by insurance.

The Court, in the *Vnuk* judgment, underlined the twofold objective of the European directives: namely, that of protecting the victims of accidents caused by a motor vehicle and that of liberalising the movement of persons and goods with a view to the completion of the internal market. First, the Court notes that the First Directive is part of a series of directives that have progressively specified the obligations of Member States in the matter of insurance of civil liability resulting from the use of vehicles. The Court goes on to observe that these – as it emerges from the recitals of the mentioned First Directive and the Second Directive, 84/5/EEC of 30 December 1983 – are intended to guarantee both the free movement of vehicles usually stationed on EU territory together with the passengers on board and the adequate protection of the victims of accidents caused by such vehicles [24]. In the First Directive, emphasis was still placed on the liberalisation of the movement of persons and vehicles between Member States. However, the later directives have placed ever greater focus on the protection of the victims of accidents caused by vehicles.

This objective is, in particular, in Articles 1 to 3 of the Second Directive: Article 1 requires the insurance referred to in Article 3 (1) of the First Directive to cover both the damage to property and personal injuries. It also requires Member States to set up bodies to provide compensation for damage caused by unidentified or non-insured vehicles; also, minimum compensation amounts need to be guaranteed.

24. At para. 50, the ECJ cites the judgments: 28 March 1996, C-129/94, *Criminal proceedings against Ruiz Bernáldez*, para. 13; 11 July 2013, C-409/11, *Gabor Csonka and Others* v. *Magyar Állam*, para. 26.

Article 2 of that directive restricts the scope of certain exclusion clauses provided for by legislation or in contracts in respect of claims by third parties who were victims of an accident caused by the use of the insured vehicle by certain persons. Article 3 extends the benefit of insurance in respect of personal injuries to the members of the insured person's family, the driver or any other person liable for the accident.

The Third Directive 90/232/EEC of 14 May 1990, in Article 1, *inter alia*, extends the insurance cover to personal injuries of all passengers other than the driver; and the Fourth Directive, 2000/26/EC of 16 May 2000, introduced in its Article 3 a direct right of action by injured parties against the civil liability insurance of the responsible person *(action directe)*.

Lastly, the Fifth Directive 2005/14/EC of 11 May 2005, in Articles 2 and 4, which amend the Second and Third Directives, respectively, extends the scope of the payment of compensation by the body established by the Second Directive; likewise, it broadens the insurance cover referred to in Article 3 (1) of the First Directive to personal injuries and damage to property suffered by pedestrians, cyclists and other non-motorist users of the roads. It also inserted a new restriction on the possibility of applying specific exclusion clauses to the insurance cover and prohibited excesses from being relied on against the injured party to an accident as far as the insurance referred to in Article 3 (1) of the First Directive is concerned.

In sum, the development of EU legislation concerning compulsory motor insurance shows that the objective of protecting the victims of accidents caused by vehicles has been continuously pursued and reinforced by the EU legislature. As the last step, all regulatory measures described above have been assembled, coordinated systematically and thus rendered more comprehensible by Directive 2009/103/EC. This instrument acknowledges and crystallises the trend in favour of protecting victims already present in the previous directives that have now been repealed [25].

Last but not least, the harmonisation directives have greatly affected private international law. By requiring Member States to adopt uniform substantive law provisions, they reduce the role of conflict of laws rules. After their implementation, it becomes irrelevant or, more precisely, relevant only in a few exceptional cases to determine the national law

25. A. Donati and G. Volpe Putzolu, *Manuale di diritto delle assicurazioni*, Milan, Giuffrè, 2019, p. 215 *et seq.*

applicable to the insurance contract. Instead, motor insurance law is now regulated by a uniform and autonomous substantive law regime at the EU level.

B. The autonomous notion of "use of vehicles" according to the ECJ

One of the most topical issues in EU insurance law is the definition of the notion of "use of vehicles" ("circulation des véhicules", "circolazione dei veicoli"). It has been the subject of numerous, including recent, interpretative judgments of the ECJ requested by the courts of many Member States. The relevance of this notion is evident, as the civil liability insurer of the person liable for the accident has to compensate the victim only if the injury was the result of the "use of vehicles".

In the mentioned case of *Vnuk*, the ECJ had to deal with a reference for a preliminary ruling by a Slovenian judge. The dispute concerned the request for compensation for bodily damage against the insurer of a tractor which had caused an injury to a man during a parking manoeuvre inside the courtyard of a farmhouse. When bales of hay were supposed to be stored in the loft of a barn, a tractor was used to bring an attached trailer into the barn. In doing so, it struck the ladder Mr Vnuk had climbed, causing him to fall. Mr Vnuk brought an action seeking compensation for bodily damage, together with default interest, against the insurance company of the tractor's owner. The first-instance court dismissed the application. The second-instance court dismissed the appeal that Mr Vnuk lodged against the judgment. It stated that a compulsory insurance policy in respect of the use of a motor vehicle covered damage caused by using a tractor as a means of transport but not damage caused when a tractor is used as a machine or propulsion device.

Regarding whether the manoeuvring of a tractor with a trailer in the courtyard of a farmhouse was to be included in the concept of "use of vehicles", the ECJ emphasised the autonomous nature of that concept. Hence, it was to be interpreted in the light of the purpose and context of EU law without paying heed to the hermeneutic canons of national legal systems. As stated, the appeal had been dismissed by the Slovenian court on the ground that the compulsory insurance policy for motor vehicles covered the damage caused by the use of the tractor as a means of transport but not the damage caused by using it as a work machine.

In its reasoning, the Court rejected this approach and extended the scope of the European concept to the actual and potential use of a vehicle. Therefore, the question of whether the tractor was used as an agricultural machine or a vehicle driving on the road was considered irrelevant. Instead, by drawing on the formula of "compliance with the usual use of the vehicle", manoeuvring the tractor was included in the "use of vehicles" concept.

The operative part of the *Vnuk* judgment states that:

> "Article 3 (1) 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 must be interpreted as meaning that the concept of 'use of vehicles' in that article covers any use of a vehicle that is consistent with the normal function of that vehicle. That concept may therefore cover the manoeuvre of a tractor in the courtyard of a farm in order to bring the trailer attached to that tractor into a barn, as in the case in the main proceedings, which is a matter for the referring court to determine."

A further interesting judgment of the ECJ of 20 December 2017 in case C-334/16, *José Luís Núñez Torreiro* v. *AIG Europe Limited and Unespa*, concerned the request for a preliminary ruling submitted to the Court by the Audiencia Provincial de Albacete. Mr Núñez Torreiro, an officer of the Spanish army, was participating in night exercises in a military manoeuvring camp located in Chinchilla, Spain. During this exercise, the insured all-terrain military-wheeled vehicle in which he was travelling as a passenger overturned, causing him several injuries. The area this vehicle crossed was not intended for the transit of wheeled vehicles but only for tracked vehicles. However, the Court ruled that it was, in any case, a vehicle and that the concept of circulation does not depend on the characteristics of the land on which the vehicle is used. Therefore, the insurance company had to compensate the victim.

The most recent judgment of the ECJ on the matter was on 20 June 2019 in case C-100/18, *Línea Directa Aseguradora SA* v. *Segurcaixa Sociedad Anónima de Seguros y Reaseguros*. It concerned the request for a preliminary ruling by the Spanish Tribunal Supremo. In this remarkable judgment, the Court extended the notion of "use of vehicles"

even further. It ruled that parking a vehicle in a private garage, where it caused a fire due to a fault in the electrical circuit, falls within the notion of "use of vehicles". It, therefore, ruled that the mandatory insurance covered the damage caused to the garage's owner against civil liability in respect of vehicle use.

However, the case involved more details: on 19 August 2013, Mr Salazar Rodes parked his new car in the private garage of a building belonging to Industrial Software Indusoft. On 20 August 2013, Mr Rodes, who wanted to show his car to a neighbour, started its engine but did not move the car. On the night of 20 to 21 August 2013, Mr Rode's car, which had not been driven for more than twenty-four hours, caught fire, giving rise to a fire and damage to the Indusoft building. The electrical circuit of this car was the cause of the fire. Mr Rodes had taken out insurance against civil liability regarding the use of motor vehicles with the company Línea Directa. Indusoft had taken out home insurance with Segurcaixa, which paid compensation for the damage caused by that fire. In March 2014, Segurcaixa brought an action against Línea Directa before the Juzgado de Primera Instancia (Court of First Instance) de Vitoria-Gazteiz. The insurer claimed compensation for the amount it had paid to Indusoft, together with statutory interest, on the ground that the accident had originated from the "use of a vehicle" that had been insured against civil liability. The Court of First Instance dismissed the action, taking the view that the fire could not be regarded as a "use of a vehicle" within the meaning of Spanish law. Segurcaixa then appealed the judgment before the Audiencia Provincial de Alava (Provincial Court, Alava). This Court upheld the appeal and ordered Línea Directa to pay the compensation claimed by Segurcaixa. Línea Directa did not accept the judgment but lodged an appeal in cassation before the Tribunal Supremo. The Tribunal Supremo noted that the Court of Appeal had adopted a broad interpretation of the "use of vehicles" under Spanish law. This covered a situation in which a vehicle was parked in a private garage on a non-permanent basis and caught fire there due to causes intrinsic to the vehicle and without the intervention of third parties.

In line with that, the referring Court considered that the central question was whether insurance against civil liability in respect of the use of motor vehicles covered an accident involving a vehicle when its engine was not running and when that vehicle, parked in a private

garage, posed no risk to road users [26]. Therefore, it decided to refer the following question to the ECJ for a preliminary ruling:

> "(1) Does Article 3 of [Directive 2009/103] preclude an interpretation that includes in the compulsory insurance cover damage caused by a fire in a stationary vehicle when the fire has its origin in the mechanisms necessary to performing the transport function of the vehicle?"

The ECJ ruled that the present situation falls within the autonomous notion of "use of vehicles". The Court, therefore, ruled that the damage caused to the owner of the property was covered by the mandatory insurance and should accordingly be compensated by the insurer. The Court thus ruled that civil liability insurance for motor vehicles covers an accident involving a vehicle whose engine had not been started, even though this vehicle, parked in a private garage, obviously did not represent a risk to road users. Whether the vehicle's engine was running at the time of the accident was not regarded as relevant either [27]. The Court stated to this effect:

> "39. On the other hand, it should be recalled that, according to the Court's case-law, no provision in Directive 2009/103 limits the scope of the insurance obligation, and of the protection which that obligation is intended to give to the victims of accidents caused by motor vehicles, to the use of such vehicles on certain terrain or on certain roads (judgment of 20 December 2017, Núñez Torreiro, C-334/16, para. 31).
>
> 40. It follows that the scope of the concept of 'use of vehicles', within the meaning of the first paragraph of Article 3 of Directive 2009/103, does not depend on the characteristics of the terrain on which the vehicle is used and, in particular, the fact that the vehicle at issue is, at the time of the accident, stationary and in a car park (see, to that effect, judgment of 15 November 2018, BTA Baltic Insurance Company, C-648/17, paras. 37 and 40).
>
> 41. In those circumstances, it must be held that the parking and the period of immobilisation of the vehicle are natural and

26. The Tribunal Supremo doubted that the situation described in its referral to the ECJ constituted "use of vehicles".

27. See, to that effect, the judgment of 15 November 2018 in C-648/17, *BTA Baltic Insurance Company* v. *Baltijas Apdrošināšanas Nams AS*, para. 39 and the case law cited there.

necessary steps which form an integral part of the use of that vehicle as a means of transport.

42. Thus, a vehicle is used in accordance with its function as a means of transport when it moves but, in principle, also while it is parked between two journeys.

43. In the present case, it must be held that parking a vehicle in a private garage constitutes a use of that vehicle which is consistent with its function as a means of transport."

C. Article 122 Italian PIC, the jurisprudence of the ECJ and the role of the hermeneutic instrument of conforming interpretation

The interpretation of the notion of "use of vehicles" was also at the centre of the interlocutory order of the Third Section of the Italian Court of Cassation No. 33675 of 18 December 2019. This order referred to the Joint Sections of the same Court the question on the interpretation [28] of the notion of "circulation on areas equivalent to public roads" referred to in Article 122 PIC. This provision states:

> "1. Motor vehicles without rail guidance, including trolley vehicles and trailers, cannot be put into circulation on public roads or areas equivalent to these if they are not covered by the third party liability insurance provided for in the Article 2054 of the civil code and Article 91, para. 2, of the highway code. The regulation, adopted by the Minister of Economic Development, on the proposal of IVASS [29], identifies the type of vehicles excluded from the insurance obligation and the areas equivalent to those of public use."

The Ministry of Economic Development has adopted the Decree of 1 April 2008, No. 86, entitled "Regulation containing provisions on the obligation to insure civil liability deriving from the circulation of motor vehicles and boats referred to in Title X Chapter I, and Title

28. According to the Italian Code of Civil Procedure, the Court of Cassation pronounces in Joint Sections on appeals which present a question of law already decided in a different sense from simple Sections, and on those which present a question of the utmost importance.

29. IVASS – the Institute for the Supervision of Insurance – is a body endowed with legal personality under public law whose goal is to ensure the adequate protection of insured persons with a view to the sound and prudent management of insurance and reinsurance undertakings and their transparency and fairness towards customers. IVASS pursues the stability of the financial system and markets.

XII, Chapter II, of the legislative decree 7 September 2005, No. 209 – Code of private insurance". Article 3 of this decree, entitled "Motor vehicles", provides that:

> "1. All motor vehicles without rails are subject to the obligation of insurance for civil liability towards third parties referred to in Article 122 of the Code, including trolley-vehicles and trailers placed in circulation on public roads or areas with these equate.
> 2. For the purposes referred to in paragraph 1:
>
> A) all areas, public or private property, open to the circulation of the public are equated to roads for public use;
> B) vehicles parked on public roads or areas equivalent to these are also considered in circulation."

Against this background, the interlocutory order of the Third Section of the Court of Cassation No. 33675/2019 referred to the Joint Sections on the question of how the notion of "circulation on areas equivalent to roads for public use" should be interpreted. According to the Third Section, this interpretation must be oriented at the (by now) consolidated jurisprudence of the ECJ on the notion of "use of vehicles" contained in the five Community directives on motor insurance and consolidated in Directive 2009/103/EC.

The referral order arose from a terrible story that upset an entire family living in Lombardy: The son of the two applicants had been hit by a vehicle owned by his aunt and driven by his grandfather inside his own private courtyard. The victim's parents had therefore engaged in a direct action against the insurance company to obtain compensation for the damages suffered due to the death of their child.

In the first instance, the Tribunal of Milan rejected the request with a ruling confirmed by the Court of Appeal. According to the judges, the direct action against the insurer could not be considered enforceable given that the accident had occurred while the vehicle was moving in a private courtyard and, therefore, not in a public street or a street equivalent to it.

The minor's parents filed an appeal in cassation against this judgment, complaining of a wrong application of Articles 122 and 144 PIC, the quoted decree dated 1 April 2008, No. 86, and Article 2054 of the Italian Civil Code. The Court of Appeal had applied this provision without taking into account the interpretation given by the ECJ of the notion of "use of vehicles". According to the Third Section, this appeal plea

made it necessary to refer the matter to the Joint Sections of the Court of Cassation. Indeed, the consistency of the case law of the Sections of the Court of Cassation with the jurisprudence of the ECJ was doubtful.

According to the Third Section, the instance courts were correct in affirming that the victim of a road accident had a direct action against the insurer of the person responsible when the accident occurred on public roads or roads equivalent to these. The latter includes private areas where the circulation of an indefinite number of people is allowed (Court of Cassation, 3/3/2011, No. 5111). The Section added that an indeterminate number of people, who have lawful access to the area, must be affirmed even if these belong to one or more specific categories; and even if the access in question is given for specific purposes and in particular conditions only (Court of Cassation, 28/6/2018, No.10717), in this case, a construction site, which could be accessed only by those who worked there and those who had commercial relations with the company.

The Third Section observed that the interpretation of Articles 122 and 144 PIC was also confirmed by the Joint Sections (Court of Cassation, Joint Sections, No. 8620 of 2015). The Joint Sections had held that these provisions only defined the subject of liability insurance by stipulating an insurance obligation for vehicles used on public roads or equivalent areas. However, the fact that the vehicle was used in a certain way rather than another did not constitute a prerequisite for the insurance obligation and, therefore, for the insurer's liability.

