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Questions put forward by the 5th Directive

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Mr President,
Ladies and Gentlemen,
Dear Colleagues,

Mr Robert Mulac of the European Commission was scheduled to participate in the programme. Unfortunately, for health reasons, he is unable to be with us today. This is why the president asked me to take his place in order that the questions put forward by the fifth Motor Insurance Directive could be dealt with during this conference.

It goes without saying that I will not be talking on behalf of the Commission. My opinion will be that of the Council of Bureaux which is the body responsible for managing the "Green Card system" and which, as such, is specifically focussed on all the developments of the European Regulations as regards motor insurance.

I will start my talk by recalling that the 5th directive was adopted on 11th May 2005 with a view to improving and modernising the cover offered by compulsory insurance to victims of road traffic accidents, to fill in the gaps, to clarify specific provisions of existing Directives and to remedy frequently occurring problems in order to create a more efficient single market for motor insurance.

To this effect, the directive modifies and supplements the text of the four first directives previously adopted on the subject of motor insurance between 1972 and 2000. It had to be applied by the Member States by 11th June 2007 at the latest. According to the information I have on me, only ten Member States have respected this deadline. It should however be noted that, according to the same information, the majority of Member State legislation will be adapted before the end of this year.

What are the questions put forward by this new community text?

Since its publication, this new text has given rise to different questions relating to its interpretation which were put forward to the Commission mainly by the Member States but also by the Council of Bureaux.

My suggestion is to review some of these questions and at the same time to try and bring replies which take into account the opinions expressed by the Commission.

1. The change of the concept: normally based

By way of a court ruling pronounced in 1992 (C73/89), the Court of Justice decided that when a vehicle carries, at the time of crossing the border, a registration plate which is normally issued by the authorities of a Member State but which is false in view of the fact that in reality it constitutes a plate which belongs to another vehicle, this vehicle must be considered as being normally based in the territory of the State which issued the plate in question.

This jurisprudence, which is coherent with the definition of normally based concept written down in the first directive, can have as a consequence, that a vehicle may be normally based in a Member State which has nothing to do with the former. This is not a very satisfactory situation for the national bureau which is obliged, according to conventions between bureaux, to reimburse the cost of the accident to the bureau of the Member State where this accident took place. In order to put an end to this dissatisfaction, the Council of Bureaux had suggested to the Commission to provide that, for all vehicles carrying a plate which is not or no longer legally issued, the normally based concept will be, in settlement of any claim, the territory of the Member State where the accident took place.

This suggestion was warmly received. However, the text kept by the directive differs somewhat from the suggestion of the Council of Bureaux. It concerns the issue of a plate which does not correspond or no longer corresponds to the vehicle involved in the accident. The question asked therefore was to know in which situations the wording kept by the directive corresponded. In a document entitled "Main conclusions of the meeting of 28 September 2006 on the application of the 5th Directive", the Commission made it known that the new text had to be understood as being extensive and that it covered a broad range of situations, notably those where the plate has been falsified but more so those where the plate has been suspended or has expired.

This last piece of information indirectly brings an answer to the question of knowing whether a vehicle carrying a recently expired temporary plate must be considered as being normally based in the Member State that issued the plate. The response is overwhelmingly negative. The Council of Bureaux has well taken note and will adapt its conventions as a result.

2. Insurance Checks

The first Directive, in its original version, held that the Member States had to refrain from making checks on the insurance of vehicles normally based in the territory of other members. It was added that the same abstention was to be applied for vehicles coming from another Member State but normally based in a third State. In this case, however, random checks were still permitted.

As a reminder, the withdrawal of insurance checks at intracommunity borders was the main aim of the first Directive. This was carried out by creating a legal fiction according to which all vehicles based in a Member State are presumed to be insured when being driven in the territory of other Member States, even if in reality, it is not. The protection of injured persons is insured by each national bureau undertaking to proceed to their reimbursement whether the foreign vehicle is insured or not.

This provision was slightly modified by the fifth Directive. It now reads as follows: "Member States shall refrain from making checks on insurance against civil liability in respect of vehicles normally based in the territory of another Member State and in respect of vehicles normally based in the territory of a third country entering their territory from the territory of another Member State. However, they may carry out non-systematic checks on insurance provided that they are not discriminatory and are carried out as part of a control which is not aimed exclusively at insurance verification".

