



Limitation periods for road traffic accidents

European Added Value
Assessment

accompanying the European
Parliament's legislative
own-initiative report
(Rapporteur: Pavel
Svoboda)

STUDY

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European Added Value Unit
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The European added value of EU legislative action on limitation periods for road traffic accidents

Study

In accordance with Article 225 of the Treaty on the Functioning of the European Union, the European Parliament has the right to request that the European Commission take legislative action. On 23 April 2015, the Conference of Presidents of the European Parliament authorised its Committee on Legal Affairs (JURI) to draft a legislative initiative report on limitation periods for traffic accidents.

All European Parliament legislative initiative reports must automatically be accompanied by a detailed **European Added Value Assessment** (EAVA). Accordingly, the JURI Committee asked the Directorate-General for Parliamentary Research Services (EPRS) to prepare an EAVA to support the legislative initiative report on **limitation periods for traffic accidents**, 2015/2087 (INI), to be prepared by Pavel Svoboda.

The purpose of the European Added Value Assessment is to support a legislative initiative of the European Parliament by providing a scientifically-based evaluation and assessment of the potential added value of taking legislative action at EU level. In accordance with Article 10 of the Interinstitutional Agreement on Better Law-Making, the European Commission should respond to a request for proposals for Union acts made by the European Parliament by adopting a specific communication. If the Commission decides not to submit a proposal, it should inform the European Parliament of the detailed reasons therefore, including a response to the analysis on the potential European Added Value of the requested measure.

This analysis has been drawn up by the European Added Value Unit within DG EPRS and builds on external expert research carried out at its request by Dr Jenny Papettas, Birmingham, and Dr Marco Bona, Turin.

The assessment presents a qualitative analysis of the existing legal framework and quantitative estimates on the possible additional value of taking legislative action at EU level in relation to limitation periods for road traffic accidents.

The expert research paper by Papettas and Bona is presented in full in Annex I.

This document was requested by the European Parliament's Committee on Legal Affairs.

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This paper has been drawn up by the European Added Value Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate-General for Parliamentary Research Services of the Secretariat of the European Parliament.

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Executive summary

Ranging from three to 30 years, limitation periods for exercising individual rights in the European Union's (EU) 28 legal systems in the case of cross-border road traffic accidents differ widely. Rules on limitation periods differ not only in terms of length of time. In fact, they vary within the EU Member States with regard to the beginning of a limitation period, the procedural requirements for stopping the running of a limitation period, and application to minors and disabled persons. The existence of such widely differing rules on limitation periods across the EU Member States can lead to situations where victims of cross-border road traffic accidents lose their right to compensation.

At international and European levels, four instruments exist to deal with cross-border road traffic accidents, namely: the Brussels I Recast Regulation (No 121/2012), the Rome II Regulation (No 864/2007), the Motor Insurance Directive (MID) 2009/203/EC and the Convention on the Law Applicable to Traffic Accidents (also referred to as the Hague Convention). While the Brussels I Recast Regulation governs the issue of jurisdiction for road traffic accidents occurring within the EU primarily, the three latter instruments contain choice of law rules to clarify which of the three legal regimes apply in the case of a cross-border road traffic accident. However, these instruments do not relate to the legal problems and issues that arise within the context of varying limitation periods across EU Member States, creating legal uncertainty and preventing victims from gaining proper access to justice.

Against this backdrop, this European Added Value Assessment outlines possible legislative action that could be taken at EU level in order to remove the legal uncertainties relating to limitation periods in cases of cross-border road traffic accidents. This legislative action includes the adoption on the basis of Article 81(2)(e) of the Treaty on the Functioning of the European Union (TFEU) of two measures aimed at harmonising rules on limitation periods in the form of minimum standards:

- Rule 1: introduction of a four-year limitation period applying to actions against:
 - (1) the insurance undertaking covering the persons responsible against civil liability claims under Article 18 of the 2009 Motor Insurance Directive (MID);
 - (2) the compensation body provided for in Articles 24 and 25 of the 2009 MID in respect of any loss or injury or death resulting from accidents occurring in a Member State other than the Member State of residence of the injured party that are caused by the use of vehicles insured and normally based in a Member State.

- Rule 2: suspension of the time-limit provided for in Rule 1 during the period between the claimant's submission of his claim to:
 - (1) the insurance undertaking of the person who caused the accident, or its claims representative provided for by Articles 21 and 22 of the MID, or
 - (2) the compensation body provided for in Articles 24 and 25 MID, and the defendant's rejection of the claim.