According to the Third Section, this judgment had not taken into account the jurisprudence of the ECJ on the notion of "use of vehicles". For that reason, a reference to the Joint Sections was necessary. The Third Section further recalled that the notion of "use of vehicles", contained in Council Directive 72/166/EEC of 24 April 1972, must be interpreted in the sense that any use of a vehicle that is "in conformity with its usual function" was covered (ECJ, 4 September 2014, C-162/13, *Vnuk*, para. 10).

This judgment referred to by the Third Section is precisely the *Vnuk* judgment, which was the starting point of this analysis and drew on the various EU provisions that have gradually strengthened the victim's position. Based on this judgment, the Third Section observed that the compulsory insurance of motor civil liability has a broad scope, which includes any accident caused by using a vehicle "in accordance with its usual function". Moreover, this European concept does not contain "spatial limitations of another kind", unlike the national notion of

"roads for public use or on areas equivalent to these", contained in Article 122 PIC.

Furthermore, the Italian court also pointed to a decision of the Grand Chamber of the ECJ (28 November 2017, C-514/16, *Rodrigues de Andrade* v. *Pronça Salvador and Others*), which also referred to *Vnuk* to show that Article 3 (1) of the First Directive must be interpreted as meaning that the "use of vehicles" is not limited to circulation on a public road but encompasses any use of a vehicle that complies with its usual function. According to the ECJ, as previously highlighted, the evolution of EU legislation on compulsory motor insurance is governed by the rationale of protecting actual and potential victims against accidents caused by the use of vehicles. Consequently, according to the Third Section, EU legislation cannot be construed as excluding from this protection persons injured by an accident caused by a vehicle during its use, provided that it was "a use in accordance with the habitual function of the vehicle itself".

On these grounds, the Third Section advocates a hermeneutic review of Article 122 PIC to disapply the regulatory provision referred to in the Decree of 1 April 2008, No. 86, Article 3, paragraph 2, letter *a)*. In substance, the notion of road traffic to which the insurance obligation refers must henceforward cover any vehicle use in accordance with its usual function. The Third Section, therefore, poses the following question to the Joint Sections of the Court of Cassation:

> "If Article 122 of the private insurance code must be interpreted, in the light of the jurisprudence of the Court of Justice, in the sense that the notion of circulation on areas equivalent to public roads is covered, does this include any space in which the vehicle can be used in accordance with its usual function?"

To sum up, first, the question was posed with clarity and coherence by the Third Section to the Joint Sections. Second, the hermeneutic instrument of conforming interpretation, often used with good results by Italian and other Member State judges, can and must be employed here to adjust the meaning of a national provision to comply with EU jurisprudence. Therefore, the notion of "circulation on areas equivalent to public roads" needs to be interpreted to include any space where the vehicle can be used in accordance with its usual function.

The ruling of the Joint Sections, 30 July 2021, No. 21983, thus fully confirms the approach of the Third Section, according to which Article 122 PIC must be interpreted in a manner consistent with the

jurisprudence of the ECJ. The only criterion for determining the insurance cover for civil liability must therefore be the use of the vehicle in compliance with its usual function. Accordingly, the insured damaging party is not covered by the insurance only in the hypothesis of the use of the vehicle in particular contexts detached from "road circulation"; that is, in the case of abnormal vehicle use, which does not conform to its usual function – when for example the vehicle is used as a weapon to run over and kill people [30].

30. As an example, one may recall what happened on the evening of 14 July 2016, when a 19-tonne cargo truck was deliberately driven into crowds of people celebrating Bastille Day on the Promenade des Anglais in Nice, France, resulting in the deaths of 86 people and the injury of 458 others. The driver was Mohamed Lahouaiej-Bouhlel, a Tunisian living in France. The attack ended following an exchange of gunfire, during which Lahouaiej-Bouhlel was shot and killed by police. On 15 July, French President François Hollande called the attack an act of Islamic terrorism.

CHAPTER III

SELECTED ISSUES OF PRIVATE INTERNATIONAL LAW CONCERNING INSURANCE: FREEDOM OF CONTRACT, UNIT-LINKED POLICIES, EQUALITY OF MEN AND WOMEN AND INSURANCE PREMIUMS

Section I. Freedom of contract and insurance: EU substantive and private international law aspects

A. Limits to the freedom of contract in insurance matters as a restriction on the freedom to provide services

The ECJ judgment of 28 April 2009 in case C-518/06, *Commission of the European Communities* v. *Italian Republic*, deals with one of the foundations of the law of all Member States in contractual matters: the freedom of contract. It implies the freedom to enter into any contract with any person in any form. Italian law imposes on insurance undertakings the obligation to provide third-party liability motor insurance at the request of any potential customer. It provides that:

> "Insurance undertakings shall be required, on the basis of the contract terms and insurance rates which they must establish in advance for any risk in respect of the use of motor vehicles and craft, to accept the proposals regarding compulsory insurance which are submitted to them." [31]

The European Commission had received complaints from a French, a Belgian and an Irish insurance company. According to these, the obligation of insurance companies operating in the Italian market to conclude a contract with any interested person was incompatible with the freedom of establishment (Art. 49 of the Treaty on the Functioning of the European Union, TFEU) and the freedom to provide services (Art. 56 TFEU). An obligation to contract would restrict these freedoms [32].

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31. This is established by Article 11 (1) of Law No. 990 relating to compulsory insurance against civil liability in respect of the use of motor vehicles of 24 December 1969, in the version in force at the time of the pre-litigation procedure. That obligation to contract was, in the main, retained in Article 132 PIC.

32. See para. 28 of the judgment: "The Commission indicated that it had received complaints from EU insurance undertakings in regard to penalties imposed by the

The Commission argued that the Italian obligation to enter into an insurance contract with any interested person represented a violation of Articles 43 and 49 of the EC Treaty (now Arts. 49 and 56 TFEU). For, as affirmed by Advocate General Mazák in his Opinion, it

> "is the worst possible restriction that a legislator can impose on an undertaking as it denies the undertaking the basic freedom of choosing the party to whom it sells goods or provides services. Only in certain particular situations, for instance, the supply of water, gas and electricity, this is justified" [33].

Before the Court, it was not in dispute that the obligation to contract applies without distinction to all undertakings providing third-party liability motor insurance on Italian territory. The Commission took the view, nevertheless, that the said obligation, in so far as it reduces the ability of insurance undertakings to implement their strategic market choices independently, hinders the establishment of, and provision of services by, insurance undertakings with a head office in another Member State in Italy.

The Commission affirmed before the ECJ that by maintaining an obligation to provide coverage for third-party motor vehicle liability insurance, incumbent on insurance undertakings, including those which have their head office in another Member State but which pursue their business in Italy under the freedom of establishment or the freedom to provide services, Italy has failed to fulfil its obligations under Articles 49 and 56 TFEU.

As already mentioned, Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and to the enforcement of the obligation to insure against such liability established a system based on the obligation on each of the Member States to ensure that third-party liability in respect of the use of motor vehicles is covered by insurance.

Article 3 (1) of Directive 72/166 provides: "Each Member State shall … take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance."

ISVAP, the Italian Insurance Authority, on the ground that the obligation to contract set out in Article 11 (1) of the law No. 990/69 had been circumvented by the charging of excessive premiums."

33. Opinion of Advocate General Mazák, delivered on 9 September 2008, para. 46.

However, it should be clarified that this provision leaves it to each Member State to choose the measures to ensure the above result. It does not imply an obligation for the Member States to impose an obligation on the insurers to enter into an insurance contract with any interested person as provided by Italian law. It should also be remembered – as this issue will bear certain importance in the arguments brought by the Commission and Italy before the ECJ – that under Article 1 (4) of Directive 84/5, Member States are obliged to set up or authorise a guarantee fund to compensate the victims of accidents caused by vehicles in respect of which the third-party liability insurance obligation has not been satisfied.

The first issue the parties had to discuss before the Court was whether Italian law, by imposing the obligation to contract, determined a restriction on the freedoms provided for by Articles 43 and 49 EC Treaty (Arts. 49 and 56 TFEU). The Commission affirmed that the obligation dissuades insurance companies established in other Member States from establishing themselves or offering services in Italy, thus hindering access to the national market. Those undertakings are prevented from freely choosing the insurance services they provide and their clients. Therefore, they are required to bear costs that are excessive in relation to their commercial strategy. Those costs are even more significant for undertakings which intend to operate in Italy only occasionally.

Italy replied weakly to this criticism, affirming that the obligation to contract has no dissuasive effect on insurance undertakings established in a Member State other than the Italian Republic that wishes to enter the Italian market.

The Court had no doubts and declared that the obligation to contract caused a restriction to both the right of establishment and the freedom to provide services. It reached this conclusion by recalling its settled case law that the term "restriction" within the meaning of Articles 43 and 49 EC Treaty covers all measures which prohibit, impede or render less attractive the freedom of establishment or the freedom to provide services [34]. Accordingly, the imposition by a Member State of an obligation to contract such as that at issue constitutes a substantial

34. See ECJ judgments: (Grand Chamber) 5 October 2004, C-442/02, *CaixaBank France* v. *Ministère de l'Economie, des Finances et de l'Industrie*, para. 11; 13 December 2007, C-465/05, *Commission of the European Communities* v. *Italian Republic*, para. 17; 17 July 2008, C-389/05, *Commission of the European Communities* v. *French Republic*, para. 52.

interference with the freedom to contract, which economic operators, in principle, enjoy [35]. Thus, the ECJ referred to its long-standing view that restrictions cover measures taken by a Member State which, although applicable without distinction, affect access to the market for undertakings from other Member States and thereby hinder intra-Community trade [36].

B. Justification of the restriction

After ruling that the obligation to contract restricts the freedom of establishment and the freedom to provide services, the Court had to decide whether this restriction was justified. This part of the judgment is particularly interesting.

The Commission argues that the obligation to contract is unjustified and disproportionate to the objective pursued. The Commission acknowledges, as regards the objective of protecting vehicle owners, that the obligation to contract contributes to guaranteeing that a vehicle owner will find an insurance company prepared to grant a third-party liability motor insurance policy. However, the obligation to contract is disproportionate, as it goes beyond what is necessary to attain the objective of consumer protection. For it is imposed on insurance undertakings in respect of all vehicle owners throughout the Italian territory. In contrast, the Italian Republic has indicated difficulties finding an insurance undertaking prepared to issue a third-party liability motor insurance policy for a specific geographical area and category of persons – for example, for new drivers in the south of Italy.

Concerning the other objective cited by Italy, namely guaranteeing appropriate compensation for victims of road traffic accidents, the Commission affirms that this is already achieved by the obligation imposed on vehicle owners – following the transposition of Article 3 of Directive 72/166 – to take out a third-party liability motor insurance

35. The Court also affirmed that inasmuch as it obliges insurance undertakings which enter the Italian market to accept every potential customer, that obligation to contract is likely to lead, in terms of organisation and investment, to significant additional costs for such undertakings. If they wish to enter the Italian market under conditions which comply with Italian legislation, such undertakings will be required to rethink their business policy and strategy. Inasmuch as it involves changes and costs on such a scale for those undertakings, the obligation to contract renders access to the Italian market less attractive.

36. See, to that effect, judgments 10 May 1995, C-384/93, *Alpine Investments BV* v. *Minister van Financiën*, paras. 35 and 38, and 5 October 2004, C-442/02, *CaixaBank France* v. *Ministère de l'Economie, des Finances et de l'Industrie*, para. 12.

policy, and by the existence in each Member State of a guarantee fund under Directive 84/5.

This is particularly interesting as compulsory civil liability insurance is usually regarded as an instrument to protect the injured party, not the policyholder [37]. Italy has given more room in its arguments to protecting the policyholder as a consumer than to protecting the injured party. However, the Commission did not challenge this relatively new approach, even if the European insurance directives clearly focus on the protection of the victim of the accident. Moreover, they do not pursue the peculiar intent claimed by Italy: guaranteeing that a vehicle owner may find an insurance undertaking prepared to issue a third-party liability motor insurance policy.

Interestingly, the Commission also observed, adopting a comparative law perspective, that other Member States have less restrictive systems for obtaining the same results. Specifically, it refers to the Bureau central de tarification (Central Rates Office) in both Belgium and France, the Consorcio de Compensación de Seguros (Insurance Compensation Consortium) in Spain, the consortium of major insurance undertakings in the Netherlands and the mutual insurance system in Portugal. Finally, turning to the arguments invoked by Italy, it points out that third-party liability motor insurance, while a private form of insurance, has a social purpose – in particular, the need to ensure that victims of road traffic accidents receive compensation. This is why an obligation was introduced for vehicle owners to take out insurance to compensate third parties.

As stated, the protection of road accident victims is the primary objective of the EU motor insurance directives. But Italy's position – as already highlighted – then changes direction, focusing on protecting the prospective policyholder, that is, the car owner who may drive the car only after signing a third-party liability motor insurance. Indeed, driving without insurance is an offence, and the culprit suffers hefty fines and the seizure of the car. By choosing to impose that obligation to contract both on insurance undertakings and motor vehicle users, Italy wished to offer maximum protection to policyholders, in their capacity as consumers, against discrimination concerning access to insurance and the use of public highways.

37. D. Cerini, "Compulsory Liability Insurance in Italy", in A. Fenyves, C. Kissling, S. Perner and D. Rubin (eds.), *Compulsory Liability Insurance From a European Perspective*, Berlin, De Gruyter, 2016, p. 196 affirms that: "The protection of the victim is generally the main objective of compulsory civil liability insurance."

At this point, Italy tries to give a precise political meaning to its position, recalling the relatively widespread accusation against the European Commission of its excessively "technocratic" approach, which does not pay enough attention to the social dimension. Italy affirms that if the Court were to accept the Commission's reasoning, third-party liability motor insurance would become insurance based solely on market logic and lose its social character to a large extent.

Finally, Italy also affirms that the obligation to contract is compatible with the principle of proportionality. Contrary to what the Commission claims, it would be neither practical nor lawful to limit the obligation to contract to certain Italian regions or certain types of consumers. Limiting the obligation to certain categories of consumers would raise discrimination issues. At the same time, a geographical limitation on southern Italy would encourage insurance undertakings to refrain from operating in the areas subject to the obligation to insure.

The Court resolved this conflict between the fundamental freedoms enshrined in the Treaty and the social needs of Italian car owners emphasised by the Italian State. As usual, the Court preliminarily recalls the conditions, which may justify a restriction on fundamental freedoms [38]. Thus, a restriction on the freedom of establishment and the freedom to provide services may be justified where it serves overriding requirements relating to the public interest, is suitable for securing the attainment of the objective that it pursues and does not go beyond what is necessary to attain it. The Court affirms:

> "73. In order to justify the obligation to contract, the Italian Republic has cited a number of objectives, including the social protection for victims of road traffic accidents.
>
> 74. That social protection objective, which amounts, essentially, to ensuring that such victims will be adequately compensated, can be taken into account as an overriding requirement relating to the public interest.
>
> 75. As is clear from the Community legislation cited in paragraphs 3 to 12 of this judgment, and as the Italian Republic and the Republic of Finland have pointed out, the very purpose of

38. See, *inter alia*, joined cases 5 December 2006, C-94/04, *Cipolla* v. *Portolese in Fazari*, and C-202/04, *Macrino et Capoparte* v. *Meloni*, para. 61; 13 December 2007, C-250/06, *United Pan-Europe Communications Belgium SA and Others* v. *Belgian State*, para. 39; 1 April 2008, C-212/06 *Government of the French Community and Walloon Government* v. *Flemish Government*, para. 55.

compulsory third-party liability motor insurance is to guarantee compensation for victims of road traffic accidents.

76. Under that same legislation, such compensation is to be principally financed on the basis of contracts underwritten by insurance undertakings, while the guarantee fund set up in each Member State has only a subsidiary role in compensating victims of road traffic accidents, namely in cases where the accident was caused by a vehicle in respect of which the insurance requirement has not been met.

77. Article 3 of Directive 72/166 accordingly requires the Member States to take all appropriate measures to ensure that their citizens comply with the obligation to take out third-party liability motor insurance.

78. Clearly, one of the ways in which Member States may fulfil that obligation imposed by Article 3 of Directive 72/166 is to ensure that every owner of a vehicle is able to take out such insurance for a premium which is not excessive."

In the passage reported below, the Court addresses the issue of the role of the guarantee fund. The Court states the following:

"79. In that regard, the Commission's argument that the objective of social protection for victims of road traffic accidents is, in any event, achieved by the existence in each Member State of a guarantee fund cannot be accepted.

80. Admittedly, the existence of the guarantee fund ensures that the victims of accidents caused by vehicles in respect of which the insurance requirement has not been met will be compensated. It is therefore not in dispute that, even in the absence of an obligation to contract such as that introduced by the Italian Republic, every victim of a road traffic accident will receive compensation.

