OPINION OF ADVOCATE GENERAL COSMOS

delivered on 21 October 1999 *

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I — Introduction

1. In the present case the Tribunal da Comarca de Setúbal (Portugal) has referred to the Court of Justice a number of questions for a preliminary ruling concerning the interpretation of the second Council Directive 84/5/EEC of 30 December 1983, regarding harmonisation of the laws of Member States in respect of civil liability arising from the use of motor vehicles. [1]

2. Essentially, those questions seek to define the rights of victims of road accidents who are members of the insured person's family, in the light of Community provisions relating to the insurance against civil liability arising from the use of motor vehicles.

3. Specifically, the questions are primarily directed to the issues whether the Second Directive obliges Member States to ensure that the compulsory insurance against civil liability arising from the use and movement of motor vehicles covers a loss even where liability is strict, that is to say where there is no fault, or whether, in the case of strict

* Original language: Greek.

1 — OJ 1984 L 8, p. 17, 'the Second Directive'.

liability, a Member State may exclude all compensation or whether that directive merely requires injury caused by error on the part of the driver to be covered, which would be a case of liability arising through fault. The question of the need for an interpretation consistent with Community law and the direct horizontal effect of the directive is also raised.

II — The relevant Community legislation

4. Measures to harmonise the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles have been taken since 1972 by means of directives.

5. Common to the first three relevant directives is the wish to facilitate the movement of vehicles and safeguard the interests of victims of road accidents in the Community, wherever that accident may occur. Thus, their aim is not only to facilitate free movement within the common market by abolishing border checks of the green card which establishes that the vehicle is insured, but also to impose some minimum rules for the compulsory insurance against civil liability arising from the use of vehicles.

6. Council Directive 72/166/EEC of 24 April 1972, concerning 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 [2] ('the First Directive'), provides for the abolition of green-card border checks and the creation of compulsory civil liability insurance in all Member States, covering loss and damage caused throughout the Community territory.

7. Adopting the principle of compensation of victims of road accidents where liability has been established, Article 3(1) of the First Directive provides:

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

8. With the Second Directive, the Community legislature sought to harmonise the various elements of that compulsory insurance with a view to guaranteeing a minimum level of protection to road accident

2 — OJ, English Special Edition II, p. 360.

victims and reducing discrepancies within the Community as to the scope of that insurance.

9. The Second Directive concerns the scope, that is to say the extent of cover provided by compulsory insurance, for which it sets maximum limits. More specifically, Article 1(1) and (2) of the Second Directive provides:

'1. The insurance referred to in Article 3(1) of Directive 72/166/EEC shall cover compulsorily both damage to property and personal injuries.

2. Without prejudice to any higher guarantees which Member States may lay down, each Member State shall require that the amounts for which such insurance is compulsory are at least:

— in the case of personal injury, ECU 350 000 where there is only one victim; where more than one victim is involved in a single claim, this amount shall be multiplied by the number of victims,

— in the case of damage to property ECU 100 000 per claim, whatever the number of victims.

Member States may, in place of the above minimum amounts, provide for a minimum amount of ECU 500 000 for personal injury where more than one victim is involved in a single claim or, in the case of personal injury and damage to property, a minimum overall amount of ECU 600 000 per claim whatever the number of victims or the nature of the damage.

...'

10. Article 3 of that Directive provides:

'The members of the family of the insured person, driver or any other person who is liable under civil law in the event of an accident, and whose liability is covered by the insurance referred to in Article 1(1) shall not be excluded from insurance in respect of their personal injuries by virtue of that relationship.'

11. The ninth recital of the preamble to the Second Directive refers to that provision and states that 'the members of the family of the insured person, driver or any other

person liable should be afforded protection comparable to that of other third-parties, in any event in respect of their personal injuries'.

12. In Annex I, Chapter IX, entitled 'Harmonisation of laws' under F, 'Insurance',[3] as amended by the Act concerning the conditions of membership of the Kingdom of Spain and the Portuguese Republic and the adjustment of the treaties, Article 5 of the Second Directive states:

'1. Member States shall amend their national provisions to comply with this Directive not later than 31 December 1987. They shall forthwith inform the Commission thereof.