This EAVA argues that the adoption of these two rules would create a more certain legal framework when applying rules on limitation periods in cases of cross-border road traffic accidents than is currently the case. A more certain legal framework would constitute an added value in itself, but would also help to reduce the costs, for example, of additional lawyers' fees and evidence on foreign rules when facing difficulties with limitation periods in relation to a cross-border road traffic accident. The EAVA makes a cautious estimate that costs linked to the absence of harmonised limitation periods in cross-border road traffic accidents could amount to €300 million per year.

Introduction

Imagine the following scenario: An English citizen is critically injured in a collision with a Spanish registered and insured car when cycling through Spain during his vacation. This inevitably raises the question: which law and which limitation period¹ should apply when bringing a claim for compensation before a court or other competent body? The answer to this question is not that simple. In fact, limitation periods for exercising individual rights in the European Union's (EU) 28 legal systems differ substantially, ranging from three to 30 years.² In the case of Spain, for example, the limitation period in non-contractual actions is one year, while it is 15 years for actions in contract. In contrast, England has a primary limitation period valid for most kinds of personal injury, irrespective of the nature of the action (contract/tort), of three years. Moreover, limitation periods do not only differ in length. There are also disparities between EU Member States when it comes to the beginning of a limitation period, the procedural requirements for stopping the running of a limitation period, and application to minors and disabled people. Consequently, the existence of such differing limitation periods create legal uncertainty, and hence, many EU citizens are unaware of their legal rights when involved in a cross-border road traffic accident in the EU.

According to Article 20 of the Motor Insurance Directive (MID) of September 2009³, victims of motor vehicle accidents should be guaranteed comparable treatment irrespective of where in the Community accidents occur. The central aim of the MID is thus to provide protective rules for the free movement of people and vehicles within the EU. Established by the Treaty of Maastricht in 1992⁴, freedom of movement for persons in the European Union (EU) is one of the cornerstones of EU citizenship. However, on account of to the above-mentioned existing differences in terms of length and type of limitation periods in the EU Member States, victims of cross-border traffic accidents often lose their right to compensation for injuries and damages. In other words, victims may sometimes receive no compensation at all, since the limited time period for bringing a claim is determined by the law of the Member State where the accident occurred, which may in some cases be much shorter than in the victim's home country. The MID's objective of facilitating the free movement of persons within the EU through protective rules is thus not fulfilled.

Against this backdrop, the aim of this European Added Value Assessment (EAVA) is to analyse possible action at EU level to improve the legal situation in the case of cross-border road traffic with regard to limitation periods and to assess the added value that these EU action(s) could potentially create. In order to do so, the study entails five analytical steps. Firstly, it will describe the current legal system for limitation periods in cross-border road traffic accidents and its weaknesses. Secondly, it

¹ Legal systems in continental Europe refer to 'prescription periods', namely periods of time after the expiry of which a claim is deemed extinguished; in common law countries there are only 'limitation periods', which indicate the time after which the right to lodge a claim is barred, although the claim itself is not extinguished. However, neither label is entirely appropriate since neither adequately reflects the consequences of failing to abide by the rules in question. Thus, for the purpose of this study the term 'limitation period' is used.

² See, e.g., Andrea Renda, Lorna Schreffler, Compensation of victims of cross-border road traffic accidents in the EU: Assessment of selected options, [Briefing Note](#), Directorate General for Internal Policies, Policy Department C. Citizens' Rights and Constitutional Affairs, European Parliament, March 2007.

³ [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.

⁴ [Treaty of Maastricht on European Union](#).

will demonstrate the costs arising from these weaknesses. Thirdly, it will outline the EU policy context on the topic. Fourthly, it will describe possible EU legislative action on limitation periods in cross-border road traffic accidents and assess, fifthly, the added value of an EU legal act.

1. The current legal system for limitation periods in cases of cross-border road traffic accidents and its weaknesses

Private international law deals with situations that involve a private dimension and a cross-border element. In the realm of private international law, there are several international and European instruments currently applicable with the respect to cross-border road traffic accidents.