81. However, as has been pointed out in paragraph 76 of this judgment, it is also apparent from the Community legislation that the existence of an individual contract for third-party liability motor insurance, and the possibility of invoking that insurance contract directly against the insurance undertaking, constitutes the principal basis for the protection of victims of road traffic accidents. In those circumstances, Member States cannot be criticised for taking initiatives aimed at preventing the owners of vehicles from being unable to meet the requirement to take out third-party liability motor insurance."

The Court thus insists on the merely subsidiary role of the guarantee fund set up in each Member State. Indeed, it only compensates victims of road traffic accidents in cases where the accident was caused by a vehicle in respect of which the insurance requirement has not been met. This seems apodictic, especially if one considers that the fund is financed by the insurance companies, which have to attribute a percentage of the premiums collected through the third-party liability insurance to the fund. It is unclear why the protection provided by the fund to the victims of road accidents should be considered of lesser value than that provided directly by insurance companies [39].

After this follows the most debated part of the judgment where, in the framework of the proportionality test, the ECJ has to evaluate whether the restriction on the freedom of establishment and the freedom to provide services does not go beyond what is necessary to attain it:

> "86. It is appropriate, next, to consider the Commission's argument that it is disproportionate to impose on insurance undertakings an obligation to contract vis-à-vis all potential customers and throughout Italian territory.
>
> 87. On that point, the Italian Republic contended, without being challenged by the Commission, that, in the southern part of its territory, there are difficult circumstances which require corrective measures on the part of the public authorities in order that third-party liability motor insurance can be provided under conditions which are acceptable both for policyholders and insurance undertakings.
>
> 88. It appears, inter alia, that the number of road traffic accidents declared to insurance undertakings is particularly high in certain areas in the south of Italy. That situation has led to a considerable increase in the financial risks incurred by those undertakings in that region.
>
> 89. In those circumstances, the Italian Republic could consider that it was appropriate to impose on all undertakings operating in its territory an obligation to contract vis-à-vis all vehicle owners domiciled in Italy, in order to avoid those undertakings withdrawing from the southern part of Italian territory and thereby depriving vehicle owners domiciled there of the possibility of taking out third-party liability motor insurance, which is nevertheless compulsory.

39. Rossetti, supra note 22, p. 61.

90. It follows, moreover, from Article 11 (1*a*) of Law no. 990/69 and from Article 35 (1) of the Code of Private Insurance that in taking that measure the Italian Republic did not prohibit insurance undertakings from applying premium rates differentiated on the basis of past statistics on the average cost of the risk within categories of insured that have been sufficiently broadly defined.

91. In particular, it is not in dispute that the obligation to insure does not prevent insurance undertakings from calculating a higher premium for a policyholder domiciled in an area characterised by a significant number of accidents than for a policyholder domiciled in an area where the risk is not so high.

92. Furthermore, it is not inconceivable that an obligation to contract limited to only the southern part of Italian territory would give rise, as the Italian Republic has claimed, to a questionable legal situation, inasmuch as vehicle owners domiciled in other regions of Italy could complain of unequal treatment if, in a region in which there was no such obligation to contract, they experienced difficulties in finding an insurance undertaking prepared to enter into a contract for third-party liability motor insurance with them.

93. It follows from all of the foregoing that the obligation to contract is appropriate to ensure the achievement of the objective which it pursues and does not go beyond what it necessary to attain it.

94. It follows that the complaint alleging breach of Articles 43 EC and 49 EC must be rejected."

The decisive point of this ruling is probably in paragraph 89, where the ECJ justifies the obligation to contract as a means to prevent the withdrawal of insurance companies from southern Italy. The risk alluded to by the Court is real. As the motor car liability insurance is a *sine qua non* condition for the lawful use of the car and as insurance companies would not sell policies in some regions of southern Italy were they not legally obliged to contract, car owners residing in these areas would be faced with a dramatic choice: don't drive or break the law – that is, drive without liability insurance. The Court was therefore convinced by the arguments advanced by Italy, and especially by the need for protection of the prospective policyholder: the car owner who may drive the car only after signing third-party liability insurance. The Court accepted this justification and shared Italy's wish to offer maximum protection to policyholders, in their capacity as consumers,

against discrimination concerning access to insurance and the use of public highways.

The ruling sparked an intense debate also in the Italian media. Some praised the Court for grasping the social character of the obligation to contract enshrined in Italian law. However, others strongly criticised the ruling, arguing that the Court was wrong by recalling that insurance frauds are widespread in southern Italy, which increases premiums even for honest policyholders. Ultimately, the Court's ruling was thus criticised for enabling fraudsters to continue their criminal practices safely [40].

In line with this, the Advocate General held in his Opinion that Italy did not fulfil its obligations under Articles 43 and 49 EC Treaty. He considered that the Italian Government had failed to produce evidence for the alleged link between the absence of an obligation on insurance undertakings to provide compulsory third-party liability insurance and an increase in the number of third-party victims of accidents with uninsured vehicles. He argued that Italy had indeed produced alarming figures about other Member States where there is no obligation to contract and the number of uninsured vehicles and accidents with these vehicles. However, it failed to show a direct correlation between the two parameters. Indeed, despite the obligation to contract, Italy had produced considerable data demonstrating a marked increase in the number of claims against the Italian guarantee fund. Therefore, Advocate General Mazák argued that the obligation to contract imposed by Italian legislation does not appear to be an appropriate means of achieving the objective of protecting third-party victims of motor vehicle accidents [41].

C. Restrictions on the freedom to contract and the Rome I Regulation

Another interesting comment focuses on the relationship between the fundamental freedoms affected in the present case and the principles of private international law. It has been argued that [42]:

> "In the judgment discussed, an insurance company established in France wished to sell insurance policies to Italian car owners. From a contract law perspective, this concerns an international situation. It implies that the applicable legal system must be

40. Rossetti, supra note 22, p. 60 *et seq*.
41. Opinion of Advocate General Mazák, delivered on 9 September 2008, para. 89.
42. J. Rutgers, "Case Note, C-518/06 *European Commission* v. *Italy*, ECJ 28 April 2009", *European Review of Contract Law*, Vol. 6 (2010), p. 287 *et seq*.

> established by means of the conflict rules applicable to contract, which are laid down in the Rome I Regulation. In the case of the free movement of services, it seems difficult to maintain that freedom of contract is infringed, since it, first, must be established which legal system is applicable under Rome I. Only, if under that rule, parties do not have the possibility of selecting another legal system than Italian law and consequently there is an obligation to enter into an insurance contract with any insured, an impediment of the free movement of services could be established. Thus, if the parties had the possibility of selecting a legal system, but did not do so, it will be hard to maintain that freedom of contract is infringed.
>
> Remarkably, neither the ECJ nor the Advocate General deals with this specific feature of private law in an international situation. … They seem to deny the existence of conflict rules as a means to solve cross-border issues in private law."

It is necessary to consider the case from the point of view of conflict of laws rules, especially when dealing with contracts concluded for the provision of services. However, the criticism of the ECJ is unpersuasive. The Court, especially in the infringement proceedings, cannot broaden its examination to matters not even mentioned by the Commission or the defendant State.

On the merits, it should be clarified that the Rome I Regulation contains a specific provision in Article 7.4 *b)*, which states: "[B]y way of derogation from paras. 2 and 3, a Member State may lay down that the insurance contract shall be governed by the law of the Member State that imposes the obligation to take out insurance." Furthermore, Article 180, paragraph 3, PIC provides that: "The specific provisions relating to compulsory insurance, as provided by the State imposing the insurance obligation, shall prevail over the law applicable to the contract." It follows that according to Italian conflict of law provisions integrating the EU Rome I Regulation, the specific Italian provisions relating to compulsory motor insurance mandatorily apply to insurance contracts entered into by EU insurance undertakings operating in Italy, irrespective of what the law applicable to the contract provides. Accordingly, even if the Court had considered these features of conflict of laws, its judgment would not have been different as the Italian provisions on the obligation to contract mandatorily apply to all companies operating in Italy.

Section II. The nature of unit-linked policies

A. The autonomous notion of unit-linked policies

EU law has always set itself the supreme, constitutional goal of uniformly applying its rules. Accordingly, almost every judgment of the ECJ contains an explicit or implicit reference to the principle of uniform application and interpretation of EU law. Case law emphasises that this principle possesses two purposes,

> "the first is that the balance of the reciprocal obligations and rights of the Member States must not be affected by unilateral interpretations or in any case national perspectives. Indeed, if each Member State were to interpret EU law à la carte, the whole building, the common home, which is the European legal order, would collapse;
> the second concerns private individuals, who, as is well known, are also, alongside Member States, subjects of the European legal order. Private individuals and legal entities must be able to rely on an identical regulation of their activities – such as insurance – in all Member States. There is a need to use the terminology dear to private international law scholars, to guarantee the continuity and therefore the stability of legal positions within the internal market. Although this is difficult to achieve, we need to ensure that a specific issue governed by EU law is assessed in a consistent manner by the judges and public authorities of all twenty-seven Member States".

If the principle of uniform interpretation forms the basis of the entire hermeneutics of the ECJ, it cannot be less so for national judges and authorities. This is now widely acknowledged. If there are occasional deviations, these mainly stem from simple errors and only rarely from real "mutinies" of national courts.

However, the principle of the supremacy of EU law over national law [43] necessarily correlates with and constitutes an inseparable aspect of the uniform interpretation and application of EU law.

Against this background, the subject of linked policies – life insurance contracts connected with investment funds or indices – may now be approached. What is surprising about the heated debate

43. Recognised in Italy starting from the *Granital* judgment of 8 June 1984, No. 170 of the Constitutional Court.

on their nature is the lack of consideration among many scholars and judges of the fact that linked products were imported into continental countries such as Italy precisely by EU law. The three directives on life assurance [44] are built on the assumption that linked policies are, for all intents and purposes, insurance contracts. This was subsequently confirmed by the Solvency II Directive (Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking up and pursuit of the business of insurance and reinsurance).

Linked policies have been available exclusively on the British market since the 1950s, according to the provisions of the "linked long term" provided by the Insurance Companies Act, which also contemplate the hypothesis that the amount paid by the insurer is lower than the premiums paid and even equal to zero. In the second half of the 1990s, they were then "exported" by the European directives and spread in all Member States; this was also achieved through the implementation of Directive 91/674 on the annual and consolidated accounts of insurance companies and the third life insurance directive (Directive 92/96), which harmonised the regulation of technical reserves.

Notwithstanding that, several scholars have denied that linked policies are insurance contracts. This position can be understood based on the doctrinal and jurisprudential approach that builds the notion of a life insurance contract around its supposed social security purpose and considers that linked policies usually exclude that the invested capital is guaranteed [45], thus transferring the financial risk to the policyholder.

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44. The First Council Directive 79/267/EEC of 5 March 1979 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct life assurance, then Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC and Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance.

45. The thesis of the financial nature of linked products was authoritatively supported by the late Professor A. Gambino, "La responsabilità e le azioni privatistiche nella distribuzione dei prodotti finanziari di matrice assicurativa e bancaria", *Assicurazioni*, Vol. 74 (2007), p. 191 *et seq*.; A. Gambino, "Linee di frontiera tra operazioni di assicurazioni e bancarie e nuove forme tecniche dell'assicurazione mista sulla vita a premio unico", *Assicurazioni* (1993), p. 157 *et seq*.; A. Gambino, "La prevenzione nelle assicurazioni sulla vita e nei nuovi prodotti assicurativo-finanziari", *Assicurazioni*, Vol. 57 (1990), p. 28 *et seq*.; A. Gambino, "Mercato finanziario, attività assicurativa e risparmio previdenziale", *Giurisprudenza commerciale* (1989), p. 13 *et seq*.; A. Gambino, "Finalità e tendenze attuali delle assicurazioni sulla vita (Le polizze vita come prodotti finanziari", *Rivista del diritto commerciale* (1985), p. 104 *et seq*. See also P. Corrias, "Previdenza, risparmio ed investimento nei contratti di assicurazione sulla vita", *Rivista di diritto civile*, Vol. 55 (2009), p. 91 *et seq*.; P. Corrias, "L'assicurato-investitore: prodotti, offerta e responsabilità", *Assicurazioni*, Vol. 78 (2011), p. 387 *et*

But this position loses relevance if one considers that EU law conceives these contracts precisely as insurance contracts. There is a conflict of views: one embedded in national legal categories, even of a constitutional nature, and another derived from EU law.

The judgment of the ECJ in the case mentioned earlier on 1 March 2012, C-166/11, *Angel Lorenzo González Alonso* v. *Nationale Nederlanden Vida Cía de Seguros y Reaseguros SAE*, has the merit of bringing us back down to earth, and therefore, inevitably, to our origins [46]. In that case, the Oviedo judge asked the ECJ whether a unit-linked policy offering life insurance in exchange for the payment of premiums intended to be invested in securities and financial products and where the policyholder bears the financial risk constitutes a life insurance contract under EU law. More precisely, as the ECJ affirms, in its judgment,

> "the national court states that Mr. González Alonso therefore took a unit-linked product, which is characterized by the fact that the insurer bears only the actuarial risk while the financial risk of

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seq.; N. Salanitro, "Prodotti finanziari assicurativi collegati ad obbligazioni Lehman Brothers", *Banca borsa e titoli di credito*, Vol. 62 (2009), p. 491 *et seq*.; F. Galgano, "Il prodotto misto assicurativo finanziario", *Banca borsa e titoli di credito* (1988), p. 91 *et seq*.; G. Alpa, "I prodotti assicurativi finanziari", in S. Amorosino and L. Desiderio (eds.), *Il nuovo codice delle assicurazioni*, Milan, Giuffrè, 2006, p. 77 *et seq*.; M. Bin (ed.), *Commentario al codice delle assicurazioni*, Padua, CEDAM, 2006, p. 14 *et seq*.; M. Bin, "Il prodotto misto assicurativo-finanziario", *Assicurazioni* (1988), p. 351 *et seq*.; L. Bugiolacchi, "L'assicurazione sulla vita", in G. Alpa (ed.), *Le assicurazioni private*, Turin, Giappichelli, 2006, p. 2712 *et seq*.; R. Lener, "Il prodotto assicurativo tra prodotto finanziario e prodotto previdenziale", *Diritto ed economia dell'assicurazione* (2005), p. 1236 *et seq*.; G. Martina"I prodotti finanziari e i prodotti finanziari emessi da imprese di assicurazione", in L. De Angelis and N. Rondinone (eds.), *La tutela del risparmio nella riforma dell'ordinamento finanziario*, Turin, Giappichelli, 2008, p. 345 *et seq*.; M. Rossetti, "Polizze linked e tutela dell'assicurato", *Assicurazioni* (2002), p. 223 *et seq*.; E. Piras, *Le polizze variabili nell'ordinamento giuridico italiano*, Milan, Giuffrè, 2011. The thesis that linked policies are insurance contracts is authoritatively supported by Professor G. Volpe Putzolu, "Le polizze linked tra norme comunitarie, Tuf e codice civile", *Assicurazioni* (2012), p. 399 *et seq*.; G. Volpe Putzolu, "Le polizze Unit linked e Index linked", *Assicurazioni*, Vol. 67 (2000), p. 233 *et seq*.; G. Volpe Putzolu, "Assicurazione sulla vita, fondi assicurativi e fondi comuni di investimento", *Giurisprudenza commerciale, società e fallimento* (1984), p. 227 *et seq*. See also M. Frigessi di Rattalma, "La qualificazione delle polizze linked nel diritto dell'Unione europea", *Assicurazioni* (2013), p. 3 *et seq*.

46. S. Weatherill, "Consumer Protection under EU Law 'Is Not Absolute': Yes, But Be Careful!", *European Review of Contract Law*, Vol. 5 (2012), p. 221; J. M. Binon, "Arrêt 'Gonzáles Alonso': les 'nouveaux' produits d'assurance vie sont-ils des contrats d'assurance?", *Journal de droit européen* (2012), p. 185 *et seq*.; M. Meister, "Directive sur les contrats négociés en-dehors des établissements commerciaux", *Europe* (2012), p. 220 *et seq*.; L. Mayaux, "Arrêt Alonso: les contrats d'assurance-vie en unités de compte sont bien de l'assurance", *Revue européenne de droit de la consommation* (2012), p. 567 *et seq*.