2. The provisions thus amended shall be applied not later than 31 December 1988.

3. Notwithstanding paragraph 2:

(a) The Kingdom of Spain, the Hellenic Republic and the Portuguese Republic shall have a period until 31 December 1995 in which to increase guarantees to the levels required by Article 1(2). If they avail themselves of this option the guarantee must reach, by reference to the amounts laid down in that Article:

— more than 16% not later than 31 December 1988,

— 31% not later than 31 December 1992;

...'

13. The third Council Directive 90/232/EEC of 14 May 1990 concerning the harmonisation of laws of Member States relating to the insurance of civil liability arising from the use of motor vehicles[4] ('the Third Directive'), was adopted in order to clarify certain provisions relating

3 — The Treaty and Act of Accession to the EEC and the EAEC were signed on 12 June 1985 (OJ 1985 L 302); accession of the Portuguese Republic to the Communities took place on 1 January 1986.

4 — OJ 1990 L 129, p. 33.

to compulsory insurance, because there were still significant discrepancies in the cover provided by that insurance. [5]

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

15. Article 1(1) of the Third Directive states that 'the insurance referred to in Article 3(1) of Directive 72/166/EEC shall cover liability for personal injuries to all passengers, other than the driver, arising out of the use of a vehicle.'

16. Finally, Article 6 of Directive 90/232 provides:

'1. Member States shall take the measures necessary to comply with this Directive not later than 31 December 1992. They shall forthwith inform the Commission thereof.

2. By way of exception from paragraph 1:

— the Hellenic Republic, the Kingdom of Spain and the Portuguese Republic have until 31 December 1995 to comply with Article 1 and 2,

...'

III — The facts and the relevant national legislation

17. On 12 February 1995, a motor vehicle belonging to Mr Mendes Ferreira, driven by one of his sons, was involved in an accident causing the death of another child, aged 12, also a son of the owner of the vehicle and a passenger in that vehicle. No other vehicle was involved and the national court found that no blame attached to the driver.

5 — See, in particular, the third recital in the preamble to the Third Directive.

18. By a contract of insurance, Mr Mendes Ferreira had transferred any civil liability in respect of the use of the vehicle in question to the Companhia de Seguros Mundial Confiança SA ('Mundial Confiança'), the sum insured being ESC 50 000 000.

19. Mr Mendes Ferreira and his wife brought an action before the Tribunal da Comarca de Setúbal seeking an order requiring Mundial Confiança to compensate them for their loss. Mundial Confiança maintained that the Portuguese law in force at the material time excluded any obligation to pay compensation.

20. According to the national court, the version of Article 504(2) of the Portuguese Civil Code ('the Civil Code') in force at the material time provided that, in the case of transport provided free of charge, the person providing it was generally liable only for damage or loss caused by fault on his part. That provision was interpreted by the Portuguese courts as meaning that a passenger carried free of charge was required to prove fault on the part of the driver and that that fault was the cause of the accident, in order to obtain any compensation.

21. Article 504 of the Civil Code was amended on 6 March by Portuguese Decree Law 14/96 of 6 March 1996. The amended text of that article provided, in paragraph 3, for the possibility for passengers carried free of charge to bring actions founded on strict (no-fault) civil liability, albeit only in respect of personal injury. [6]

22. According to the national court, the preamble to Decree-Law 522/85 of 31 December 1985 which transposed the Second Directive into Portuguese law, states in particular that compulsory motor insurance cover must be extended to passengers carried free of charge. [7] Given that, where the driver was at fault, passengers carried free of charge were protected by civil liability for tortious conduct, as laid down in Article 483 et seq. of the 1966 Civil Code it was only within the framework of strict civil liability that the legislature could extend compulsory motor insurance cover to passengers carried free of charge. However, that protection was denied by Article 504(2) of the Civil Code.

23. Furthermore, the national court explains that even though domestic law recognised the right of a passenger carried free of charge to obtain compensation in a case of no-fault liability, Article 508(1) of the Civil Code limits the amount of compensation for a road traffic accident in the absence of any fault on the part of the

6 — As stated in the order for reference, the preamble to Decree-Law 14/96 justifies the amendment of Article 504 of the Civil Code by the need to adapt domestic law to the Third Directive, and in particular to Article 1 thereof.