On the international level, the Convention on the Law Applicable to Traffic Accidents⁵ deals with cross-border road traffic accidents. At the EU level, three instruments deserve particular attention in the context of cross-border road traffic accidents:

- Brussels I Recast Regulation (No 1215/2012)⁶
- Rome II Regulation (No 864/2007)⁷
- EU Motor Insurance Directive (MID) 2009/103/EC⁸

The Convention on the Law Applicable to Traffic Accidents, the Rome II Regulation and the MID contain choice of law rules to clarify which of the three legal regimes apply in the case of a cross-border road traffic accident. The Brussels I Recast Regulation primarily governs the issue of jurisdiction for road traffic accidents occurring within the EU. Under the regulation, the claimant can choose whether to bring the claim in the defendant's domicile within the EU or to stay in the framework of the legislation of the country where the accident occurred.⁹

Regarding choice of law rules, the Convention on the Law Applicable to Traffic Accidents contains a basic rule (Article 3) that designates as applicable the law of the place of the accident. The convention provides for a system of rigid exceptions such as, for example, that the law of the state of registration of the vehicle concerned shall apply to claims made by the driver, owner or other persons having control of the vehicle. Nevertheless, under the convention, in most circumstances the applicable law will be the law of the place of the accident.¹⁰ Only 13 of the EU Member States are currently contracting states of the convention.¹¹

⁵ [Convention on the Law Applicable to Traffic Accidents](#) (concluded 4 May 1971).

⁶ [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 (recast).

⁷ [Regulation](#) (EC) No 864/2007 of the European Parliament and of the Council of July 2007 on the law applicable to non-contractual obligations (Rome II).

⁸ [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.

⁹ See Jenny Papettas, Marco Bona, *EU Harmonisation of Limitation Periods for Claims Arising out of Cross-Border Road Traffic Accidents*, pp. 33 and 34.

¹⁰ For further details on the convention see, e.g., Jenny Papettas, *Choice of Law for Cross-Border Road Traffic Accidents*, [Note](#), Directorate General for Internal Policies, Policy Department C. Citizens' Rights and Constitutional Affairs, European Parliament, November 2012, pp. 15-17.

¹¹ Austria, Belgium, Croatia, Czech Republic, France, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Slovenia, Slovakia and Spain.

Similarly to the Convention on the Law Applicable to Traffic Accidents, the Rome II Regulation includes an article (4) providing that the applicable law in a cross-border traffic accident will be that of the place where the direct damage occurred, excluding as a basis for the choice of law any possible indirect damage. Here too, however, exceptions exist. For example, when the parties share habitual residence, the law of that state will apply (Article 4 (2)). In spite of these exceptions, following the Rome II Regulation, the law applicable when bringing a claim in a cross-border road traffic accident is often the law of the place of the accident.¹² Crucially, the relationship between the Rome II Regulation and the Convention on the Law Applicable to Traffic Accidents is not very clear. Moreover, both instruments can trigger a different choice of applicable law owing to their varying exceptions. An example by Jenny Papettas demonstrates this:

Where two German citizens hire a car in Spain and the driver crashes into a tree, a German court applying Rome II would apply German law as the law of shared habitual residence, whilst a Spanish court, applying the Hague Convention, would apply Spanish law as the law of the place of registration of the vehicle.¹³

As a result, there are consequences as to the relevant limitation period, which will depend on the state where the claim for compensation in a cross-border traffic accident is put forward, leading to legal uncertainty with regard to its duration.

The EU Motor Insurance Directive (MID) ensures that in a cross-border road traffic accident visiting victims can bring a claim for compensation directly against an insurer or compensation body in a court of her or his Member State of residence. The purpose of the MID is thus to provide victims of cross-border road traffic accidents with a familiar legal environment. In other words, to allow them to bring a claim in their own language and under legal regimes and procedures that are familiar to them and their legal adviser. The MID has thus the underlying objective of securing the free movement of persons by ensuring that they receive comparable legal treatment in cross-border road traffic accidents throughout the EU. Under the Brussels I Recast Regulation (Article 11(1)(a)), however, the claimant can choose where the claim is brought directly against an insurer, in the Member State of the insurer's domicile or in the claimant's state of residence.¹⁴

However, none of these instruments relates to the legal problems and issues that arise within the context of limitation periods in cross-border road traffic accidents. Therefore, the far-reaching differences between EU Member States with regard to rules on limitation periods create a complex and complicated legal situation. This includes legal uncertainty in terms of the overall time limits for bringing a claim, the beginning of a limitation period, the procedural requirement for stopping a limitation period, suspension of the running of a limitation period, the protection of victims after the expiry of the limitation period, the discretion granted to the courts to extend limitation periods, and the protection of minors and persons with disabilities.¹⁵

Therefore, lack of familiarity with foreign rules on limitation periods can lead to the loss of the right to make a valid claim and/or to obstacles to accessing justice. Lawyers need in-depth knowledge of relevant rules on limitation periods under foreign legal systems in order to give advice. Furthermore, the legal uncertainty caused by differing limitation periods across EU Member States generates costs

¹² See Papettas, Bona, *EU Harmonisation of Limitation Periods for Claims Arising out of Cross-Border Road Traffic Accidents*, pp. 36 and 37.