> the investment is transferred to the policyholder. It is the policyholder who assumes the risk in exchange for certain tax advantages [47].
>
> In those circumstances, despite the exclusion of insurance contracts from the scope of Directive 85/577, provided for in Article 3 (2) *(d)* thereof, and the corresponding exclusion in Article 2 (1) (3) of Law 26/1991, the national court raises the question whether it is possible that the contract at issue in the main proceedings may be covered by that Directive. In the view of that court, such an interpretation could be justified, having regard to the case-law of the Court of Justice, which has ruled on many occasions that the exclusions laid down in Article 3 of Directive 85/577 must be interpreted restrictively" [48].

It is striking how the arguments developed by the Spanish Court are similar to those produced by several Italian scholars and courts. The ECJ starts by recalling the requirements of both the uniform application of EU law and the principle of equality. On this basis, the scope of the term "insurance contract" must be inferred from the context of the Directive and be given an autonomous and uniform interpretation throughout the EU [49]. The ECJ then states:

> "28. As regards the type of contract at issue in the main proceedings, it provides, inter alia, life assurance in the strict meaning of the term. The classification of such a contract as an 'insurance contract' within the meaning of Directive 85/577 does not, therefore, appear to be manifestly incorrect. Although the contract at issue in the main proceedings offers life assurance in return for payment of a monthly premium to be invested, in varying

47. According to the Oviedo judge, the contract executed by Mr González Alonso provided for types of benefit that distort the inherent characteristics of the life assurance and convert it into a mixed contract. The benefits linked with that insurance contract are combined with those corresponding to a financial investment product. The Spanish Court points out that the monthly premiums paid by the policyholder are used for a financial investment in which the customer may choose the apportionment of his funds according to the portfolio offered to him. Thus, under the option chosen by Mr González Alonso, 30 per cent of the premiums paid were invested in an internal fund managed by Nationale Nederlanden, 60 per cent in variable-rate investments and 10 per cent in fixed-rate investments.

48. Paras 20 and 21.

49. Para. 25. The ECJ refers, to that effect, to case C-64/81, *Corman & Fils SA* v. *Hauptzollamt Gronau*, 14 January 1982, para. 8, and to case C-98/07, *Nordania Finans and BG Factoring* v. *Skatteministeriet*, 6 March 2008, para. 17.

> proportions, in fixed-rate investments, variable-rate investments and financial investment products, the financial risk of which is borne by the policyholder, such contractual stipulations are not unusual.
>
> 29. On the contrary, contracts which are 'unit-linked' or 'linked to investment funds', such as that concluded by Mr González Alonso, are common in insurance law. Thus, the European Union legislature took the view that that type of contract falls within a class of life assurance, as is clear from Annex I, point III to the Life Assurance Directive, read in conjunction with Article 2 (1) *(a)* of that Directive."

The ECJ thus recognised that a unit-linked contract, even if it implies a relevant financial risk for the insured, is a life insurance contract according to the EU life insurance directives. The Court even added that such contracts "are common in insurance law".

Yet every judgment must be contextualised. For example, in the case before the Oviedo Court underlying the referral for a preliminary ruling, the legal issue was to establish whether the unit-linked policy was governed by the provisions on the right to cancellation contained in Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises or in Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance.

The ECJ stated that Directive 85/577 excludes the matter of "insurance contracts" from its scope (Art. 3, para. 2). Moreover, the Court classified linked policies as insurance contracts under Directive 2002/83. It, therefore, indicated that the cancellation of the contract *(jus poenitendi)* was governed by the insurance Directive 2002/83/EC and not by the doorstep selling Directive 85/577. Though this statement by the Court may seem obvious, it is not unanimously agreed upon. Just consider the Italian approach of denying the insurance nature of linked policies, which prevails in legal doctrine and case law.

The *González Alonso* decision clarified that the regime applicable to linked policies concerning the cancellation of the contract is established by Article 35 of the life insurance Directive 2002/83/EC. This provides that the policyholder of an individual life insurance contract enjoys a period, varying between fourteen and thirty days, from the day he is informed that the contract was concluded, to waive the effects of

the contract [50]. Therefore, the contract is immediately effective. The contracting party can exercise her withdrawal right within the time limit set by national law, which must not be less than fourteen days. As regards Italy, Article 177 PIC provides that the policyholder can withdraw from the life insurance contract within thirty days of receiving notice that the contract is concluded.

It follows from *González Alonso* that Article 30, paragraph 6, of the Consolidated Law on Finance (TUF) [51] – which provides for the suspension of the contract concluded outside the registered office for seven days during which the investor can exercise the withdrawal [52] – does not apply to linked policies. The TUF applying to financial products issued by insurance companies indeed constitutes the special law *(lex specialis)* with respect to the private insurance code applicable to all life insurance contracts. However, the principles of supremacy of EU law and its uniform interpretation and application have priority over the TUF's speciality criterion. As a result, these EU law principles determine the supremacy of Article 35 of the Directive as implemented by Article 177 PIC over Article 30, paragraph 6, of the TUF. The regime of cancellation regulated by Article 35 must not, therefore, be displaced by national law but applied uniformly throughout EU Member States.

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50. Under Article 35 of that Directive, entitled "Cancellation period":

> "1. Each Member State shall prescribe that a policy holder who concludes an individual life-assurance contract shall have a period of between 14 and 30 days from the time when he/she was informed that the contract had been concluded within which to cancel the contract.
>
> The giving of notice of cancellation by the policy holder shall have the effect of releasing him/her from any future obligation arising from the contract."

51. Testo Unico della finanza, Consolidated Law on Finance, legislative decree No. 58/1998.

52. It provides that:

> "6. The enforceability of contracts for the placement of financial instruments or the management of individual portfolios concluded outside the registered office or sold using distance marketing techniques pursuant to Article 32 shall be suspended for a period of seven days beginning on the date of subscription by the investor. Within that period the investor may notify his withdrawal from the contract at no expense and without any compensation for the financial advisors authorised to make off-premises offers. This possibility shall be mentioned in the forms given to the investor. Without prejudice to the application of the discipline of the first and second sentence to the investment services referred to in Article 1, Section 5, letters *c)*, *c-bis)* and *d)*, for contracts undersigned as from 1 September 2013, the same discipline also applies to the investment services referred to in Article 1, Section 5, letter *a)*. The same rules shall apply to contract proposals effected outside the registered office or using distance marketing techniques pursuant to Article 32."

For the sake of completeness, it should be added that the position advocated here in favour of the application of the right of cancellation contained in Article 177 PIC is confirmed even after the entry into force of the new Directive 2011/83/EU [53]. Article 9 also includes a regulation of the right of withdrawal. This derives from Article 2 (12), which establishes that "'financial service' means any service of a banking, credit, insurance, personal pension, investment or payment nature", and from Article 3 (3), which states that "This Directive shall not apply to contracts: *(d)* for financial services". Therefore, the life insurance Directive 2002/83/EC continues to prevail. The same result also follows from Article 3 (2), which provides that: "In the event of a conflict between the provisions of this Directive and a provision of another Union act governing specific sectors, the provision of that other Union act shall prevail and apply to those sectors specific."

B. Clashes of perspectives between the ECJ and national courts

The characterisation of unit-linked policies is disputed among national and European law. This is shown by the recent decision of the Tribunal of Bergamo of 25 May 2022 (RG 585/2017), which had to examine a case where the legal nature of a unit-linked policy was at stake. The policy excluded the recognition of any minimum return and a guarantee of capital conservation, as it is expressly provided that the policyholder exclusively bears the financial risks. According to the Tribunal, this contract is, therefore, a life insurance contract characterised by a mixed causal component: financial and insurance. As the first is preponderant, the policy can be ascribed to a speculative nature.

The Tribunal affirms that in the light of Italian regulations and in compliance with the position adopted by the Italian Supreme Court, the policy in question should be considered outside the typical scheme of life insurance contracts, as the insurer does not assume any demographic risk.

The Tribunal of Bergamo summarises the most relevant judgments by the Italian Court of Cassation. First, judgment No. 6061 of 18 April

53. Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC. This repeals and replaces the old Directive 85/577.

2012, where the Supreme Court defined a unit-linked insurance contract beyond the *nomen iuris* attributed to the contract. A life insurance policy presupposes that the insurer assumes the risk related to the insured person's life. Conversely, the policy should be considered an investment in a financial instrument if the policyholder entirely bears the financial risk.

The Tribunal goes on to say that the principle was reaffirmed in ordinance No. 10333 issued on 30 April 2018 by the Court of Cassation. This decision based the exclusion of the insurance nature of the unit-linked contract on the lack of a guarantee by the insurance undertaking of conservation of the capital upon expiry.

In judgment No. 6319 of 5 March 2019, the Supreme Court confirmed the need for a provision, in "a non-minimal scope", of a "demographic risk" in the policy to characterise the contract as insurance. In detail, the Court held that in unit-linked policies, of which the composite causal component (financial and insurance) has been recognised, even where the former prevails, for the part qualified as insurance, it must be verified whether the extent of the insurance coverage, "screened with specific reference to the amount of the premium paid by the contracting party, the time horizon and the type of investment", is "able to concretely integrate the demographic risk", resulting otherwise not in compliance with the Italian notion of life insurance contract laid down by the civil code, the insurance code and the secondary legislation connected to them.

The Tribunal of Bergamo affirms that with the ruling above, the distinction between an insurance and an investment contract has shifted from the guarantee of the conservation of the capital at maturity (an element no longer considered decisive to characterise the contract as insurance) to the effective transfer of a demographic risk from the insured to the insurer. Therefore, the Court of Cassation has now admitted the possibility of a partial financial risk transfer from the insurer to the insured party. However, the insurance component of the contract must still be recognisable, of a non-minimal scope and correspond to the typical nature of life insurance.

Turning to EU law, the Bergamo Tribunal notes preliminarily that the relevant EU directives, starting from the first "life" directive (Directive 79/267 EEC) up to the current Directive 2002/83/EC, include, in the context of direct life insurance contracts, life insurance connected with investment funds, widely used in practice; and contracts referenced, in the classification into insurance classes, in the context of class III. The

Italian legislature has adapted to the EU directives and included linked policies in class III, as provided by Article 2, paragraph 1, III PIC.

The Bergamo Tribunal then recalls the jurisprudence of the ECJ that confirmed that unit-linked products fall within class III and, therefore, within the scope of life insurance contracts. This is even so when the risk associated with fluctuations in the market prices of the underlying assets is high for the policyholder. The Italian Tribunal notes further that with the ruling of 1 March 2012 in *González Alonso*, the ECJ also held that life insurance contracts in which the premiums are intended to be invested in securities and financial products and where the financial risk is borne by the insured are considered as insurance contracts by the EU legislature, as required by the life insurance directives.

The Tribunal also notes that in the subsequent ruling No. 542 of 31 May 2018 (in case C-542/2016, *Länsförsäkringar Sak Försäkring-saktiebolag* v. *Dödsboet efter Ingvar Mattsson and Others*), the ECJ reiterated that Directive 2002/92/EC does not contain a definition of an insurance contract, nor does it refer on such a definition to the law of the Member States. On these grounds, the ECJ found that the principles of uniform application and equality imply that the notion of "insurance contract" must be defined, taking into account the context in which the Directive is situated and the need to establish an identical meaning in all Member States.

The Bergamo Tribunal observes that the ECJ thus affirmed that an insurance transaction is characterised by the following: the insurer undertakes, upon payment of a premium, to procure to the insured, in the event of the realisation of the risk, the benefit agreed at the time of stipulation of the contract. Therefore, to fall within the concept of "insurance contract", a life insurance policy must provide, against the payment of a premium by the insured, that the insurer grants a benefit in the event of the policyholder's death or other events referred to in the contract. Accordingly, the allocation of the funds underlying the policy's financial risk is irrelevant.

Finally, the Tribunal of Bergamo states that this interpretation was confirmed by the most recent decision of the ECJ (issued in joined cases 24 February 2022, C-143/20, *A* v. *O*, and C-213/20, *GW*, *ES* v. *A. Towarzystwo Ubezpieczen Zycie SA*). Therein, the ECJ once again affirmed the nature of life insurance contracts of unit-linked policies in the sense of Directive 2002/83. To this effect, the Court deemed sufficient that an insurance company undertakes to provide a benefit in the event of the insured's death or upon the occurrence of another event

relating to the duration of human life in exchange for the payment of a premium.

In light of these considerations, the Tribunal of Bergamo argues that in the current regulatory landscape of supranational origin, the life insurance contract has a broader notion than that enshrined in the Italian civil code. Alongside "traditional" life insurance products, it includes contracts in which the risk is transferred to the insured in varying degrees. Even though these are formally attributable to the "life branch", they perform functions other than social security.

The Tribunal of Bergamo rightly concludes that the necessarily uniform definition of a life insurance contract, as outlined by the jurisprudence of the ECJ, must be adhered to by national judges. These are bound to uniformly apply in all Member States the EU provisions on access to the insurance market, supervision, transparency and fairness in relations with customers, the protection of the weaker party and the distribution of insurance products.

C. The characterisation of unit-linked policies and the Rome I Regulation

Building on these considerations, unit-linked policies are also relevant from the perspective of the Rome I Regulation. Depending on whether a unit- or index-linked policy is characterised as an insurance or financial investment contract, different conflict of laws provisions apply, with the consequence that the law applicable to the contract may differ.

Whereas the Rome I Regulation contains special conflict rules for the insurance contract (Art. 7), the financial investment contract is governed by the ordinary conflict of laws rules of the Regulation (Arts. 3 and 4) unless the particular discipline dedicated to the contract with the consumer applies (Art. 6). The issue is, therefore, one of characterisation, the exercise which a court must undertake to select an appropriate conflict of law rule, which, in turn, determines the applicable law *(lex causae)*. For this purpose, the Court of any Member State will have to qualify the contract by referring to the autonomous notion of a life insurance contract specific to EU law as identified in the ECJ jurisprudence described above. Accordingly, unit- and index-linked contracts must be characterised as life insurance contracts and subject to Article 7 Rome I Regulation.

The overall structure of Article 7 and the provisions applicable to life insurance contracts reflect the European legislature's multi-track

approach to conflict of laws [54]. While the rules deal with insurance contracts covering large risks in Article 7 (2) of Rome I, the remaining areas of direct insurance are governed by Articles 3, 4 and 6 of Rome I when the risk is not situated in a Member State. In contrast, insurance contracts covering risks located in a Member State are subject to the special rules of conflict contained in Articles 7 (3) to (5) of Rome I.

Under the reference in Article 7 (2) Rome I, the freedom of choice, according to Article 3 of Rome I, applies to insurance contracts covering large risks [55]. In the absence of a choice of law, insurance contracts covering large risks are subject to the law of the country where the insurer is established for the purpose of the relevant contract (Art. 7 (2) together with Art. 19 Rome I). To define "large risk", Article 7 (2) Rome I refers to Article 5 *(d)* of the First Council Directive 73/239/EEC (replaced by Art. 13 (27) Dir. 2009/138) [56].

Direct insurance contracts are to be distinguished depending on whether they cover risks in or outside the Member States. For this purpose, Article 7 (6) refers to the definitions in the directives – Article 2 *(d)* of the Second Council Directive 88/357/EEC as well as Article 1 (1) *(g)* of Directive 2002/83/EC), both replaced by Article 13 (13) and (14) Directive 2009/138 – to determine the location of the risk [57]. Furthermore, concerning life insurance, "Member State of the commitment" shall mean the Member State where the policyholder has his habitual residence or establishment in case of a legal person. Finally, the principle of freedom of choice (Art. 3 Rome I) also applies to direct insurance contracts covering risks outside the Member States.

This approach by the EU legislature has met with criticism. As described below, Article 7 (3) limits freedom of choice regarding insurance contracts covering risks in the European Union. This regime, applicable to mass risks, has been established by the EU legislature to

54. See H. Heiss, "Insurance Contract Law (International)", *Max-EuP 2012*, https://max-eup2012.mpipriv.de/index.php/Insurance_Contract_Law_(International).

55. Mass risks, as opposed to large risks, are governed by a specific regime (Art. 7.3) that aims at protecting the policyholder considered the weaker party.

56. For a detailed analysis of the notion of "large risks", see Chap. III.

57. Article 7.6:

> "For the purposes of this Article, the country in which the risk is situated shall be determined in accordance with Article 2 *(d)* of the Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services (17) and, in the case of life assurance, the country in which the risk is situated shall be the country of the commitment within the meaning of Article 1 (1) *(g)* of Directive 2002/83/EC."

avoid the stronger party in an insurance undertaking imposing as the governing law of the contract the law most convenient to it. However, Article 7 (2) jeopardises the protection of the counterpart concerning insurance contracts covering mass risks outside the EU. Thus it has been held that "the differentiated treatment of insurance contracts cannot be justified objectively" [58]. The system of protection has been developed to compensate for the weaker party's lack of legal knowledge, economic resources and bargaining power. Yet these asymmetries do not depend upon the localisation of the risk, which is most of the time the habitual residence of the weaker party [59].