7 — The national court adds that, as confirmed in the judgment of the Supremo Tribunal de Justiça (Supreme Court of Justice) of 23 September 1997 (*Boltim do Ministério da Justiça*, 469, p. 538) 'it is important to emphasise that the objectives set out in the preamble to Decree-Law 522/85, in accordance with the principles contained in the second Council Directive of 30 December 1983, were not legally embodied in that decree-law... Those objectives consisted in extending compulsory motor vehicle insurance to cover passengers carried free of charge'.

person responsible. Specifically, where there is death or injury, the maximum amount of compensation payable in the event of first death or injury is twice the amount that may be awarded by the Portuguese courts of second instance which, since 1987, has been ESC 2 000 000.[8] In other words, where there is no fault, it is the double of that amount, that is to say, ESC 4 000 000, that may be awarded by way of compensation.

24. The national court asks whether, having regard to Article 1(2) and Article 5(2) of the Second Directive, as amended by the Act of Accession, Member States may fix maximum limits for the compensation of victims of road traffic accidents where the driver responsible was not at fault that are lower than the minimum amounts of compulsory insurance cover laid down by that directive. The national court takes the view that the Second Directive makes no distinction between civil liability on the basis of fault on the part of the driver and strict, no-fault liability.

IV — The questions referred to the Court

25. In order to settle the dispute before it, the Tribunal de Comarca de Setúbal is seeking a preliminary ruling from the Court of Justice on the following questions:

'(1) Does Article 3 of Directive 84/5/EEC require compulsory civil liability motor vehicle insurance to cover injury caused to the members of the family of the insured person or of the driver of the vehicle even where they are carried free of charge and where only civil liability, without fault, for materialisation of risk arises, or may the Member State exclude the award of compensation in such cases?

(2) Do the amounts of minimum cover laid down by Article 1(2) of Directive 84/5/EEC also apply to cases where strict civil liability, without fault, for materialisation of risk arises, or may the Member State lay down maximum limits for compensation in cases where there is no fault on the part of the driver of the vehicle responsible for the accident, that are lower than the minimum amounts laid down in Article 1(2)?

(3) Must national courts interpret domestic law in such a way as to render it consistent with a Community directive where the directive has been imperfectly transposed or where [incompati-

8 — Article 20(1) of Law 38/1987 of 23 December 1987. As the national court points out, that amount has remained unchanged despite the significant depreciation of Portuguese currency since that time.

ble] pre-existing provisions of domestic law remain in force?

(4) Must national courts interpret domestic law in such a way as to render it consistent with a Community directive even where such interpretation is contrary to the normal meaning and scope of its provisions of domestic law, or where such interpretation is consistent with the intention of the national legislature but that intention has not properly been expressed in the legal text in question?

(5) Must national courts interpret domestic law in such a way as to render it consistent with a Community directive even in disputes involving only private individuals?

(6) Must national courts interpret domestic law in a way which is consistent with the provisions of Article 1 of Directive 90/232/EEC, even with regard to an accident which occurred before the expiry of the period allowed for transposition of that provision into domestic law?

(7) In the event that it is not possible to interpret domestic law in such a way as to render it consistent with a directive, does the primacy of Community law require national courts to disapply provisions of domestic law which are inconsistent with that directive, even in disputes involving only private individuals?'

V — Replies to the questions referred to the Court

26. As a preliminary point, it must be observed that the accident which gave rise to the dispute in the main proceedings occurred on 12 February 1995, that is to say, after the first two directives became operative but before expiry of the transposition period allowed to the Portuguese Republic under the Third Directive. [9]

27. The questions referred must be examined in two groups. First, it is necessary to clarify the system established by the three directives for civil liability insurance in respect of the use of motor vehicles, as emerges from their provisions and to reply to the first two questions relating to that issue (A). Second, if need be, I shall examine the five other questions, which relate to the issue of the interpretation of domestic law in a manner consistent with Community law and to the horizontal effect of the directives (B).

9 — It should be remembered that Article 6(2) of the Third Directive gave that Member State until 31 December 1995 to comply in particular with Article 1 which requires insurance to cover liability for personal injury for all passengers other than the driver, arising from use of a vehicle.