¹³ Papettas, *Choice of Law for Cross-Border Road Traffic Accidents*, [Note](#), p. 17.

¹⁴ See Papettas, Bona, *EU Harmonisation of Limitation Periods for Claims Arising out of Cross-Border Road Traffic Accidents*, p. 35.

¹⁵ Several examples of varying application of limitation periods can be found in *ibid.* pp. 7 - 15.

arising from cross border-road traffic accidents as will be demonstrated in the next section of this study.

2. The costs of not having European Union-wide harmonised limitation periods

Based on available data, the costs linked to the absence of harmonised limitation periods in cross-border road traffic accidents are estimated to amount to approximately €300 million per year. In fact, the true costs are likely to be higher. As there are no indicators or data available on issues directly associated with varying limitation periods across EU Member States, such as additional court fees or additional translation costs, these costs cannot be taken into account.

What can be taken into account are the increased costs of lawyers' legal advice and expert evidence on foreign rules when foreign limitation rules have to be applied in the context of a cross-border road traffic accident. The average additional costs of lawyers' legal advice may reach €600 per claim. The average costs of foreign expert evidence on rule limitation periods is around €300 per claim. According to data from the European Commission and previous calculations¹⁶, the number of cross-border road traffic accidents in the EU might be assumed to 775 000 per year. Of these 775 000 cross-border road traffic accidents per year, about 248 000 cases require additional lawyers' advice in relation to limitation period rules, amounting to an overall additional cost of €148 million per year. The number of cases where expert evidence on foreign limitation period rules is required is about 511 500, amounting to an overall additional cost of €153 450 million per year. Added together, costs linked to the absence of harmonised limitation periods in cross-border road traffic accidents is estimated to amount to approximately €300 million per year. Furthermore, data shows that personal injury claimants who lost the right to claim will lose, on average, €16 000 if their claim becomes time-barred or extinguished. Taking the example of the United Kingdom, for damage only claims the loss would be, on average, €2 000 per claim. On account of the lack of available solid statistical data, however, these figures should be considered a rough estimation at best.¹⁷

Crucially, in the majority of cross-border traffic accidents, the claimant will not lose the right to claim for compensation, but will face obstacles in accessing justice owing to unfamiliar and varying rules on limitation periods. These obstacles cause costs in four forms: (i) increased lawyer's costs, (ii) costs of expert evidence on foreign rules, (iii) costs of translation of documents, and (iv) additional court fees. Against this backdrop, it can be assumed that the real costs linked to the absence of harmonised limitation periods in EU legislation is indeed over €300 million per year.

3. The EU policy context

Back in February 2007, the European Parliament (EP) adopted a resolution with recommendations to the European Commission on limitations periods in cross-border disputes involving personal injuries

¹⁶ Demolin, Brulard, Barthelemy-Hoche, Compensation of victims of cross-border road traffic accidents in the EU: Comparison of national practices, analysis of problems and evaluation of options for improving the position of cross-border victims, [Report](#), Directorate for Internal Market and Services, European Commission, 2009; Renda, Lorna Schreffler, Compensation of victims of cross-border road traffic accidents in the EU.

¹⁷ More details on the figures can be found in Papettas, Bona, EU Harmonisation of Limitation Periods for Claims Arising out of Cross-Border Road Traffic Accidents, pp. 47-51, pp. 64-66.

and fatal accidents.¹⁸ In its resolution the EP called on the Commission 'to carry out an inquiry into the effects of the existence of differing limitation periods on the internal market, and particularly on citizens exercising their freedoms under the Treaty'. The Commission reacted to this call in 2012, by inter alia, conducting a public consultation on 'Limitation periods for compensation claims of victims of cross-border road accidents in the EU'.¹⁹ This public consultation built on an extensive report evaluating options for improving the position of cross-border victims, which had been carried out by the Belgian law firm Demolin, Brulard, Barthelemy-Hoche at the request of the European Commission's Directorate General for Internal Market and Services.²⁰ The Commission's public consultation presented four options addressing the issue of limitation periods:

Option 1: Improving information to 'accident-abroad victims' in concrete cases - optional

Option 2: Improving information to 'accident-abroad victims' in concrete cases - mandatory

Option 3: Improving general information on limitation and prescription periods

Option 4: New rules harmonising limitation and prescription periods for cross-border traffic accidents

The Commission summarised the findings of the consultation as follows:

'The difficulties faced by victims of cross-border road traffic accidents with respect to the time-limits for claiming compensation were confirmed by some respondents. Among the options put forward for consultation, the one which received almost unanimous support was that of improving the general information on prescription and limitation periods, with varying degrees of support for the options of improving information to visiting victims in concrete cases. The feedback on the appropriateness of harmonising prescription/limitation periods for road traffic accidents across the EU was not conclusive; several replies questioned the necessity of having special rules for prescription/limitation periods for road traffic accidents only.'

In its follow-up to the consultation, the Commission has not yet prepared a specific proposal on how to tackle the legal obstacles that victims of cross-border road traffic accidents face as a result of varying rules for limitation periods across the EU Member States.

In order to fill the legislative gap in the context of limitation periods in cross-border road traffic accidents, the Committee on Legal Affairs (JURI) of the European Parliament decided to draw-up a new legislative own-initiative report, providing the following justification: 'Limitation periods for tort claims vary widely between Member States. In the specific case of traffic accidents with a cross-border element, that can lead to victims losing their right to reparation. The committee would like to consider whether it is appropriate to provide for a standard limitation period for such cases.'

¹⁸ European Parliament [resolution](#) with recommendation to the European Commission on limitations periods in cross-border disputes involving personal injuries and fatal accidents (2006/2014(INI)).

¹⁹ For information on the consultation, see the Commission's website: http://ec.europa.eu/justice/newsroom/civil/opinion/121031_en.htm#summary.

²⁰ Demolin, Brulard, Barthelemy-Hoche, Compensation of victims of cross-border road traffic accidents in the EU: Comparison of national practices, analysis of problems and evaluation of options for improving the position of cross-border victims, [Report](#), Directorate for Internal Market and Services, European Commission, 2009.

4. Possible EU legislative action

Given the weaknesses of the existing legal frameworks causing legal uncertainty and the considerable costs arising from the differences in limitation periods across EU Member States, this EAVA study argues that rules of harmonisation providing minimum standards would address the main issues currently faced by claimants in cases of cross-border road traffic accidents. EU legislative action to improve the protection of victims in cross-border road traffic accidents has a suitable legal basis with Article 81 of the Treaty on the Functioning of the European Union (TFEU)²¹, enabling the EU to 'develop judicial cooperation in civil matters having cross-border implications based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases'. Furthermore, Article 81 TFEU provides for the adoption of measures for the approximation of laws and regulation of the Member States by the EP and the Council, 'acting in accordance with the ordinary legislative procedure, when necessary for the proper functioning of the internal market.' Basically aimed at ensuring 'effective access to justice' (TFEU Article 81(2) (e)), the introduction of two harmonising measures using the above mentioned legal base and respecting the principle of subsidiarity should be considered. These two measures for harmonising limitation periods in the form of minimum standards, which could be enacted under the 2009 MID, are:

- Rule 1: introduction of a four-year limitation period applying to actions against:
 - (1) the insurance undertaking covering the persons responsible against civil liability under Article 18 of the 2009 Motor Insurance Directive (MID);
 - (2) the compensation body provided for in Articles 24 and 25 of the 2009 MID in respect of any loss or injury or death resulting from accidents occurring in a Member State other than the Member State of residence of the injured party which are caused by the use of vehicles insured and normally based in a Member State.

- Rule 2: the suspension of the time-limit provided for in Rule 1 during the period between the claimant's submission of his claim to
 - (1) the insurance undertaking of the person who caused the accident, or its claims representative provided by Articles 21 and 22 of the MID, or
 - (2) the compensation body provided for in Articles 24 and 25 MID, and the defendant's rejection of the claim.

These two proposals concerning the possible regime applicable to limitation periods partly take up suggestions already indicated in the EP resolution of March 2007, notably the introduction of a general limitation period of four years. Although the two rules in the form of baseline minimum standards will not resolve every legal uncertainty, they will cover those rules of limitation periods that are most likely to give rise to legal uncertainty in the context of cross-border road traffic accidents and are causing the additional costs.