In the absence of a choice of law, the law applicable is that of the country of the insurer's establishment (Art. 4 (1) *(b)* in conjunction with Art. 19 Rome I). However, these basic principles of connection have been derogated from in the context of consumer insurance contracts. Thus, Article 6 (2) 2 of Rome I restricts the validity of a choice of law agreement made with consumers to the provisions of the chosen law that are more favourable than the mandatory consumer law in the domestic Member State that would otherwise apply. If a choice of law is not made, the insurance contract is governed by the law of the country where the policyholder has his habitual residence (Art. 6 (1) of Rome I).

The regime for direct insurance contracts covering risks inside Member States is as follows. First, to protect the counterparty of the insurance undertaking, the weaker party, Article 7 (3) of Rome I provides a list of limited choice of law options [60]. These determine the

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58. H. Heiss, "Insurance Contracts in Rome I: Another Recent Failure of the European Legislature", *Yearbook of Private International Law*, Vol. 10 (2008), p. 262 *et seq.*, at p. 279.

59. See, on the state of the art of the debate on this aspect, the precise analysis by S. Dominelli, *Party Autonomy and Insurance Contracts in Private International Law*, Roma, Aracne, 2016, p. 334 *et seq*.

60. Art. 7.3:

> "In the case of an insurance contract other than a contract falling within paragraph 2, only the following laws may be chosen by the parties in accordance with Article 3:
>
> *(a)* the law of any Member State where the risk is situated at the time of conclusion of the contract;
> *(b)* the law of the country where the policy holder has his habitual residence;
> *(c)* in the case of life assurance, the law of the Member State of which the policy holder is a national;
> *(d)* for insurance contracts covering risks limited to events occurring in one Member State other than the Member State where the risk is situated, the law of that Member State;

situations in which the EU legislature gives an option to choose the applicable law.

For life insurance contracts, the possible options are:

– the law of the Member State where the policyholder has his habitual residence or, if the policyholder is a legal person, the Member State where the latter's establishment, to which the contract relates, is situated [61]; or
– the law of the Member State of which the policyholder is a national, Article 7 (3) lit. *c)*.

Member States are at liberty to augment existing choice of law options [62], but not with reference to the specific conflict of laws provision at letter *c)* of Article 7 (3) for life assurance.

Moreover, Article 7 of Rome I derogates from the protection provided to consumers by the conflict of laws rules contained in Article 6 (1).

In the absence of a choice of law, the location of the risk is the relevant connecting factor. Per the definition contained in the directives, the location of the risk is frequently determined according to the habitual residence of the policyholder. Thus, the law of the policyholder's environment is applied in most cases [63]. This is the case also for life

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(e) where the policy holder of a contract falling under this paragraph pursues a commercial or industrial activity or a liberal profession and the insurance contract covers two or more risks which relate to those activities and are situated in different Member States, the law of any of the Member States concerned or the law of the country of habitual residence of the policy holder.

Where, in the cases set out in points *(a)*, *(b)* or *(e)*, the Member States referred to grant greater freedom of choice of the law applicable to the insurance contract, the parties may take advantage of that freedom.

To the extent that the law applicable has not been chosen by the parties in accordance with this paragraph, such a contract shall be governed by the law of the Member State in which the risk is situated at the time of conclusion of the contract."

61. This derives from both letters *a)* and *b)* of Article 7.3. See Dominelli, supra note 59, p. 351, who rightly assumes that: "However the limited scope of letter *(b)*, if furthermore read in light of letter *(a)*, shows a complete overlap in life assurance matters between the two provisions, which in the end makes only letter *(a)* also applicable to such contracts."

62. Article 7.3 states that: "Where, in the cases set out in points *(a)*, *(b)* or *(e)*, the Member States referred to grant greater freedom of choice of the law applicable to the insurance contract, the parties may take advantage of that freedom." Therefore, there is no unified regime of conflict of law rules among the Member States.

63. Exceptions to this general principle are the following instances: insurance contracts covering real property are governed by the *lex rei sitae*; insurance contracts covering registered vehicles are governed by the law under which the vehicle is registered; insurance contracts covering short-term holiday risks are governed by the law of the country in which the contractual statement was submitted by the policyholder.

insurance contracts: the law of the Member State where the policyholder has his habitual residence applies [64].

It has been said that some Italian judges qualify unit-linked contracts as financial investment contracts, not insurance contracts. Should this different characterisation be accepted, the regime of private international law applicable to such contracts would be different. Financial investment contracts are governed in principle by the ordinary conflict of law provisions of the Rome Regulation (Arts. 3 and 4) unless the rules on consumer contracts apply (Art. 6) [65].

Free choice of law by the parties (Art. 3 Rome I) constitutes the cornerstone of the conflict of law rules for financial investment contracts [66]. The choice of law has to take place explicitly or follow unequivocally from the provisions of the contract or the circumstances of the individual case (Art. 3 (1) 2 Rome I). It is well known that financial institutions regularly stipulate in their terms and conditions (standard contract terms) the application of the law of their own residence [67].

Concerning the internally mandatory rules of Member States' laws, choice of law is restricted in respect of purely domestic cases, as already provided by the Rome Convention (Art. 3 (3) Rome I) [68]. To the extent that substantive European banking and financial contract law has been harmonised by EU directives, which have an internally cogent effect, the relevant rules cannot be waived by the choice of a third country's law whenever all factual elements are located in the area of the European Union, including Denmark (Art. 3 (4) Rome I [69]); analogous rules contained in consumer directives remain in force as well (Art. 23 Rome I).

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64. If the policyholder is a legal person, the law of the Member State where the latter's establishment, to which the contract relates, is situated, applies.

65. See, in general, J. von Hein, "Banking Law (International)", *Max-EuP 2012*, https://max-eup2012.mpipriv.de/index.php/Banking_Law_(International).

66. Article 3.1: "A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract."

67. von Hein, supra note 65.

68. Article 3.3: "Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement."

69. Article 3.4: "Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement."

If the parties did not choose the contract's governing law, Article 4 (1) Rome I provides for a typified connection aimed at legal certainty. Generally, financial contracts' purpose is to provide financial services. Accordingly, these contracts are like other service contracts subject to the law of the country where the service provider – the financial institution – has its habitual residence (Art. 4 (1) *(b)* Rome I) [70]. Article 19 (1) 1 Rome I defines the habitual residence of legal persons as the place of their central administration; when the contract is concluded in the course of the operation of a branch, the place where the branch is located constitutes the connecting factor (Art. 19 (2) Rome I).

A general escape clause is provided by Article 4 (3) Rome I, under which a deviation from the above-mentioned conflicts rules is permitted if it is clear from all the circumstances of the case that the contract is manifestly more closely connected to another country.

Rome I admits party autonomy for consumer contracts but with specific limitations to protect the weaker party. The law chosen by the parties does not apply if the provider has directed his activity at the consumer country, the contract falls within the scope of that activity or the law of the consumer's habitual residence affords him better protection (Art. 6 (2) Rome I). In the absence of a choice of law, the law of the habitual residence of the customer is applicable under the circumstances mentioned above (Art. 6 (1) Rome I). If the financial institution did not target its activities at the country of the customer's residence or the contract is beyond the ambit of that activity, the general rules on contracts apply (Arts. 3 and 4 in connection with Art. 6 (3) Rome I).

Section III. Gender equality and insurance contracts

A. Equality between men and women and insurance premiums

The *Test-Achats* judgment of the ECJ of 1 March 2011 declared the invalidity of Council Directive 2004/113/EC of 13 December 2004, implementing the principle of equal treatment between men and women in the access to and supply of goods and services. The violation of primary law was found in the provisions which admit the derogation from the equal treatment between men and women in terms of insurance premiums. Whereas the judgment has been widely criticised, it is substantially just, and the real problem is to be found in the misguided setting of Directive 2004/113/EC.

70. Article 4.1, *b)*: "a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence".

It is evident that the Court could not admit that the fundamental principle of equal treatment between men and women with reference to insurance premiums, once enshrined in secondary EU legislation, could be left substantially unfulfilled indefinitely. This is, however, what the Council did in Directive 2004/113/EC when it allowed Member States to derogate from that equal treatment principle without any time limit. The intrinsic setting of the directive is thus flawed.

This defect may also be reconceived as violating the EU legislature's deontology. Granting European citizens and legal entities fundamental rights – the most sacred provisions of secular law, so to speak – and factually repealing them simultaneously betrays the European rule of law.

Technically, the ECJ declared the Directive's partial invalidity for internal regulatory inconsistency. The provision of an exemption without any time limit contained in Article 5.2 is incompatible with the general principle of unisex premiums laid down in Article 5.1 and unfolded in greater detail in recitals 18 and 19. The Court could do nothing about this apparent failure of the European legislature, which fell prey to a contradiction in terms. The error is, therefore, upstream rather than downstream. If a fundamental human right is introduced into the European legal order, it is impossible to "stop it" by exceptions that the Member States can provide without a time limit.

Yet these pertinent criticisms do not mean that the legal situation created by the ECJ ruling deserves applause. Instead, in-depth actuarial and statistical studies show that the absolutisation of the principle of unisex premiums, as laid down in Article 5.1 of the Directive, is misguided. There are undeniable gender-related differences that justify differentiated premiums concerning certain types of insurance contracts. For example, one does not need to be an actuary to know that women have a longer average lifespan than men; consequently, it is natural that the premium inherent in various types of insurance contracts linked to the duration of human life may be differentiated between men and women. Furthermore, it is statistically proven that women in certain age groups cause fewer accidents than men of the same age while driving vehicles, which justifies lower premiums of third-party motor liability insurance [71].

71. See Opinion by Advocate General Kokotte, delivered on 30 September 2010, at para. 53:

> "In the proceedings before the Court the following two examples were primarily put forward in support of that: Women have – from a statistical point of view – a

The European legislature should therefore have taken care to specify explicitly in Directive 2004/113/EC the types of insurance contracts excluded from applying the unisex premium regime [72]. This would not be an *escamotage* but a reasonable legislative choice policy, which is not, in principle, subject to judicial review by the ECJ.

Such a list of admitted exclusions would also be in line with the Proposal for a Council Directive of 2 July 2008 on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM (2008) 426 final. This states in recital 15 that:

> "Actuarial and risk factors related to disability and to age are used in the provision of insurance, banking and other financial services. These should not be regarded as constituting discrimination where the factors are shown to be key factors for the assessment of risk."

In Article 2.7, the Proposal confirms that

> "in the provision of financial services Member States may permit proportionate differences in treatment where, for the product in question, the use of age or disability is a key factor in the assessment of risk based on relevant and accurate actuarial or statistical data".

By rejecting a principle of non-differentiation of premiums based on age, the proposed directive secures the fundamental insurance practice according to which age is taken into account in the risk assessment process and thus in the setting of the premium. An explicit confirmation

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higher life expectancy than men and serious traffic accidents are – from a statistical point of view – more often caused by men than by women. In addition, it is from time to time stated as regards private health insurance policies that women – from a statistical point of view – take advantage of more medical benefits than men."

72. The *Test-Achats* ruling represents a further step towards an invasive intervention by the public authority in establishing insurance premiums. On this trend, and for a critique of it, see especially G. Gabrielli, "Le 'disposizioni in materia di r.c. auto' del dicembre 2002: elusione dell'obbligo di contrarre da parte delle imprese assicuratrici ed elusione del principio di libertà tariffaria da parte del legislatore italiano", *Diritto ed economia dell'assicurazione* (2004), p. 75 *et seq*. All this goes against the proclamation by the ECJ in the judgment of 25 February 2003 of a fundamental principle of "tariff freedom" in favour of insurance companies. On this judgment, see M. Frigessi di Rattalma, "Blocco delle tariffe assicurative e responsabilità dello Stato per violazione del diritto comunitario: riflessioni a margine di Corte di Giustizia 25 febbraio 2003 C-59/01", *Diritto ed economia dell'assicurazione* (2003), p. 629 *et seq.*

of this result may be found in the Guidelines on the application of Council Directive 2004/113/EC to insurance, in the light of the judgment of the ECJ of 1 March 2011, C-236/09, *Association Belge des Consommateurs Test-Achats ASBL and Others* v. *Conseil des ministers*. In paragraph 20 of the Guidelines, it is stated that:

> "The use of age and disability would continue to be allowed under the proposal for a directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, as it would not be considered discriminatory. Where the legislator provides that, under certain conditions, a specific practice is not discriminatory, it does not create a derogation from the principle of equal treatment of comparable situations (which could only be admissible for a transitional period). It rather complies with the principle of equal treatment by recognizing that the situations at issue are not comparable and should be treated differently (or that, in spite of comparability, there is an objective justification for treating them differently)."

At note 17, the Guidelines confirm that:

> "In contrast to the Directive [73], the proposal does not contain a general principle such as the unisex rule, according to which the use of age and disability should not result in different premiums or benefits. The objective of the relevant provision is rather to recognize that, for instance, two persons of a different age are not in a comparable situation with regard to life insurance and that proportionate differences of treatment based on a sound risk assessment therefore do not constitute discrimination."

It is thus advisable that the institutions involved at various levels in the European legislation process take due care of the legislative technique referred to above and ensure an accurate wording of the legislation in light of the approach adopted by the ECJ in the *Test-Achats* judgment. Otherwise, the EU act would be exposed to the risk of an action for annulment under Article 263 TFEU.

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73. "The Directive" refers to Council Directive 2004/113/EC of 13 December 2004.

B. Effects of the invalidity of EU provisions permitting Member States to derogate equal treatment between men and women concerning insurance premiums

The *Test-Achats* judgment generated important consequences. As stated, it declared the partial invalidity of Directive 2004/113/EC of 13 December 2004, as far as the derogation from equal treatment between men and women in insurance premiums is concerned (Art. 5.2). From 21 December 2012 onwards, it was no longer permitted to use the variable of gender in the calculation of insurance premiums. Only after the expiry date would any action based on the ECJ ruling and aimed recognising unisex premiums have been accepted. Indeed, Member States could still allow insurance contracts to include differentiated, non-unisex criteria for premiums in their legislation.

The effects of the *Test-Achats* judgment on existing insurance contracts have been widely and controversially discussed in the insurance milieu. However, there was consensus on the inapplicability of the unisex regime to the premiums paid before the deadline, so insurance companies were not obliged to return the premiums collected from the customer up to 21 December 2012.

The debated issue was – as endorsed by Advocate General Kokotte in her Opinion delivered on 30 September 2010 [74] – whether the unisex premium regime would also apply to contracts already existing on 21 December 2012, with the effect that lower premiums would be due after that date. This issue is very relevant. Such an interpretation would have disruptive economic effects as the balance between premium and performance due by the insurer would be significantly altered.

On this point, it should be recalled that the judgments of the ECJ declaring the invalidity of a European act have, in principle, retroactive effect. However, the Court has found it possible to limit, in whole or part, the effects of an invalidity ruling over time pursuant to

74. "81. After that transitional period had expired all future insurance premiums, in the calculation of which sex-specific differences are currently still being made, and also the benefits financed out of the new premiums would however have to be neutral in terms of sex. That would also have to apply to existing insurance contracts. It would not be justified to permanently deny insured persons who have been discriminated against, who may, for example, in the past have concluded life assurance contracts, the adjustment to which they are entitled, particularly since such contracts may in many cases continue to run for a period of many years. The general principle of non-retroactivity under European Union law does not prohibit a new legal situation from being applied to the future effects of existing situations."

Article 267.1, *b)* TFEU. This result was based on the analogous application of Article 264.2 TFEU in relation to such rulings.

This discretionary power of limiting or excluding the retroactive effect of the invalidity rulings is used by the Court when there are specific needs for legal certainty or overriding economic constraints.