It clearly appears in this new text that the Member States are authorised to check the insurance situation of foreign vehicles whether they come from third countries or other Member States. This issue was hotly debated and some Member States thought that they had acquired this right even under the old wording.

The problem at the moment is knowing how the police authorities can, solidly, check the insurance situation of vehicles coming from other Member States. There is no problem for vehicles coming from third countries. In accordance with Article 7 of the 1st Directive, they must be the subject of a valid Green Card. Conversely, this internationally recognised document is no longer obligatory for vehicles registered in the Member States and the insurers have not been systematically issuing Green Cards for a number of years now.

This new situation has brought about controversy: some think that the registration plate allowing for the establishment of the normally based concept in such or such Member State constitutes proof of insurance, others, on the other hand, think that the police authorities are right in demanding proof of insurance. The Council of Bureaux, faced with two entirely opposite views, decided to shortly question the Commission on what interpretation to give this new community provision. It is about a more important question than first thought as it is linked to the fight against non-insurance which, in some Member States, constitutes a real problem.

3. The guarantee amounts obligatorily covered by insurance contracts

   The writers of the Directive wanted, with the aim of offering better protection to injured persons, to considerably increase the obligatorily insured amounts. After lengthy discussions, we decided to make provisions for compulsory cover of the following amounts:

   - in the event of personal injury: either €1,000,000 per victim, or €5,000,000 per claim;
   - in the event of material damage: €1,000,000 per claim.

As regards personal injury, the Commission was given the opportunity to clarify that the drafting of the text did not allow for combining the two criteria, that is to say, €5,000,000 per claim and €1,000,000 per victim. The Commission also made it known that, in the English version, the word "claim" associated with the amount of €5,000,000 had to be understood as relating to an accident and not to a request for compensation.

At the request of some of the Member States, these are seen as being granted a transition period of five years as from the 11th of June 2007 (that is to say until June 2012) in order to progressively adapt the contracts to covering the amounts provided for by the Directive. However, it is specified that "Member States should increase their amount of cover to at least

half of those levels within thirty months of the date of implementation (that is to say in December 2009)."

According to the information I have, twelve Member States have decided to take advantage of the transition period. As regards a right granted by the Directive, the attitude of these States is not open to criticism. However, we observe that the broad diversity between the Member States resulting from this provision is liable to bring about a partial response to the issues currently being raised by the Commission regarding the fragmentation of the motor insurance market. It is in fact difficult, in these conditions, to conceive that an insurance company can offer the same insurance contract in all Member States at an attractive price.

4. Compensation of material damage in the event of an accident caused by a vehicle that has not been identified.

Pursuant to the new Directive, the Member States are no longer authorised to exempt the Guarantee Funds of being responsible for material damage following an accident caused by an unidentified vehicle when, at the same time, significant personal injuries have been noted from the same accident.

The Commission was given the opportunity to remind everyone that it is up to each Member State to define what needs to be understood by the terms "significant personal injuries" and that the reference made to hospital care in the Directive is only a suggestion which may, if the case arises, be taken into account in the definition.

The opinion of the Commission is logical as it corresponds to the text of the Directive which itself results from the inability of different participants, during the preparatory work, to come to an agreement on a common definition of significant personal injuries.

We therefore risk finding ourselves before a broad variety of definitions which will not ease the job of those who will have to apply the legislation of other Member States. Here we think of representatives responsible for the settlement of claims and Compensation Bodies created by the fourth Directive.

5. Vehicles despatched from one Member State to another Member State.

The European citizen who wishes to import to their Member State a new or second-hand vehicle already registered in another Member State is faced with real difficulties as regards insurance. In effect, for the duration of the journey up until the destination Member State, the vehicle must be temporarily insured by an authorised insurance company in the Member State where the vehicle is registered. However, this kind of insurance is either much more expensive or much more difficult to obtain. Afterwards, when the vehicle has arrived at its destination, it must be insured by waiting for re-registration formalities to be finished. This is very often refused by the authorised insurers in the destination Member State.