A — *The system established by the three directives*

(a) General

28. First, the First Directive makes civil liability insurance arising from the use of motor vehicles compulsory. The Community legislature requires all Member States to take all appropriate measures to ensure that civil liability is covered by insurance, but leaves them with a discretionary power to determine, at national level, the extent of the liability covered and the terms and conditions of the insurance.

29. Second, the Second Directive, which essentially forms part of the framework established by the First, concerns the scope of the discretionary power left to Member States to determine the extent of the liability covered and the terms and conditions of the insurance. It provides that members of the family of the insured person, driver or any other person whose civil liability for an accident has been incurred and who is covered by the insurance cannot, by virtue of that relationship, be excluded from the insurance cover for their personal injuries.

30. In other words, the Second Directive is designed to grant members of the family of the persons mentioned above the same protection as that accorded to third parties. In accordance with the First Directive, Member States retain competence to determine the extent of the third-party cover and the terms and conditions thereof, within the framework of the conditions laid down by both the First and the Second Directive. However, whatever the degree of protection accorded to third parties, [10] the purpose of the Second Directive was to prevent the family relationship from constituting a ground for exclusion, that is to say, to grant members of the family of the insured person, driver or any other liable person, the same protection as that accorded to third parties, as the Commission rightly points out at point 12(b) of its written observations.

31. Consequently, where in a Member State, compulsory cover extends to third-party passengers, passengers who are members of the family of the insured person, driver or any other liable person must also be covered. However, in a Member State which has not made the cover of third-party passengers compulsory, passengers who are members of the family would not be covered by the insurance under the Second Directive, since in that situation the protection is the same and the degree of relationship cannot be used as a means of exclusion.

32. Finally, the Third Directive resolved the problem of personal injury cover for passengers in a vehicle, whoever they may be, with the exception of the driver. As stated

10 — For example, in one Member State, insurance extends to a third party who is a passenger whereas in another State, that is not the case.

in the fifth recital in its preamble, compulsory insurance cover for passengers of motor vehicles revealed gaps in certain Member States and these gaps needed to be filled in order to protect this 'particularly vulnerable category of potential victims'.

33. Accordingly, the specific difference between the provisions of the Second Directive and those of the Third Directive is that whereas with the Second Directive the Community legislature seeks to prevent the degree of relationship from continuing to be a ground for excluding insurance cover, with the Third Directive its concern relates to the fundamental question of the scope of insurance cover accorded to passengers in motor vehicles.

(b) Nature of the civil liability

34. As the Italian Government and the Commission both point out in their written observations, it follows from the wording of the First Directive and from the following two directives that although they deal with cover for civil liability, they are not, however, concerned with the fundamental question of what form that liability might take, that is to say, they make no distinction between liability due to fault and strict liability or liability in the event of materialisation of risk.

35. To be more specific, it is not disputed that civil liability must be established in order to set in motion the protective mechanism of the Community directives. That means that a specific action (the fact of having caused an accident whilst using a motor vehicle) must be linked to a specific person, to whom it will be imputed for the purposes of compensation.

36. All legal systems start from the premiss that, in principle, responsibility for the loss or damage lies with the person who has sustained it (*casum sentit dominus*), unless there is a particular reason which requires and justifies the transfer of the burden of it to a third party, who must ultimately assume the obligation to pay compensation. [11] Legal systems base non-contractual liability in principle on the fault of the person who caused the loss or damage.

37. However, legal systems also have to deal with cases of strict liability, that is to say unconnected with fault. A special type of strict liability is liability for materialisation of risk. The characteristic feature of that liability is that the creation or failure to remove a source of danger is used as a criterion for attributing blame. That criterion thus enables the obligation to compen-

11 — See in particular, P.K. Kornilákis, 'Η ενθυνη απο διακινδυνευση. Δογματιχη και (Risk liability. Dogmatic and l politico-legal approach). Thessalonica, 1982, in the collection' (Law and social issues), No. 1 (227 pages), p. 36 et seq. and p. 113 et seq.

sate the loss sustained by the injured party to be imposed.