5. European added value

As this study shows, the costs linked to additional lawyer's fees and foreign expert evidence generated by legal uncertainty in applying unfamiliar foreign rules on limitation periods amount to up to €300 million per year. These costs for victims of cross-border road traffic accidents could be greatly reduced by taking legislative action at EU level according to the proposals outlined above.

²¹ Consolidated Version (2012) on the [Treaty on the Functioning of the European Union](#).

Legislative measures by the EU to harmonise rules for limitation periods under the 2009 MID would help to create more legal certainty for victims of cross-border road traffic accidents than is currently the case. In other words, a EU legal act would present enormous added value in terms of securing access to justice, guaranteeing that victims do not lose their right to reparation as well as supporting the free movement of people within the EU in line with the purpose of the MID.

Furthermore, EU legal measures would contribute to a considerable simplification of the framework applicable to cross-border road traffic accidents within international private law, ending the substantial diversity of limitation periods across the EU Member States.

Finally, the simplification of the legal situation through a harmonisation of rules on limitation periods in the form of minimum standards at EU level would generate European added value in terms of reduced legal, as well as emotional, costs.

RECOMMENDATION

The EU could consider adopting, on the basis of Article 81 [TFEU](#) (2) (e) a legal act establishing measures to harmonise minimum standards of rules on limitation periods in the field of international private law, as outlined in this European Added Value Assessment, to address the legal uncertainty faced by victims of cross-border road traffic accidents.

Annex I

EU Harmonisation of Limitation Periods for Claims Arising out of Cross-Border Road Traffic Accidents

by Dr Jenny Papettas and Dr Marco Bona

Abstract

Rules of limitation determine the time available for the bringing of a claim for compensation before a court or other competent body. They are extremely important in the context of civil actions following the occurrence of a road traffic accident (RTA). The application of foreign limitation periods creates additional hurdles for the claimant in trying to access justice. Minimum standards harmonisation covering the overall time limit, the beginning of the time period and the interruption of the period, would address many of the issues currently faced by visiting victims and would lead to significant savings in terms of legal costs, delays and emotional costs. In total, across the EU, addressing the issues associated with the application of foreign limitation rules could therefore generate up to €300 m in added value, each year.

AUTHORS

This study was written by Dr Jenny Papettas and Dr Marco Bona, at the request of the European Added Value Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate General for Parliamentary Research Services (DG EPRS) of the General Secretariat of the European Parliament.

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List of Abbreviations

| | |
|-------|---|
| CJEU | Court of Justice of the European Union |
| EC | European Community |
| ECHR | European Convention on Human Rights |
| ECtHR | European Court of Human Rights |
| EU | European Union |
| OJ | Official Journal |
| MID | Motor Insurance Directive |
| RTA | Road Traffic Accident |
| TEU | Treaty on European Union |
| TFEU | Treaty on the Functioning of the European Union |

Executive Summary

Rules of limitation determine the time available for the bringing of a claim for compensation before a court or other competent body. They are extremely important in the context of civil actions following the occurrence of a road traffic accident (RTA). If they are not complied with they can determine the failure of a claim even before substantive legal issues arise. They enable a defendant to bring proceedings to an end at a relatively early stage, before having to go to the expense of preparing a defence on the substantive legal issues and can effectively prevent what might otherwise be a valid claim from proceeding. From the point of view of the victim, failure to comply with limitation will be fatal to an otherwise valid claim. Where failure to comply arises because of uncertainty about foreign applicable rules, because of the cross border nature of the accident, the issue is whether there is an obstacle to effective access to justice.

In the EU protection for victims of road accidents which occur in a Member States (MS) other than that where the victim is resident has been in place for over 10 years. The Motor Insurance Directive (MID) ensures that visiting victims can bring a claim directly against an insurer or a compensation body in the court of their MS of residence. This provides victims with a familiar legal environment, the ability to proceed in their own language and under legal procedures which will be familiar, either to themselves or to their legal advisors. The aim of these measures is to ensure victims receive comparable treatment, regardless of where in the EU the accident occurs, giving protection to victims and supporting the free movement of people and vehicles within the Union.

Rules regulating which law should be applied to the claim very often designate the law of the place of the accident. This is likely to be unfamiliar to the victim and their legal advisors. Also, most cross border accident victims will take advantage of the ability to bring an action at home, meaning that the court hearing the case will have to apply a law which is foreign to it. This includes the unfamiliar rules of limitation.