With a view to facilitating this kind of process, the fifth Directive has provided, in a new provision introduced in the third Directive, that "where a vehicle is dispatched from one Member State to another, the Member State where the risk is situated shall be considered to be the Member State of destination, immediately upon acceptance of delivery by the purchaser for a period of thirty days, even though the vehicle has not formally been registered in the Member State of destination".

When questioned regarding the meaning of this new provision, the Commission let it be observed that only the Member State where the risk is situated is changed but that the vehicle normally remains based in the Member State of origin. This specification is important in the event of intervention by national bureaux following an accident according to the Commission.

The Commission also specified that if the vehicle was not re-registered in the destination State within a period of thirty days, the risk would return to the Member State of origin. The objective of this provision is to allow the vehicle purchaser to insure the car in their country of residence even if it still has a foreign plate. According to the Commission, this means that the insurance must be exclusively taken out with an authorised insurer in the destination Member State whether they act on the right of establishment or on the basis of the freedom of providing services given that it concerns the State where the risk is situated.

The Council of Bureaux has made it known to the Commission that the recommended solution, that is to say the insuring of a vehicle by an insurer of the destination Member State, was liable to pose certain practical problems.

In effect, if the vehicle is involved in an accident which took place in the territory of the State of origin when it is still registered there and at the same time being insured in the destination Member State, the national bureau will not be able to compensate the damage as its competence is limited to accidents caused by vehicles registered in other States. Furthermore, the vehicle insured by a contract which does not correspond to the conditions stipulated by the national law on compulsory insurance risks being considered as uninsured.

We also ask ourselves how information centres will be in a position to note the existence of an insurance contract when it is regarding a vehicle registered in another State.

The Commission has become aware of the existence of these practical difficulties and has asked the Council of Bureaux to investigate any potential problems and to draft a note to this effect. This note should then be examined by government experts taking part in ad-hoc group work which has just been put together.

6 Statement of Claim

The Directive requires that Member States shall ensure that the policyholder has the right to request at any time a statement relating to the third party liability claims involving the vehicle or vehicles covered by the insurance contract at least during the preceding five years of the contractual relationship, or to the absence of such claims. The statement shall be provided within fifteen days of the request.

The Commission recalled that, regarding this provision introduced in the 3rd Directive, the aim was to allow any person wishing to take out a new insurance contract to be in a position to provide a statement containing the claims taken on by their previous insurer. This statement must be made available at any time and not only on termination of the contract. The Directive does not impose any harmonisation of the document but the Commission insists on the fact that certificates provided in the various Member States must be comparable.

The Commission finally recalls that this provision does not judge the use made of the certificate by the new insurer when they are fixing the amount of the premium. In this context, the insurer will continue to benefit from the possibility of freely fixing their rates.

7 Judicial competence

The Directive introduces a new recital in the text of the 4th Directive mentioning Regulation 44/2001 of the 22nd of December 2000 regarding the judicial competence which did not yet exist when the 4th Directive was adopted on the 16th of May 2000. The aim was to confirm that the text of this Regulation allows the injured party to bring legal proceedings against the insurer of civil liability in the Member State in the territory of which they are domiciled.

Let us remember that the 4th Directive allows all those residing in a Member State, who are victims of a road accident in the territory of another Member State, to revert a demand for compensation, in their State of residence, to a representative appointed by the insurer of the vehicle involved in the accident. However, this Directive does not contain any derogatory provisions to the rules regarding judicial competence which, at the time, were governed by the Brussels Convention of the 27th of September 1968.

This recital was the object of a parliamentary question sent to the Commission by Ms Wallis. In its response of the 8th of September 2006, the Commission confirms that this recital reflects the fact that Regulation 44/2001 was adopted after the 4th Directive and amends the reference as a result. The Commission adds that "Given that the right of the injured party to call the insurer of civil liability before the courts of the State Member in whose territory they are domiciled follows on directly from the regulation, it is not necessary that the Member States carry out specific transposition measures."

It is nevertheless a fact that the Court of Justice was appealed to about an interlocutory question on this subject and that it would be advisable to wait for its court ruling in order to be completely set on the interpretation to be given to this new recital.

A few issues are therefore briefly mentioned which follow on from the application of the fifth Directive. Examination of them should be carried out in the future and solutions, perhaps of a legislative nature, will need to be brought to the questions.

Thank you for your attention.

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