38. Risk liability is unconnected with fault on the part of the person responsible and sometimes it does not even require any unlawful conduct or, more generally, any human involvement. [12] Acknowledgement of that liability stems from the gradual expansion of the principles of social justice and the idea that, since the nature and the rapid evolution of technical civilisation has enabled man to carry out certain activities, by making available to him machines and procedures which constitute potential sources of danger to third parties (for example, the use of natural forces, the operation of motor vehicles, etc.), it is fair and just that responsibility for damage caused does not lie with the injured persons but with those who created or had control of the dangers, and this is so, in general, irrespective of any fault or any particular conduct. In a sense, the burden placed on these persons is, as it were, the price they have to pay for the legal acknowledgement of the sources of danger, which, after all, determine the corresponding obligations. [13]

39. In many legal systems, this liability arising from the use of a vehicle is strict (risk liability) and unrelated to fault. Such is the case, for example, in Greek, [14] French, [15] and German [16] law. It must be pointed out that, unlike the majority of continental laws, English law makes no provision for strict liability for loss or damage caused by the operation of motor vehicles but requires the existence of fault ('negligence'). [17]

40. At first sight, the directives do not refer to the issue whether liability arising from the use of a motor vehicle is subjective, that is to say that it presupposes fault, intention to harm or negligence on the part of the person responsible as a criterion for attributing liability for loss or damage or whether, on the contrary, it is objective, that is to say, whether it arises without any element of fault, by employing the risk as a criterion for attributing it.

41. Has this matter deliberately been left to the discretion of Member States? The reply to that question will be inferred from a grammatical, systematic and teleological

12 — Accordingly, the event giving rise to that liability may be a physical event (for example, the behaviour of an animal or the collapse of a building) or a technical event (for example, the operation of a motor vehicle); see, in particular, A.S. Georgiadis, '(Law of obligations, General part), Athens, P.N. Sakkoulas, 1999 (in the collection' [Law and economy], 779 pages); paragraph 65, points 1 et seq. and P. Kornilákis, already cited, p. 127 et seq.

13 — See A. Georgiadis, cited above, paragraph 65, point 2.

14 — See A. Georgiadis, cited above, paragraph 65, points 1 et seq.

15 — For a presentation of the system in force in French law, see Y. Lambert-Faivre, 'Insurance law', Paris, *Précis Dalloz*, 10th edition, 1998 (in the collection 'Private law', 837 pages), p. 509 et seq., paragraphs 724 et seq. and p. 539 et seq., paragraphs 754 et seq.

16 — For a comparative analysis of risk liability in contemporary legal systems, see, for example, A. Georgiadis, cited above, paragraph 65, points 9 et seq. and P.K. Kornilákis, cited above, passim.

17 — See, in particular, R.F.V. Heuston and R.A. Buckley, *Salmond and Heuston on the law of torts*, London, Sweet and Maxwell, 21st edition, 1996 (592 pages), p. 223 et seq. and B.S. Markessinis and S.F. Deakin, *Tort law*, Oxford, 3rd edition, 1994 (758 pages), p. 268 et seq.

interpretation of the provisions of the three directives.

42. First, by harmonising national laws, the directives are designed in particular to ensure that the interests of victims of road traffic accidents occurring within the Community are safeguarded, wherever the accident occurs. That is why, by adopting the principle of compensation for victims of road accidents as from the time when liability has been established, Article 3(1) of the First Directive provides that each Member State is to take all appropriate measures to ensure that *civil liability* in respect of the use of vehicles which are normally based in its territory *is covered by insurance. The extent* of the liability covered and the terms and conditions of the cover are to be determined on the basis of those measures.

43. The wording of Article 3(1) of the First Directive clearly shows that the Community legislature: (a) makes no distinction between liability for fault and risk liability. [18] More specifically, it refers to an obligation to cover civil liability, whatever that may be; once it has been established, it must be covered by insurance. Accordingly, on a literal interpretation of the directive, it can be maintained that in so far as the directive does not refer to the various forms of civil liability and makes no distinction between them, the Community legislature has left the determination of the nature of the civil liability to the discretion of the Member States; (b) is concerned with laying down rules relating not to the determination of the *nature* of the liability but to the introduction of an *obligation* to insure and to the determination of the *scope* of that obligation. For example, it deals with the question whether that insurance is to cover only personal injury and damage to property, as Article 1(1) of the Second Directive in fact provides, or (also) non-pecuniary damage. Similarly, it lays down the terms and conditions of the cover. The wording is extremely broad and takes account of the existing disparities between national laws with regard to the extent of the cover. [19] In other words, as the Court has observed, [20] Article 3(1) of the First Directive '[in its] original version... left it to the Member Sates, however, to determine the damage covered and the terms and conditions of compulsory insurance.'