Now, in the *Test-Achats* judgment, not only was the retroactive effect excluded but it was envisaged that the invalidity would operate only in the future, starting from 21 December 2012. In other previous judgments concerning European directives, the Court had declared the invalidity of the same and suspended the effects of the declaration of invalidity until the adoption of a new directive that would remedy the defects of the previous one. It is clear that with the *Test-Achats* judgment, an attempt was made to make the transitory effect more stringent than the previous ones mentioned above; on the other hand, from the ruling, we derive the will of the Court to consider the partial invalidity of the directive irrelevant for a certain period. It also considers that a general prohibition of retroactivity of the new legal rule exists according to EU law as developed by the ECJ. In those judgments whereby the Court affirms that this general prohibition does not exclude the application of the new legal framework to the future effects of situations already existing at the time of publication of the judgment, the ECJ has always expressly regulated the impact of the rule. However, there is no trace of all this in the *Test-Achats* ruling. Furthermore, an argument based on analogy militates against the applicability of the unisex regime after 21 December 2012 to premiums stipulated in pre-existing contracts. When Directive 2004/113/EC introduced that regime in 2004 (Art. 5.1), it provided that this regime would apply only "to new contracts concluded after 21 December 2007" and not to premiums due in fulfilment of contracts in place on 21 December 2007. As recital 18 clarifies, the objective of these provisions is "to avoid a sudden readjustment of the market".

By analogy, these concerns need to be taken into account also in establishing the consequences of the invalidity of Article 5.2 declared by the Court. On these grounds, the unisex regime applies only to premiums and performances due in fulfilling new contracts stipulated after 21 December 2012. Accordingly, for contracts signed before that date, no obligation to apply the unisex premium regime may be derived from the judgment. This assessment of intertemporal aspects is confirmed in the Guidelines. These expressly state that:

> "6. In the Test-Achats ruling, the Court of Justice concludes that Article 5 (2) of the Directive 'must therefore be considered to be invalid upon the expiry of an appropriate transitional period' ending on 21 December 2012. This means that from that date the requirements of Article 5 (1) must be applied without derogation."

C. The autonomous notion of "new contracts" and the unisex insurance premiums regime

On the concept of new contracts, the Guidelines specify that:

> "9. The Directive does not define the concept of a 'new contract', nor does it contain any reference to national laws as regards the meaning to be applied to such terms. This concept should therefore be regarded, for the purposes of application of the Directive, as designating an autonomous concept of European Union law which must be interpreted uniformly throughout the Union."

Therefore, an interpretation of a "new contract" based on national law is banned. Indeed, this would risk giving rise to unequal conditions of competition for insurance companies throughout the internal market. We are again faced with an "autonomous notion" in EU law. The autonomous character is confirmed by paragraph 10 of the Guidelines, according to which the concept must be shaped in the light of "the need for legal certainty and be based on criteria that avoid undue interference with existing rights and preserve the legitimate expectations of all parties".

The notion of "new contract" is then also explicitly defined in the Guidelines, according to which:

> "11. … the unisex rule pursuant to Article 5 (1) shall apply whenever *(a)* a contractual agreement requiring the expression of consent by all parties is made, including an amendment to an existing contract and *(b)* the latest expression of consent by a party that is necessary for the conclusion of that agreement occurs as from 21 December 2012."

Since "new contract" is an autonomous notion governed by EU law, a reference to national notions, such as the domestic concept of novation, is inadmissible. However, the Guidelines are still relevant when

they negatively define the concept; that is, when they illustrate what does not correspond to the notion of a "new contract":

> "13. On the contrary, the following situations should not be considered as constituting a new contractual agreement:
>
> *(a)* the automatic extension of a pre-existing contract if no notice, e.g. a cancellation notice, is given by a certain deadline as a result of the terms of that pre-existing contract;
> *(b)* the adjustments made to individual elements of an existing contract, such as premium changes, on the basis of predefined parameters, where the consent of the policyholder is not required;
> *(c)* the taking out, by the policyholder, of top-up or follow-on policies whose terms were pre-agreed in contracts concluded before 21 December 2012, where these policies are activated by a unilateral decision of the policyholder;
> *(d)* the mere transfer of an insurance portfolio from one insurer to another which should not change the status of the contracts included in that portfolio."

In line with this, the cases in which the renewal, modification or extension of the contract was already provided for in the contract, depend on unilateral omissive or commissioning conduct by a party or automatic mechanisms already provided by the parties are not considered to give rise to a "new contract". In this, the legitimate expectations of the parties shall be preserved. Consequently, contracts that are tacitly renewed due to omitted termination, and contracts that are subject to changes by virtue of automatic adjustment or indexing clauses, are not subject to the unisex premium regime.

Finally, it remains to be clarified that Article 5.1 of the Directive states:

> "Member States shall ensure that in all new contracts concluded after 21 December 2007 at the latest, the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits."

Since this calculation does not affect Article 5, paragraph 1, companies can continue to assess the risks, the tariff requirements, the reserves and the reinsurance policies according to gender. However, the premium proposed to the consumer will have to be established

regardless of gender. This solution is reflected in the Guidelines, which add that marketing and advertising fall outside the scope of Article 5.1. Thus, insurance companies can, of course, carry out different advertising aimed at women or men.

Concerning the calculation of the technical provisions, this calculation may continue to take into account the actual demographic risk of the population or its composition by sex, even in the presence of undifferentiated tariff premiums. This would not go against the Directive, which refers to the treatment of customers (premiums and benefits) and not the assessment and coverage of risks (reserves) [75].

A separate issue is indirect discrimination. Under Article 2, letter *b)*, of the Directive, indirect discrimination occurs "where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary".

The decision in *Test-Achats* did not rule on this point. However, some practical considerations can again be found in the Guidelines. The use of risk factors that may be related to gender, therefore, remains possible as long as these are risk factors in the proper sense. Thus the Guidelines specify that price differentiation based on the size of a car engine in the field of motor insurance should remain possible, even if, statistically, men drive cars with more powerful engines. Furthermore, a family history of breast cancer does not have the same impact on a man's and a woman's health risk (and the assessment of this impact requires knowledge of whether the person is a woman or a man).

In the opinion of the Commission, under the conditions specified in Article 4, paragraph 5, of the Directive, it remains possible for insurers to offer insurance products (or options in contracts) adapted explicitly to gender to accommodate conditions that exclusively or primarily concern the male or female gender; for example, prostate cancer, breast cancer or uterine cancer.

To conclude, it would have been preferable to adopt a directive amending Directive 113/2004 to promote legal certainty and prevent litigation [76]. However, the Guidelines provide a solid basis for the

75. See S. Landini, "Modelli attuariali nei processi cognitivi giuridici. Alcuni spunti di riflessione", *Assicurazioni*, Vol. 78 (2011), p. 425 *et seq.*

76. The point assumes particular relevance with regard to the inapplicability of the unisex regime to existing contracts. A regulatory intervention under EU law that would

proper functioning of the overall system. On the one hand, the national legislature is obliged to implement the *Test-Achats* ruling clarified by the Guidelines; on the other hand, national judges and administrative authorities are required, according to general principles, to interpret national law in a sense that conforms to the Guidelines [77]. Though devoid of a legislative character, they have, in any case, great importance in that, in insurance companies and policyholders, they create legitimate expectations protected under EU law [78].

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had stated the rules provided by the Guidelines would have been for obvious reasons useful.

77. ECJ judgment, 13 December 1989, C-322/88, *Grimaldi* v. *Fonds del maladies professionelles*.

78. ECJ judgment, 24 March 1993, C-313/90, *CIRFS and Others* v. *European Commission*.

CHAPTER IV

JURISDICTION IN INSURANCE MATTERS

Section I. The protection of the insured according to the Brussels I bis Regulation

A. Essential features of the rules on the jurisdiction of the Brussels I bis Regulation

European civil procedure law, in particular, the Brussels I bis Regulation No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, constitutes another essential pillar of European insurance law. This regime has high significance for the procedural protection of the rights of the policyholder, the insured and the damaged third party *vis-à-vis* the insurance undertaking. This is also shown by the jurisprudence of the ECJ, of which a recent ruling will be presented at the end of this analysis.

To understand the regime on the jurisdiction in insurance matters (Sec. 3 of Chap. II of the Brussels I bis Regulation), an overview of the systematic framework of the discipline of the jurisdiction in the Brussels I bis Regulation is needed. Of particular interest is the distinction between the "ordinary regime" based on both Section 1 ("General provisions") and Section 2 ("Special jurisdiction") of Chapter II and the "Exclusive jurisdiction" governed by Section 6 of Chapter II.

The general provisions on jurisdiction provide that a person must be sued before the courts of the Member State in which his domicile is located (Art. 4, para. 1) [79], regardless of the defendant's nationality. The rationale behind this general rule is the legal maxim *actor sequitur forum rei* which provides for a *favor iuris* of the defendant. Though embedded in national procedural law, its significance in international litigation is even higher. Indeed, it is more complex and expensive to defend oneself before the court of a foreign state rather than a national court at one's domicile. As regards companies, the statutory

79. Article 4.1: "Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."

seat is assimilated to the domicile for the purposes of the Regulation [80]. Whereas jurisdiction is thus granted to the State where the defendant's domicile is located, it is up to the internal rules of civil procedure to identify the competent court among the various courts of the State of the defendant's domicile [81].

Section 2 of Chapter II, entitled "Special jurisdiction", contains a list of cases in which the defendant may be sued in a Member State other than that of his domicile. These are special jurisdictions which are added to the defendant's domicile. It should be noted that in such cases, the regulation establishes directly and immediately the competent court: here, there is no need to "go through" the internal rules on civil procedure. It is up to the plaintiff to choose whether to sue the opposing party before the courts of the State of the defendant's domicile (under Art. 4.1) or before the court indicated by the provisions on special jurisdiction.

Finally, Section 6 on "Exclusive jurisdiction" concerns the category of exclusive competencies. It refers to disputes over which a particular State has exclusive jurisdiction, with the plaintiff not being allowed to initiate the case before the courts of the State of the defendant's domicile. In this case, the Regulation assumes that only the judicial authority of a particular State is competent to judge a given dispute and excludes the possibility of adding to it the jurisdiction of courts of other Member States [82].

In international trade, it is common practice to introduce a contractual clause by which the parties themselves designate the competent jurisdiction to decide future disputes. This clause – commonly referred to as the "jurisdiction clause" or the "choice of court clause" – contributes considerably to legal certainty. It enables the parties to know in advance which court to refer to. In this way, any uncertainties about the determination of the competent court through legal rules on jurisdiction in the absence of such a clause are eliminated.

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80. Article 63.1: "For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: *(a)* statutory seat; *(b)* central administration; or *(c)* principal place of business."

81. Article 62.1: "In order to determine whether a party is domiciled in the Member State whose courts are seised of a matter, the court shall apply its internal law."

82. This sort of "monopoly" is explained by the particular link that connects the disputes referred to in Article 24 with a given legal system and the corresponding judicial authority: for example, the deep link between the judge of the *locus rei sitae* and disputes relating to real estate is quite evident (Art. 24.1).

The Regulation widely recognises the freedom of the parties to choose the competent jurisdiction through a contractual clause. Thus, under Article 25 [83], if the parties have agreed on the jurisdiction of a Member State's court to hear present or future disputes arising from a particular legal relationship, the exclusive judicial competence lies with that court. A valid jurisdiction clause designates the competent judge exclusively by overriding the provisions on general and special jurisdiction. However, the rules on jurisdiction contained in Section 6 on "Exclusive jurisdiction" must not be derogated by the parties.

A tacit prorogation of jurisdiction is provided for by Article 26, which establishes the jurisdiction of the court before which the defendant enters an appearance. Of course, this does not apply when the defendant only appears to plead the lack of jurisdiction of the seized court. However, the tacit prorogation is not effective in the case of "Exclusive jurisdiction", where the court will have to declare the lack of jurisdiction *ex officio* [84].

Finally, according to the rules on jurisdiction contained in Sections 1 and 2 of Chapter II, the court of the State which decides on the recognition or execution of a judgment does not have the power to control whether the Regulation's rules on jurisdiction were correctly applied by the court of the State which passed that judgment. However, this control is permitted in some cases, for example, when the rules on "Exclusive jurisdiction" contained in Section 6 of Chapter II [85] were misapplied.

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83. Article 25.1: "If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise."

84. Article 26.1: "Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 24."

85. In other words, if the judge who issued the judgment has violated the provisions contained in Section 6, the requested judge will have the power to refuse the recognition or enforcement of the judgment. This is stated by Article 45.1, which provides that: "On the application of any interested party, the recognition of a judgment shall be refused: if the judgment conflicts with: … *e) (ii)* Section 6 of Chapter II."

B. The regime on the jurisdiction in matters relating to insurance

After analysing the Regulation's general regime on jurisdiction, "Jurisdiction in matters relating to insurance", as entitled in Section 3 of Chapter II, may be approached.

As regards its drafters' intentions, it emerges from the 1968 report accompanying the Brussels Convention that the insurance section was conceived as an exception to the general regime just described. In fact, in some of the six original Member States, the rules on jurisdiction in insurance matters were mandatory and pertained to the *ordre public*. If this "internal" approach had been ignored, the recognition and enforcement of judgments concerning insurance matters would have been at risk. Moreover, this would have jeopardised the fundamental principle of the free circulation of judgments underlying the Convention [86].

In addition, the report underlines that the provisions on insurance have a social motivation in that they aim to counteract the abuses that may derive from insurance contracts, particularly from standard contracts preformulated by the insurer [87]. In the judgment of 14 July 1983, in case C-201/82 [88], the ECJ stated that:

> "17. It is apparent from a consideration of the provisions of that section in the light of the documents leading to their enactment that in affording the insured a wider range of jurisdiction than that available to the insurer and in excluding any possibility of a clause conferring jurisdiction for the benefit of the insurer their purpose was to protect the insured who is most frequently faced with a predetermined contract the clauses of which are no longer negotiable and who is in a weaker economic position."

The notion of "matters relating to insurance" must not be interpreted in the light of the *lex fori* of the seized court. Instead, it must be construed – based on the ECJ's consolidated interpretation of the concepts used in the Regulation – as an "autonomous notion"[89]. According to the ECJ,

86. Report on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ C 59, 5.3.1979 (Jenard Report 1968), p. 29.

87. Jenard Report 1968, p.30.

88. Judgment of the ECJ (Third Chamber), 14 July 1983, C-201/82, *Gerling Konzern Speziale Kreditversicherungs-AG and Others* v. *Amministrazione del Tesoro dello Stato*.

89. For the purposes of an interpretation of a provision of EU law, the Court must, according to its settled case law, take account not only of its terms but also of its context and the objectives pursued by the legislation of which it forms part. See judgment of 24 March 2021, C-603/20, *SS* v. *MCP*, para. 37, and the case law cited.

a case qualifies as an insurance matter if "the action necessarily raises a question relating to rights and obligations arising out of an insurance relationship between the parties to that action" [90]. The only (disputed) exception is Article 13.2, which deals with the forum of the *action directe*. This is the action by an injured third party directly against the insurer, which is characterised in some Member States as a matter of tort law rather than based on the insurance contract.

Article 10, which introduces Section 3 of Chapter II, affirms that "in matters relating to insurance, jurisdiction shall be determined by this Section, without prejudice to Article 6 and point 5 of Article 7". Thus, Section 3 constitutes an independent system of jurisdictional criteria [91]. Moreover, the provision confirms the general principle set out in Article 4.1. In other words [92], the provisions of Section 3 apply exclusively if the defendant – the insurer or his counterpart – is domiciled in a Member State. If this is not the case, Article 6 provides that national rules on jurisdiction apply instead of the provisions of the Regulation.

The protection afforded by Section 3 to the policyholder, the insured and the damaged third party *vis-à-vis* the insurance undertaking is dependent on the condition that the counterpart of the insurance undertaking is domiciled in the EU has been widely discussed in legal doctrine. Critics affirm that this distinction violates the EU principle of equality. Indeed, the non-EU domiciled policyholder would be deprived of protection, although his status as the weaker party has no connection to his domicile. As a result, foreign policyholders are not protected against the choice of court clauses imposed by EU-based insurance undertakings just because of their domicile. However, other authors have attenuated this criticism as the courts of third States would, in any case, not be bound by the Regulation [93].

Article 7.5 permits a person domiciled in one Member State to be sued in another Member State if the dispute arises out of the activities of a branch, agency or any other establishment located in the latter State.

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90. ECJ, 9 December 2021, C-708/20, *BT* v. *Seguros Catalana Occidente and EB*, para. 30.

91. I. Järvekülg, "Article 10", in M. Requejo Isidro (ed.), *Commentary on Regulation (EU) No 1215/2012* (Elgar Commentaries in Private International Law), Cheltenham, Edward Elgar, 2022, p. 201 *et seq.*, at p. 202, affirms that: "Section 2 is intended to regulate jurisdiction in insurance matters comprehensively and exclusively."