There is a high level of complexity involved in national rules of limitation. There can be issues in understanding which is the applicable overall time limit, when and how time begins to run and how this is suspended or interrupted. National lawyers need in-depth knowledge of the relevant rules in order to give accurate advice in any given circumstance. Each Member State has in place different rules for each of these aspects, creating a unique legal landscape which requires specialist knowledge.

Generally speaking it is more difficult to organise a claim from abroad. It can take time to discover which claims representative or insurer a claim should be made against; to collect evidence about the accident; and to get any necessary documents translated. There are examples of cases in which the lack of familiarity with the way in which the rules of limitation operate has led to the claimant losing the right to claim altogether. This is especially so where the overall time limit is particularly short or where there is ambiguity about the way in which time can be suspended or interrupted.

More often however, the application of foreign limitation periods creates additional hurdles for the claimant in trying to access justice. The situation often requires additional hours to be spent by the legal advisor dealing with the issue of limitation, which they would not have had to do for purely domestic cases. This increases legal costs. There may be additional costs if an expert in the country of the accident is called upon to provide advice about the limitation issue. There are indications that this happens regularly. The delay, extra expense and uncertainty created by the application of foreign limitation periods also gives rise to emotional costs for the victim, who may experience stress worry and anxiety. This goes directly against the purpose of the protective rules of the MID, which aim to facilitate the free movement of persons within the EU.

The complexity of the situation and the difficulties faced by claimants, therefore give sound reason for the consideration of harmonising rules relating to limitation.

Although various ways of dealing with these issues have been suggested, it is submitted that the method which will be effective in overcoming the difficulties created by the current situation, but which will also satisfy the principles of subsidiarity and proportionality, is to effect minimum standards harmonisation in relation to the main aspects of limitation law. Harmonised rules should only apply to actions provided for by the MID – actions against insurers and actions against compensation bodies, and then only to those situation which are of a cross border nature. A legislative measure in these terms could be correctly based on Art 81(2)(e) Treaty on the Functioning of the European Union (TFEU).

Minimum standards harmonisation covering the overall time limit, the beginning of the time period and the interruption of the period, would not eliminate all uncertainty about the applicable rules of limitation, but would address most of the issues currently faced by visiting victims and would lead to significant savings in terms of legal costs, delays and emotional costs. In terms of financial costs, data shows that claimants who lose the right to claim will lose, on average, €16,000 per claim for claims involving personal injury and €2,000 per claim for property damage. This obviously does not reflect the tragic consequences which would materialise should a person with catastrophic injury lose the right to claim.

There is difficulty, due to a lack of available statistical data, in calculating the number of accidents occurring in the EU each year, as well as how many accidents give rise to claims which raise limitation issues. Analysis suggests that up to 250,000 people each year could face additional hurdles in bringing a claim as a result of the application of a foreign limitation period and that up to 775,000 accidents could give rise to the need to seek foreign expert advice about limitation issues. The average additional legal costs associated with foreign limitation issues are likely to be in the region of €600 per claim. The average cost of foreign expert evidence on limitation is likely to be in the region of €300 per claim.

In total, across the EU, addressing the issues associated with the application of foreign limitation rules could therefore generate up to €300 m in added value, each year. This figure does not take into account the costs associated with additional court fees or

additional translation costs, which are directly associated with the issue of limitation, as there is no data on these issues. But it does mean that the true financial added value is likely to be higher still.

The decision to harmonise rules of limitation for other claims arising out of other modes of transport has not depended on the need to show that enough people would benefit from such action, or that enough money would be saved. Protecting access to justice and thereby supporting free movement of people within the Union constitutes a sufficient reason to harmonise rules in relation to cross border RTAs. However, there are many people who are potentially affected by the current, very complex and difficult situation, and there are likely to be significant savings involved in taking action on this issue.

1. Introduction

This European Added-Value Report is the culmination of a research study conducted by Dr Jenny Papettas and Dr Marco Bona on behalf of the European Parliament. The research and the report form part of an on-going process, examining the position of those who become the victims of road traffic accidents (RTAs) in an EU Member State (MS), other than that in which they habitually reside. The overarching aim of this report is to assist the European Parliament in deciding whether, and if so how, to formulate legislative proposals for the EU wide harmonisation of rules of limitation for claims arising out of cross border RTAs.