44. The Community legislature did not intend to require Member States to adopt a particular type of liability (liability for

18 — It should be borne in mind that at point 34 of his Opinion in Case C-129/94 *Ruiz Bernáldez* [1996] ECR I-1829, Advocate General Lenz drew attention to the following: 'Upon reading the directives, one is struck by the fact that they do not lay down any specific requirements regarding the relationship between the parties to the contract of insurance. The directives are silent as to the consequences of a breach of a duty of care by the insured or by the person causing the damage. It can be concluded from this that the Member States or the contracting parties are relatively free to define the relationship between the parties to the contract of insurance, but their freedom may, of course, be exercised only in compliance with the other provisions of the directives. Consequently it seems to be wholly permissible for legal consequences to be linked to the failure of the insured party or the driver to observe a duty to take due care.'

19 — See in that respect, point 25 of the Opinion of Advocate General Lenz in *Ruiz Bernáldez*, cited above, p. 18.

20 — Paragraph 15 of the judgment in *Ruiz Bernáldez*, cited in footnote 18.

fault or no-fault liability, that is to say risk liability), but it does require the civil liability in question, where it arises under national law, to be covered by insurance. The contention that the Community provisions do not go that far and leave Member States the right to include the concept of fault among prerequisites for civil liability can find support in other compelling arguments, derived from the Court's interpretation of other provisions of the First Directive.

45. In Case 64/83 *Bureau Central Français* [21] a question arose concerning the interpretation of Article 2(2) of the First Directive, which provides that for vehicles which are normally based in the territory of a Member Sate, the provisions of that directive, except for Articles 3 and 4, are to take effect after an agreement has been concluded between national insurance bureaux, under the terms of which 'each national bureau guarantees the settlement, *in accordance with the provisions of its own national law on compulsory insurance*, of claims in respect of accidents occurring in its territory caused by vehicles normally based in the territory of another Member State, whether or not such vehicles are insured' (emphasis added).

46. In an effort to define the scope of that provision of Article 2(2), Advocate General Sir Gordon Slynn drew attention to the following: [22] 'There is no absolute obligation to ensure that liability exists in every case for injury or loss caused by a vehicle, or that such liability shall be identical in all the Member States.... However desirable it may be that the law on compulsory insurance for vehicle accidents should be identical in each Member State of the Community, so that the citizen knows that he will be covered everywhere on a uniform basis, it does not seem to me that this directive goes that far. It abolished the need for green card control at the frontier whilst leaving intact the provisions of national law on compulsory insurance save where express obligations were imposed, as for example in Article 3.'

47. In its judgment in the same case, the Court followed its Advocate General in ruling [23] that 'the expression "provisions of national law on compulsory insurance" contained in Article 2(2) of Directive No. 72/166 must be understood as referring to *the limits and conditions of civil liability* applicable to compulsory insurance, provided always that the driver of the vehicle at the time at which the accident occurred is deemed to be covered by valid insurance in

21 — [1984] ECR 689.

22 — See the Opinion in *Bureau Central Français*, cited above, in footnote 21.

23 — Paragraph 29 of the grounds and paragraph 1 of the operative part of the judgment.

conformity with that legislation.' (emphasis added).[24] In other words, the Court essentially took the view that the directive leaves it for the Member States to define the conditions under which civil liability arises, among which there manifestly has to be included the problem whether that liability is objective or subjective, in which case it is necessary to examine whether or not the evidence of fault is required.

48. Moreover, a teleological interpretation of the abovementioned provision provides further support for my conclusion that the Community legislature requires cover for *all civil liability* arising from the use of motor vehicles, whether that liability be objective or subjective, yet without imposing the adoption of a particular type of liability. The fundamental aim of the Community legislature is to protect victims of road accidents by means of compulsory insurance against civil liability;[25] it did not intend to put that protection at risk by leaving the cover of that liability by insurance to the discretion of the national legislature.[26]

49. In other words, I take the view that the Community legislation did not intend to allow Member States, where they recognise civil risk liability arising from the use of a motor vehicle, to restrict the protection resulting from the directives solely to cases where there is fault (intention to harm or negligence) on the part of the person responsible in law or where the fault attains a certain degree (for example, intention to harm or gross negligence). In such a situation, the protection afforded by the directives and the harmonisation sought would in all essential respects be non-existent and Article 3(1) of the First Directive would be deprived of all practical effect. Therefore, where civil liability under national law is established, the protection afforded by the directives constitutes the unavoidable[27] consequence of this.