92. Järvekülg, *ibid.*, p. 203.

93. See the fine summary of the state of the art of the debate on this aspect by Dominelli, supra note 59, p. 265 *et seq*.

Moreover, if an insurance matter also qualifies as a matter pertaining to a consumer contract, the more specific provisions of Section 3 have priority [94].

In examining the criteria of jurisdictional competence in insurance matters, the first rule is provided by Article 11, which concerns the case of the defendant insurer. Article 11.1 *a)*, which establishes the jurisdiction of the State of the insurer's domicile for the lawsuits brought against him, merely reaffirms for insurance matters the basic principle referred to in Article 4.1 of the Regulation. Thus the policyholder, the insured and the beneficiary can lodge a claim with the Court designated in 11.1 *a)*. These rules are in line with the general regime laid down in Sections 1 and 2.

The actual "break" occurs in Article 11.1 *b)*, which – under the principle of the protection of the weaker party – introduces a *forum actoris* as a criterion of jurisdiction. Accordingly: "1. An insurer domiciled in a Member State may be sued: *(b)* in another Member State, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the claimant is domiciled."

This provision requires clarification. Unlike Article 11.1 *a)*, it designates not only the State whose judges have jurisdiction but directly and immediately the competent court – namely the Court of the domicile of the policyholder, the insured or a beneficiary. On the other hand, an insurer may bring proceedings against the policyholder, insured or beneficiary exclusively before the courts of the Member State where these persons are domiciled. This provision completes the protection of these subjects considered weaker parties.

Article 11.2 provides that an insurer who is not domiciled in a Member State but has a branch, agency or other establishments there shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State. This provision contains an exception from the general rule of Article 6.1 by extending the rules of jurisdiction to defendants not domiciled in Member States [95].

Article 12 provides that: "In respect of liability insurance or insurance of immovable property, the insurer may in addition be sued in the courts for the place where the harmful event occurred. The same applies if movable and immovable property are covered by the same insurance

94. Järvekülg, supra note 91, p. 203.
95. I. Järvekülg, "Article 11", in *ibid.*, p. 209.

policy and both are adversely affected by the same contingency." This provision is not exclusive; accordingly, a claimant may choose a jurisdiction under Articles 11 or 13.

Article 13.1. provides that "In respect of liability insurance, the insurer may also, if the law of the court permits it, be joined in proceedings which the injured party has brought against the insured".

Under this provision, an insured sued for damages by an injured party may bring an action against the insurer in the same court if this is permitted by the *lex fori*. This provision aims to permit the insured party to be compensated by the insurer in the same proceedings. Moreover, the provision seeks to avoiding contradictory judgments [96].

Another important provision is contained in Article 13.2, which states that: "2. Articles 10, 11 and 12 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted." This provision establishes a *forum actoris* at the injured party's domicile [97]. It deals with the *action directe*, an action that is of paramount importance in civil liability insurance. As stated, the *action directe* is the action brought by the injured third person directly against the insurer of the injuring party. The injured party usually makes use of this action if permitted by the applicable law, for the insurance company has assets regulated by strict EU rules, which guarantees the victim's compensation, whereas it is not certain that the injuring party has the funds to compensate the injured party.

According to general principles (as confirmed by the Jenard Report accompanying the Brussels Convention [98]), it is up to the system of private international law of the court seized by the injured party to determine the law that governs whether the claimant is entitled to an *action directe*. According to some national conflict of laws systems, the question is governed by the *lex loci delicti*; others refer to the law governing the insurance contract or the *lex fori*; there are also eclectic solutions, like those codified by the Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents [99].

Article 18 Rome II Regulation is of special importance in European private international law. It states: "Direct action against the insurer of

96. I. Järvekülg, "Article 13", in *ibid.*, p. 220.

97. See ECJ judgment (Second Chamber), 13 December 2007, C-463/06, *FBTO Schadeverzekeringen NV* v. *Jack Odenbreit*. Previously this was excluded. See Jenard Report 1968, supra note 86, p. 32. The injured party could sue the insurer at the court of the policyholder's domicile and not at the court of his own domicile.

98. Jenard Report 1968, supra note 86, p. 32.

99. On these aspects see M. Frigessi di Rattalma, *Il contratto internazionale di assicurazione*, Padova, CEDAM, 1991, p. 241 *et seq.*

the person liable. The person having suffered damage may bring his or her claim directly against the insurer of the person liable to provide compensation if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides."

It should be noted that the Hague Convention of 4 May 1971 takes priority over Rome II. Moreover, the *action directe* is foreseen in Article 18 of Directive 2009/103/EC in relation to compulsory motor vehicle liability insurance. In this insurance sector, the protection of the injured third party is of paramount importance.

Finally, Article 13.3 of the Brussels I bis Regulation provides: "If the law governing such direct actions provides that the policyholder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them." If the *lex fori* admits it, this provision entitles the insurer to join the policyholder or the insured if he wishes. This rule aims to prevent incompatible judgments and hinder fraud.

In insurance matters, the Regulation admits that the parties establish jurisdiction clauses in the contract, but their admissibility is limited. The reasons for such limitations are obvious: the basic structure of Section 3 attributes protection to the counterpart of the insurer, who can bring his claim against the insurer before numerous courts, whereas the latter can typically only resort to the courts of the State of the defendant's domicile. The concept underlying this legal framework is that the policyholder (or, in any case, the counterpart of the insurer) is considered the weaker party from an economic and social point of view. Therefore, the protection offered to him by the provisions contained in Section 3 should not be nullified by contractual jurisdiction clauses imposed by the insurer as the stronger party.

However, in its original version, the Brussels Convention of 1968 (replaced by Regulation Brussels Ibis) did not consider that the policyholder is not always the weaker party; sometimes, it is a strong subject, possibly more experienced than the insurer. In such cases, the Convention sacrificed, on an erroneous premise, an important and traditional manifestation of the parties' contractual freedom, namely their right to choose the competent jurisdiction in the contract.

The 1978 Accession Convention [100] partially remedied this defect. The UK pointed out during the negotiations of the Accession Conven-

100. 78/884/EEC: Convention of Accession of 9 October 1978 of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the ECJ.

tion that Section 3 made no sense when the policyholder was a strong economic actor. However, the position prevailed not to exclude the application of Section 3 in this case altogether but rather to allow the parties to freely choose the jurisdiction in the contract [101]. The criteria to identify the stronger party needed to be established at this point. The British proposal to focus on the contracting company's capital and turnover was rejected. However, several Member States accepted the principle expressed by the British, according to which the limitation of jurisdiction clauses in insurance matters on social grounds is no longer justified in the case of a strong policyholder. On this basis, jurisdiction clauses in marine insurance and in some aviation insurance sectors had to be treated differently [102].

Finally, Regulation Brussels I and Brussels I bis allowed choice of court clauses when the contract covers so-called large risks (to be discussed below). Under Article 15 Brussels I bis, the provisions of Section 3 can be waived only in five cases, three of which were already provided for in the 1968 Convention and the other two added by the 1978 Accession Convention. The Regulation fine-tuned these cases. Article 15 states that:

> "The provisions of this Section may be departed from only by an agreement:
>
> (1) which is entered into after the dispute has arisen;
> (2) which allows the policyholder, the insured or a beneficiary to bring proceedings in courts other than those indicated in this Section;
> (3) which is concluded between a policyholder and an insurer, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which has the effect of conferring jurisdiction on the courts of that Member State even if the harmful event were to occur abroad, provided that such an agreement is not contrary to the law of that Member State;
> (4) which is concluded with a policyholder who is not domiciled in a Member State, except in so far as the insurance is

101. See Report on the Convention of 9 October 1978 on the accession of Denmark, Ireland and the United Kingdom, OJ C 59, 5.3.1979 (Schlosser Report 1978), p. 113 *et seq*.

102. See Schlosser Report 1978, *ibid.*, p. 114.

compulsory or relates to immovable property in a Member State; or

(5) which relates to a contract of insurance in so far as it covers one or more of the risks set out in Article 16."

According to paragraph (1), the derogation of the provisions of Section 3 is thus possible if based on an agreement concluded by the parties after the dispute between the insurer and his counterpart has arisen. At that point, there is no longer the "danger" that the insurer "imposes" a clause on the counterpart. Under paragraph (2), courts not designated in this section may only be seized in proceedings brought by the counterpart of the insurer. According to paragraph (3), a derogation is also possible when the harm occurred abroad, but the parties to the insurance contract are both strictly connected to the Member State upon whose courts they confer jurisdiction through the jurisdiction clause. Under paragraph (4), a jurisdiction agreement may be entered into by an insurer and a policyholder who is domiciled outside the EU. This provision is important, as it entails a different treatment of weaker parties domiciled within and outside the European Union. As mentioned, upon the request of the UK, the 1978 Accession Convention extended the lawfulness of jurisdiction agreements to cases where the policyholders are powerful businesses, such as in maritime and aircraft insurance matters. Finally, under paragraph (5), full party autonomy is granted concerning so-called large risks, as defined by Article 13 (27) of the Solvency II Directive (Directive 2009/138/EC). "Large risks" means:

– risks classified under classes 4 (railway rolling stock), 5 (aircraft), 6 (ships: sea, lake and river and canal vessels), 7 (goods in transit; including merchandise, baggage and all other goods), 11 (aircraft liability) and 12 (liability for ships: sea, lake and river and canal vessels) in Part A of Annex I;
– risks classified under classes 14 (credit) and 15 (suretyship) in Part A of Annex I, where the policyholder is engaged professionally in an industrial or commercial activity or in one of the liberal professions, and the risks related to such activity;
– risks classified under classes 3 (land vehicles; other than railway rolling stock), 8 (fire and natural forces), 9 (other damage to property), 10 (motor vehicle liability), 13 (general liability) and 16 (miscellaneous financial loss) in Part A of Annex I in so far as the policyholder exceeds the limits of at least two of the following criteria:

(i) a balance sheet total of 6.2 million euros;
(ii) a net turnover, within the meaning of Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54 (3) *(g)* of the Treaty on the annual accounts of certain types of companies (30), of 12.8 million euros;
(iii) an average number of 250 employees during the financial year.

Significantly, the latter provision is consistent with Article 7.2 of the Rome I Regulation, which states that:

> "2. An insurance contract covering a large risk as defined in Article 5 *(d)* of the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance shall be governed by the law chosen by the parties in accordance with Article 3 of this Regulation."

Thus, the European legislature wisely created an area of contractual freedom concerning insurance contracts that cover large risks, as there is no need to protect the policyholder. The insurer and the policyholder are thus empowered to freely choose both the law governing the contract and the jurisdiction of the court to be seized in the event of disputes about the contract.

Section II. The nature of the regime provided by Section 3 of Chapter II and the interpretation of the notion of "matters relating to insurance"

A. The "hybrid" nature of the regime provided by Brussels I bis on the jurisdiction in matters relating to insurance

Considering both the general regime of jurisdiction provided by Sections 1 and 2 and the special regime of jurisdiction in insurance matters laid down in Section 3, a full assessment of the rules on jurisdiction in insurance matters may be developed. On closer inspection, the regime provided by Section 3 may be located halfway between the general rules on jurisdiction provided by Sections 1 and 2 and the rules concerning exclusive jurisdiction:

– first, the rules on jurisdiction in insurance matters only apply if the defendant is domiciled in a Member State. This brings them closer to

the provisions provided by Sections 1 and 2 and distinguishes them from the provisions on exclusive jurisdiction contained in Section 6, which apply even if the defendant is not domiciled in a Member State;

– second, while under exclusive jurisdiction rules, the claimant has no choice, as there is only one national judicial authority that is competent, in insurance matters, the weaker party has considerable freedom in choosing the forum. Moreover, in insurance matters, there is, in principle, only a sole competent court – and therefore no choice – when the claimant is the insurer; in this aspect, the insurance regime is similar to exclusive jurisdiction.

The freedom of the parties to derogate from the rules on jurisdiction established by the Regulation is also recognised in insurance matters, albeit in a more limited way than under the general regime; however, that freedom is more accentuated than in the case of exclusive jurisdiction, where the parties can never derogate from the courts established by Section 6.

Jurisdiction by entering on appearance is admitted in relation to Sections 1 and 2 and Section 3, while it is not accepted in cases of exclusive jurisdiction. Therefore, the insurance discipline seems comparable to the general regime and not to exclusive jurisdiction. First, however, Article 26.2 needs to be taken into account:

> "In matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the defendant, the court shall, before assuming jurisdiction under paragraph 1, ensure that the defendant is informed of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance."

As regards recognition and enforcement of judgments, Articles 45.1 *e) i)* and *ii)* and 46 subjects the rules of jurisdiction in insurance matters to the regime, which is also applicable to exclusive jurisdiction. If the court of the State of origin violates the provisions of the Regulation on exclusive jurisdiction and insurance (as well as on consumer and individual employment contracts), recognition and enforcement of the judgment in another Member State are excluded. On the contrary, the violation of the ordinary rules on jurisdiction established by Sections 1 and 2 is not an obstacle to recognising and enforcing the judgment in another Member State.

In sum, the varied legal framework contained in Section 3 provides for a "hybrid" regime on jurisdiction inspired by both the general regime enshrined in Sections 1 and 2 and the mandatory regime applicable to cases of exclusive jurisdiction.

B. The autonomous notion of "matters relating to insurance"

To conclude this chapter on jurisdiction in insurance matters, the judgment of the ECJ on 9 December 2021 in case C-708/20, *BT* v. *Seguros Catalana Occidente and EB*, will be analysed. It had to rule, *inter alia*, on the relationship between the provisions of the Regulation on "special jurisdiction" contained in Section 2 and its provisions on insurance matters enshrined in Section 3.

The case deals with a reference for a preliminary ruling by the ECJ. BT, a person domiciled in the United Kingdom, had an accident during a holiday in Spain. The accident occurred at a property owned by EB, who is domiciled in the Republic of Ireland. Seguros Catalana Occidente is the civil liability insurer of EB in respect of that property and has its registered office in Spain. BT alleges that, pursuant to a contract, EB agreed to provide accommodation for her and her family on that property. BT was injured following an accidental fall in a courtyard that is part of that property. BT decided to sue EB and Seguros Catalana Occidente for the damages suffered due to that injury. She argued that EB owed her a duty under contract and tort law to exercise due care and skill to ensure that the property could be utilised reasonably securely, which had been breached. Specifically, BT argued that EB should have installed a handrail near the stairs.

The proceedings were commenced before the County Court's Money Claims Centre in Salford, England. It was then served on the defendants Seguros Catalana Occidente and EB and transferred to the County Court at Birkenhead (also in England). BT claims that the courts of England and Wales have international jurisdiction over Seguros Catalana Occidente by virtue of Article 11 (1) *(b)* and Article 13 (2) Brussels I bis. BT argues, concerning EB, that a claimant may bring an action against an insurer domiciled abroad under Article 13 (3). In her view, the existence of a "dispute" between the insurer and the insured regarding the validity or effect of the insurance policy is not necessary in that regard. The only requirement under Article 13 (3) is that such an action against the insured is provided for by the law governing direct actions against the insurer, in this case, Spanish law.

Seguros Catalana Occidente did not challenge the jurisdiction of the referring court and presented its defence on the merits. EB challenged the jurisdiction of the courts of England and Wales to hear the claims brought against her by BT on the basis of Article 13 (3) of the Regulation. EB affirmed that this provision applies exclusively to insurance claims. According to EB, BT's claim is compensation for consequential loss and damage arising from alleged negligence in the provision of holiday accommodation. It is not an insurance claim and cannot become one merely because it was brought in the same action as the direct action against the insurer.

Before EB's application challenging the jurisdiction of the courts of England and Wales could be heard, Seguros Catalana Occidente clarified its position on the merits and affirmed that the limitations and restrictions in the insurance policy meant that the policy did not extend to EB's use of the property to accommodate third parties on holiday against payment.

It is reasonable to assume that BT was aware of the risk that the British court could reject its claim against the insurer; this circumstance explains why BT brought legal action against both the civil liability insurer and EB [103]. The insurer, therefore, disputed that they were liable to compensate EB in relation to the accident and sought the dismissal of BT's claim on the merits. The County Court stayed the proceedings on the insurer's application to dismiss BT's claim until the reference for a preliminary ruling is resolved. The referring Court considers that it must preliminarily examine EB's challenge to its international jurisdiction. It underlines that Seguros Catalana Occidente is not a party to the proceedings as regards the latter aspect.

In these circumstances, the County Court at Birkenhead decided to stay the proceedings and to refer the following questions to the ECJ for a preliminary ruling:

> "(1) Is it a requirement of Article 13 (3) of [Regulation No. 1215/2012] that the cause of the action on which the injured person relies in asserting a claim against the policyholder/insured involves a matter relating to insurance?

103. As already highlighted, the injured party will usually use exclusively the *action directe* for the reason that the insurance company has assets which guarantee the compensation; therefore, he does not need to sue the insured as well. However, the procedural strategy of the victim may change in cases like the one at hand, where the insurer excludes coverage on account of limitations in the policy. In these cases, the victim will likely sue the injuring party too.

(2) If the answer to [question 1] is in the affirmative, is the fact that the claim which the injured person seeks to bring against the policyholder/insured arises out of the same facts as, and is being brought in the same action as the direct claim brought against the insurer sufficient to justify a conclusion that the injured person's claim is a matter relating to insurance even though the cause of action between the injured person and the policyholder/insured is unrelated to insurance?

(3) Further and alternatively, if the answer to [question 1] is in the affirmative, is the fact that there is a dispute between the insurer and injured person concerning the validity or effect of the insurance policy sufficient to justify a conclusion that the injured person's claim is a matter relating to insurance?

(4) If the answer to [question 1] is in the negative, is it sufficient that the joining of the policyholder/insured to the direct action against the insurer is permitted by the law governing the direct action against the insurer?"

In its judgment, the ECJ preliminarily notes that:

> "By its first three questions, which should be considered together, the referring court asks, in essence, whether Article 13 (3) of Regulation No. 1215/2012 is to be interpreted as meaning that, in the event of a direct action brought by the injured person against an insurer, in accordance with Article 13 (3) thereof, the court of the Member State in which that person is domiciled may also assume jurisdiction, on the basis of that Article 13 (3), to rule on the claim for compensation brought at the same time by that person against the policyholder or the insured who is domiciled in another Member State and who has not been challenged by the insurer."

The ECJ then rightly notes that Section 3 of Chapter II, to which Article 13 (3) belongs, establishes an autonomous system for allocating jurisdiction in insurance matters. Then the Court recalls the argument brought forward by the German Government and the European Commission, according to which an action for compensation brought by an injured person against an insured cannot fall within the scope of Article 13 (3) of that Regulation since it does not arise from an "insurance relationship" and is essentially a matter of tort or delict.

The ECJ rightly notes that under Article 10, the autonomous notion of "matters relating to insurance" enables a clear distinction between the jurisdiction established by Section 3 of Chapter II in that area and the special jurisdiction established by Section 2 of that chapter in matters of contract or tort. Accordingly, what triggers the application of the special rules of jurisdiction laid down in Section 3 is that the action necessarily affects rights and obligations arising from an insurance relationship between the parties.

Based on these correct observations, the Court argues that a claim brought by the injured person against the policyholder or the insured cannot be considered an insurance claim simply because that claim and the claim made directly against the insurer have their origin in the same facts; or because there is a dispute between the insurer and the injured person about the validity of the insurance policy.

The Court thereafter develops a reasoning that refers to the peculiar characteristics of Section 3 on jurisdiction in insurance matters mentioned above: It follows from recital 18 of the Regulation that a certain imbalance between the parties characterises actions in insurance matters. The provisions of Section 3 of Chapter II are intended to remedy this asymmetry by giving the weaker party the benefit of rules of jurisdiction, which are more favourable to his interests than the general rules [104]. This imbalance is inexistent, though, where an action does not concern the insurer, in relation to whom both the insured and the injured person are considered weaker.

The ECJ furthermore observes that Article 13 (3) is aimed to grant the insurer the right to involve the insured as a third party in the proceedings between the insurer and the injured person – to protect the insurer against fraud and to prevent different courts from handing down contradictory judgments. It follows, according to the Court, that when an action for damages has been brought by the injured person directly against an insurer, and the insurer has not brought such an action against the insured, the court seized cannot rely on Article 13 (3) to establish its jurisdiction.

The Court also points to the risk that Article 13 (3) is used for a sort of *forum shopping*, which would distort the equilibrium among the various sections of which the Regulation is composed. At this point, the ECJ stresses that allowing the injured person to bring an action

104. See, to that effect, judgments: 20 July 2017, C-340/16, *KABEG* v. *MMA IARD SA*, para. 28; 27 February 2020, C-803/18, *AAS BALTA* v. *UAB GRIFS AG*, paras. 27 and 44.

against the insured on the basis of Article 13 (3) would circumvent the rules on jurisdiction in matters of tort or delict, as defined in Section 2 of Chapter II. Similarly, the Court highlights the risk that each injured person could then bring an action against the insurer on the basis of Article 13 (2) to benefit from the more favourable provisions of Articles 10 to 12, to subsequently bring an action against the insured, as a third party to these proceedings, based on Article 13 (3). On all these grounds, the Court orders that:

> "Article 13 (3) of Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that, in the event of a direct action brought by the injured person against an insurer in accordance with Article 13 (2) thereof, the court of the Member State in which that person is domiciled cannot also assume jurisdiction, on the basis of Article 13 (3) thereof, to rule on a claim for compensation brought at the same time by that person against the policyholder or the insured who is domiciled in another Member State and who has not been challenged by the insurer."

CHAPTER V

CONCLUSION

Many new developments have placed private international law in insurance matters at the centre of the attention of practitioners and scholars in recent years. The role of the ECJ in the field is remarkable in several respects. To start with, the ECJ has created a conflict of laws rule which operates at a macro-systemic level and assigns to national law the definition and characteristics of the civil liability regime for motor vehicles, which determines the compensation due by the insurer. It is then up to the Rome II Regulation to establish which national law applies in the specific case. Thus, the Regulation's provisions intervene at a micro-systemic level. In sum, the Court has actively participated in developing conflict of law rules that impact the insurance industry.

Yet the deference to national law to define the civil liability regime for motor vehicles is limited. The Court does not give *carte blanche* to national legislatures. Instead, EU law requires that compensation for damage must exist and not be disproportionate to the extent of the damage. In the *Petillo* case, Italian courts asked the Court whether these conditions were respected by Italian rules on limits to compensation due by the insurer for bodily micro-injuries resulting from car accidents.

The ECJ has held that this regime is compliant with EU law. Moreover, the compensation caps provided by Italian law were regarded as adequate in light of the insurance directives' *effet utile*. To reach this conclusion, the Court almost assessed the merits of the dispute underlying the national reference, which is quite unusual.

The Opinion of Advocate General Wahl stresses the benefits of the Italian statutory limitations, though these inevitably curb the national courts' discretion in fixing the amount of compensation in the light of the circumstances of the individual case. Nevertheless, such statutory limitations render compensation levels more predictable, enhancing legal certainty and reducing incentives for litigation. Moreover, insurance undertakings can make more accurate estimates of their financial risk exposure over time, which may have favourable effects on premium levels.

The reasoning followed by the ECJ in *Petillo* is similar to judgment No. 235/2014 of the Italian Constitutional Court, which shows a

remarkable convergence between the positions of both Courts. The Constitutional Court agrees that it is legitimate to set reasonable limits on the award of personal damage. However, according to this Court, this presupposes that the victim's interest in full compensation is outweighed by the public interest, as in this case, maintaining the economic viability of the compulsory motorcar liability insurance system.

Generally, there is an increasing number of judgments in which the ECJ has corrected national courts when interpreting and implementing legislation of European insurance directives with a national law bias. To maintain a balance in the interpretation of European law, the concept of autonomous interpretation was applied by the Court also to the notion of "indirect consequences" of a tort in the sense of the Rome II Regulation. This is therefore characterised as an autonomous notion of European law. Yet this approach is not convincing as the Court itself has continuously held that the civil liability regime is, in principle, a matter devolved to national law.

In private international law, applying the law of the State in which the accident occurred rather than that of the residence of the heirs can lead to unfair results, either by excess or by lack of compensation for damages due by the civil liability insurer. Before the entry into force of the Rome II Regulation, the Italian Court of Cassation, in a decision concerning the death of Italian citizens in a plane crash in Cuba, decided that their heirs were to be compensated according to the compensation principles and economic parameters of Italian law, their State of residence – and not according to the inadequate standards of Cuba where the accident occurred.

The concept of autonomous interpretation has also been a central element of the jurisprudence of the Court on compulsory insurance of civil liability as regards the notion of "use of vehicles". Indeed, the Court has adopted an expansive interpretation in several important judgments. According to this approach, even situations that do not involve a risk for road users fall under the notion of "use of vehicles". The ECJ is in contrast to the position of the national referring courts. Their requests for preliminary rulings suggested a restrictive interpretation of the "use of vehicles". By opting for the broad notion, the Court has expanded the scope of protection of the injured party. Though this position may be shared, it generates important consequences as it may lead to increased consumer costs. Indeed, any broader interpretation of "use of vehicles" inevitably increases civil liability insurance premiums.

One of the fundaments of the contract law of all Member States is freedom of contract. It implies the freedom to enter into any contract with any person in any form. However, Italian law imposes on insurance undertakings an obligation to contract; that is, to provide third-party liability motor insurance at the request of any potential customer. In its judgment of 28 April 2009 in the case *Commission* v. *Italian Republic*, the Court admitted that the obligation to contract restricts both the insurer's right of establishment and the freedom to provide services. This was based on settled case law, according to which the term "restriction" within the meaning of Articles 49 and 56 TFEU covers all measures that prohibit, impede or render less attractive the right of establishment or the freedom to provide services. Yet the Court subsequently had to decide whether this restriction was justified. The Commission argued that the obligation to contract is unjustified and disproportionate. However, the Court was convinced by the arguments invoked by Italy, especially by the need for the protection of prospective policyholders – in other words, the car owners who may lawfully use their cars only after having contracted third-party liability motor insurance. In particular, the Court agreed that policyholders, in their capacity as consumers, must not be discriminated against in relation to access to insurance and use of public highways. Indeed, driving without insurance is an offence, and the culprit faces hefty fines and the seizure of the car. Against this background, the obligation to contract both on insurance undertakings and motor vehicle users was accepted as a valid justification for restricting the freedom of establishment and providing services.

This ruling was criticised for having ignored private international law. According to this criticism, before a violation of the fundamental freedoms by an obligation to contract may be found, the law governing the contract under the Rome I Regulation needs to be established – and if it is possible to choose a national law that, unlike Italian law, does not foresee an obligation to contract, no violation is present in the first place.

Whereas the Court should have addressed the private international law dimension of the problem, the criticism is unfounded on the merits. Indeed, the decision would have been the same even if the Court had addressed these aspects. For, according to Article 7.4 *b)* Rome I Regulation, "a Member State may lay down that the insurance contract shall be governed by the law of the Member State that imposes the obligation to take out insurance" – and this is precisely what Italy did

in Article 180 (3) 3 PIC. Moreover, this provision reads: "The specific provisions relating to compulsory insurance, as provided by the State imposing the insurance obligation, shall prevail over the law applicable to the contract." Thus, according to the national conflicts of law rules implementing the Rome I Regulation, the Italian provisions on compulsory insurance mandatorily apply to insurance contracts entered into by foreign undertakings operating in Italy – irrespective of what the law applicable to the contract provides. Accordingly, even if the Court had considered the private international law side, it could not have decided otherwise.

The concept of "autonomous notions" in EU law, which requires a uniform approach in the interpretation of European directives and national implementation legislation, prompted the Court to pronounce important judgments not only concerning non-life insurance but also to linked policies, which affect the life insurance sector as well.

The most interesting case is that of unit-linked policies. Some national courts, for example, in Italy or Spain, classify these contracts not as insurance contracts but as financial investment contracts. This is submitted to be correct when, as often happens, the policyholder bears the financial risk inherent to the unit-linked policy. However, this jurisprudence is inconsistent with the case law of the ECJ. Starting with the *González Alonso* judgment, this court has consistently held that allocating the financial risk to the insurer is not a necessary element of the insurance contract. In this context, the concept of autonomous notions in EU law as defined by the Court takes on central importance. It requires a uniform approach in the interpretation of EU law and national implementation legislation of European directives.

These considerations are also relevant to unit-linked policies from the perspective of the Rome I Regulation. Depending on whether unit- or index-linked policies are characterised as insurance contracts or financial investment contracts, different conflict of laws provisions apply, which may lead to a different *lex contractus*. The Rome I Regulation contains special conflict rules for insurance contracts (Art. 7), while financial investment contracts are governed in principle by the Regulation's general conflict of law provisions (Arts. 3 and 4) unless a consumer contract is at issue (Art. 6). The problem is, therefore, one of characterisation, which enables the court to select an appropriate conflict of laws rule, which, in turn, determines the applicable law *(lex causae)*. In addition, national courts need to qualify the contract by

referring to the autonomous notion of a life insurance contract specific to EU law as established in the jurisprudence of the ECJ. Accordingly, unit- and index-linked contracts may be characterised as insurance contracts in the sense of Article 7 Rome I Regulation.

The concept of autonomous notions in EU law has also become relevant in another well-known case concerning gender differences in insurance premiums. In the *Test-Achats* judgment, the Court ruled unlawful the Directive provision that allowed Member States to postpone the application of unisex premiums indefinitely. The right to unisex premiums contained in the Directive had even been characterised as a human right in the sense of Articles 21 and 23 of the European Charter of Fundamentals Rights, which enshrine the right to equality between men and women. To define the intertemporal application of the new unisex premium regime, the European Commission has issued Guidelines. These determine the new contracts subject to the regime of unisex premiums by distinguishing them from contracts that remain subject to the previous regime allowing gender differences in premiums. These Guidelines are also inspired by the ECJ's concept of autonomous notions, which aims at the uniform application and interpretation of EU law in all Member States.

As regards international civil procedure law in insurance matters, this is regulated at the EU level in the Brussels I bis Regulation. Section 3 of Chapter II on jurisdiction in insurance matters focuses on protecting the rights of the policyholder, the insured and the damaged third party *vis-à-vis* the insurance undertaking. The notion of "matters relating to insurance" must not be interpreted in the light of the *lex fori* but conceived of as an autonomous notion. As clarified by the ECJ's case law, to be considered an insurance matter, "the action necessarily raises a question relating to rights and obligations arising out of an insurance relationship between the parties to that action". The only (disputed) exception to this rule is Article 13.2, which deals with the *forum* of the direct action – that is, the action by an injured party directly against the insurer, which is based not on contract but tort law in some Member States.

Generally, the Regulation's regime on jurisdiction in insurance matters is divided into an "ordinary regime" regulated in Section 1 ("General provisions") and Section 2 ("Special jurisdiction") of Chapter II and rules on "Exclusive jurisdiction" laid down by Section 6 of Chapter II. On this basis, Section 3 may be considered to provide for a "hybrid" regime on jurisdiction, inspired by both the ordinary regime

governed by Sections 1 and 2 and the mandatory regime on exclusive jurisdiction contained in Section 6.

The protection afforded by Section 3 to the policyholder, the insured and the damaged third party *vis-à-vis* the insurance undertaking is made dependent on the controversial condition that the counterpart of the insurance undertaking is domiciled in the European Union. Critics affirm that this provision entails a violation of the equality principle. Indeed, policyholders domiciled outside the EU are deprived of protection, though their status as weaker parties is not connected to their domicile. Thus, foreign policyholders are not protected against choice of court clauses imposed by EU-based insurance undertakings just because of their domicile. However, other authors have attenuated this criticism as courts of third States, which foreign policyholders may seize, are not bound by the Regulation in the first place.

For decades, European private international law on insurance has been shaped by free market impulses and dirigiste tendencies. As a result, there were pressures towards greater recognition of party autonomy in the choice of the law applicable to the contract as well as the competent jurisdiction, but also positions that strongly advocated a limitation of party autonomy. These contrasts were resolved in the Brussels I bis and Rome I Regulations. The compromise was achieved through the subdivision of the insured risks into "large risks" and "mass risks": Article 16.5 of the Brussels I bis Regulation grants full party autonomy concerning "large risks", as defined by Article 13 (27) of the Solvency II Directive (Directive 2009/138/EC). The Regulation thus recognises the freedom of the parties to choose the competent jurisdiction through a contractual clause. This rule is consistent with the provision of Article 7.2 of the Rome I Regulation. There, it is stated that "2. An insurance contract covering a large risk as defined in Article 5 *(d)* of the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations, and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance shall be governed by the law chosen by the parties in accordance with Article 3 of this Regulation".

In sum, the European legislature has wisely created an area of contractual freedom for insurance contracts covering large risks, where there is no need to protect the policyholder. The insurer and the policyholder are thus empowered to freely choose the law governing the contract and the jurisdiction competent to decide future disputes arising from the contract.

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