50. Moreover, as I have pointed out, in many legal systems, liability in respect of

24 — See also C. Berr 'Droit européen des assurances: accidents de la circulation causés dans un État de la CEE par un véhicule étranger,' in *Droit européen des assurances*, 1984 (pp. 643 to 653, at p. 650), in which he expresses some reservations about this expression.

25 — See also point 21 et seq. of the Opinion of Advocate General Lenz in *Ruiz Bernáldez*, cited in footnote 18.

26 — The fact that the protection of victims is a fundamental aim of Community legislation is also apparent from the sixth recital in the preamble to the Second Directive, according to which 'it is necessary to make provision for a body to guarantee that the victim will not remain without compensation where the vehicle which caused the accident is uninsured or unidentified', although the Member States remain free to make the compensation payable by that body subsidiary or non-subsidiary. As the Court pointed out in paragraph 17 of its judgment in *Ruiz Bernáldez*, cited in footnote 18, Article 1(4) of the Second Directive strengthened the protection of victims by requiring Member States to create or approve bodies responsible for paying compensation for damage to property or personal injury caused by unidentified or uninsured vehicles.

27 — In *Ruiz Bernáldez*, cited in footnote 18, where the question was the extent to which a contract could exclude from compulsory insurance cover compensation for loss and damage caused by intoxicated drivers, the Court held (paragraph 18) that in view of the aim to protect victims of road accidents, 'stated repeatedly in the directives, Article 3(1) of the First Directive, as developed and supplemented by the Second and Third Directives, must be interpreted as meaning that compulsory motor insurance must enable third-party victims of accidents caused by vehicles to be compensated for all the damage to property and personal injury sustained by them, up to the amounts fixed in Article 1(2) of the Second Directive'. However, the Court continued (paragraph 19): 'Any other interpretation would have the effect of allowing Member States to limit payment of compensation to third-party victims of a road traffic accident to certain types of damage, thus bringing about disparities in the treatment of victims depending on where the accident occurred, which is precisely what the directives are intended to avoid. Article 3(1) of the First Directive would then be deprived of its effectiveness.' It concluded (paragraph 20): 'That being so, Article 3(1) of the First Directive precludes an insurer from being able to rely on statutory provisions or contractual clauses to refuse to compensate third-party victims of an accident caused by the insured vehicle.'

the use of vehicles is strict (risk liability) and unrelated to the existence of fault although English law does not prescribe strict liability for damage caused by the use of vehicles and requires that there be fault ('negligence'). Thus, the fact that national legislation makes fault a precondition for establishing civil liability covered by compulsory insurance cannot be regarded as equivalent, in essence, either to a stratagem by Member States for avoiding their obligations under Community legislation, or to an obstacle blocking the path that is to lead to achievement of free movement of goods and persons, since the question of the nature of the liability is a matter for the national authorities.

51. To accept the contrary solution would raise the question whether the Community directives require Member States which do not prescribe strict liability for damage caused by the use of vehicles to alter the conditions under which civil liability is incurred and to envisage in those situations introducing strict, or risk, liability.

52. However, as I have pointed out, in so far as that requirement results neither from the letter or the spirit of the Community legislation, the harmonising obligation laid down by the directives has not, in my view, become hostage to the particularities of national legal systems, which would be contrary to the principle that Community law takes precedence over national laws.

53. In the result, a literal, systematic or teleological interpretation of the provisions in question shows that the definition of the conditions under which civil liability in respect of the use of motor vehicles arises, in other words the question whether fault is required or not, falls within the competence of the Member States.

54. Those considerations lead me to conclude that Community law regarding the insurance against civil liability has not completely harmonised individual civil liability regimes. The Community legislation is concerned with compulsory insurance but not civil liability. That is why none of the three directives contains any provision taking account of the possible existence of different sets of rules governing civil liability, that is to say, national rules governing liability for an event that is not due to fault (strict or risk liability) the terms and conditions of which may differ, primarily with regard to the amounts of compensation, from those of a parallel set of rules governing civil liability based on fault on the part of the driver.

(c) Reply to the first two questions

(1) Reply to the first question

55. By its first question, the national court is asking this Court to say whether Article 3 of the Second Directive requires compulsory insurance against civil liability in respect of the use of motor vehicles to cover loss or damage sustained by members of the family of the insured person or of the driver of the vehicle, even where those persons are carried free of charge and where only strict liability, without fault, arises, or whether the Member State may exclude all compensation in such cases.

56. In accordance with the foregoing analysis, it is for the national court to interpret national law as it stood at the material time in order to establish whether a passenger carried free of charge who has become the victim of an accident in which there was no fault on the part of the driver must be covered by the insured person's compulsory insurance scheme.

57. Furthermore, where the national law applicable requires passengers who are not members of the family of the insured person or driver of the vehicle to be covered, it follows from Article 3 of the Second Directive that, as from the date on which the period allowed for transposing the directive into Portuguese law expired, any contractual or legislative provision which excludes a victim of an accident, who finds himself in the legal position of a third party, merely and solely because he is a member of the family of the insured person or the driver, is to be disapplied. On the other hand, if the national law in force does not require passengers to be covered, Article 3 of the Second Directive cannot be invoked in order to bring a passenger who is a member of the family of the insured person or driver within the ambit of the obligation to provide cover.

(2) Reply to the second question

58. The second question seeks to determine to what extent the minimum capital sums insured as laid down in Article 1(2) of the Second Directive are applicable to situations where strict civil liability, without fault, arises or whether the Member State may legislate to the effect that, if no fault can be attributed to the driver of the vehicle which caused the accident, the maximum limits of the compensation payable are to be lower than those limits.

59. The Commission wonders whether a reply to that question is really of assistance in deciding the case in the main proceedings.

60. In my view, although the reply to the first question itself contains many elements of the reply to the second question, the

reply to the second question cannot be regarded as unnecessary for deciding the case in the main proceedings, since a number of points merit a more thorough analysis.

61. Specifically, it follows from Article 1(2) of the Second Directive that, once civil liability arises and in view of the fact that the compensation must cover the actual harm (personal injury or damage to property), the minimum capital sums prescribed by that article must be adhered to, whatever the nature of the civil liability.

62. Accordingly, any national legislative measure which, primarily because the type of liability provided for is strict liability, sets amounts of compensation lower than the minimum sums prescribed by the Second Directive in respect of compulsory insurance, is not consistent with that directive and must be disapplied.

B — *The questions regarding interpretation in a manner consistent with the directives and horizontal effect of the directives*

63. In its last five questions, the national court raises issues relating to the obligation to interpret the national provisions in a manner consistent with Community law and to recognition of the direct horizontal effect of the provisions of the directives; in that respect, it starts from the premiss that the relevant Community legislation may impose rules relating to the type of liability (strict or not) and, consequently, to the corresponding differentiation in the obligation to provide cover for that liability.

64. In view of the foregoing, I have therefore concluded that the Community directives governing compulsory insurance against civil liability in respect of the use of motor vehicles do not impose any obligation on the Member States to prescribe a particular type of liability and, consequently leaves them with every latitude to regulate this matter, and I have pointed out that the Community legislation concerns in particular the scope of the compulsory insurance against that liability and imposes limits which must be observed by the Member States. Examination of those questions is therefore superfluous as they are of no assistance in deciding the case in the main proceedings.

V1 — Conclusion

65. I therefore propose that the Court reply to the questions referred by the Tribunal da Comarca de Setúbal as follows:

(1) Article 3 of the second Council Directive 84/5/EEC of 30 December 1983on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles must be interpreted as meaning that such insurance must provide passengers who are members of the family of the insured person or driver of the vehicle the same protection as that provided for by national legislation for passengers who are not members of the family.

(2) Article 1(2) of the Second Directive must be interpreted as meaning that the minimum amounts of cover laid down in that article are applicable to situations where civil liability on the part of the insured person has been incurred, regardless of whether there are different national regimes governing civil liability based on the existence or non-existence of fault.