A note should be made here about the terminology used in this report. Rules which provide for a time limit for the bringing of a claim, the date at which time should be calculated from and so on, are referred to differently as rules of prescription in some Member States (usually those with a civilian law tradition) and as rules of limitation in others (often common law countries). Rules of prescription have the effect of extinguishing the right upon which the claim is founded and are usually considered to be substantive rules of law. Rules of limitation, on the other hand, do not affect the existence of the right, but rather limit the ability of the claimant to pursue that right in a court of law and are usually considered to be procedural in nature.²²

It has been said that in fact neither label is entirely appropriate since neither adequately reflects the consequences of failing to adhere to the rules in question.²³ For the purpose of this report the term limitation is used. This is the term used in EU instruments which harmonise such rules in relation to specific actions provided for by EU law.²⁴ Limitation is also the term used by the European Commission in the public consultations it conducted on the issue under consideration here. Use of the term limitation in this report is not intended to demonstrate a preference for one term over the other.

I Cross Border Accidents and Rules of Limitation

Rules of limitation determine the time available for the bringing of a claim for compensation before a court or other competent body. They are extremely important in the context of civil actions following the occurrence of a RTA. If they are not complied with they can determine the failure of a claim even before substantive legal issues arise.²⁵ They enable a defendant to bring proceedings to an end at a relatively early stage, before having to go to the expense of preparing a defence on those substantive legal issues. They can effectively prevent what might otherwise be a valid claim from proceeding. From the point of view of the victim, failure to comply with limitation will be fatal to an otherwise valid claim. Where failure to comply arises because of uncertainty about foreign applicable rules, because of the cross border nature of the accident, the issue is whether there is an obstacle to effective access to justice.

²² R. Zimmermann *Comparative foundations of a European Law of Set-Off and Prescription* (CUP 2002) p69-75.

²³ *Ibid* p 75.

²⁴ See 5 (a) below.

²⁵ See *Folino v. Link Motor Insurance Ltd and others* Lamezia Terme Court, 29.10.2009 No. 1024.

This issue is particularly important in relation to traffic accident victims for two main reasons. Firstly, the sheer volume of traffic accidents means that any problem with regard to accessing justice is liable to affect a great many claimants, both now and in the future. Secondly, the EU has long recognised that the creation of a borderless Union, in which it is necessary that people are able to move freely between Member States, requires the protection of victims of accidents which occur in a Member State which is not that of the victim's residence.

II Background

Towards the end of the 1960s the then European Community (EC) institutions decided to take action to begin a process of harmonisation of rules relating to the provision of compulsory third party liability motor insurance. This was thought necessary in order to support the fundamental freedoms associated with the free movement of vehicles and people and with the development of the internal market. The process has been on-going since the early 1970s and has produced six Directives, known as the Motor Insurance Directives.²⁶ The first five Directives progressively constructed a harmonised system of rules relating to third party liability motor insurance, the sixth Directive is a consolidation instrument.

The Directives make third party liability insurance compulsory throughout the territory of the EU,²⁷ set down minimum levels of cover,²⁸ stipulate who must be covered and which exclusions may be relied upon by insurers as against third party claimants.²⁹ The European legislator was also alive to the difficulties faced by victims who became involved in accidents outside their Member State of residence, known as visiting victims. Accordingly, the fourth Directive ensured a right of direct action against the motor insurer³⁰ and, following amendment by the fifth Directive and clarification by the Court

²⁶ 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 [1972] OJ L103; Second Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles [1984] OJ L8/17; Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles [1990] OJ L129/33; Directive 2000/26/EC Of The European Parliament And Of The Council of 16 May 2000 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and amending Council Directives 73/239/EEC and 88/357/EEC [2000] OJ L181/65; Directive 2005/14/EC of The European Parliament And Of The Council of 11 May 2005 amending Council Directives 72/166/EEC, 84/5/EEC, 88/357/EEC and 90/232/EEC and Directive 2000/26/EC of the European Parliament and of the Council relating to insurance against civil liability in respect of the use of motor vehicles [2005] OJ L149/14. The Directives have now been consolidated into a new 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 [2009] OJ L263/11.

²⁷ Dir 2009/103/EC Article 3 and 14.

²⁸ Ibid Article 9.

²⁹ Ibid Article 12 and 13.

³⁰ Now Article 18 Dir 2009/103/EC.

of Justice of the European Union (CJEU) also permitted visiting victims to bring such a direct action in the courts of their Member State of habitual residence.³¹ By harmonising minimum standards, the Directives were able to do away with national border checks on insurance within the EU and to begin to neutralise the disadvantages faced by visiting victims trying to obtain compensation, thus supporting, rather than hindering the free movement of people and vehicles within the EU.

However, there remains substantial variation in the schemes for establishment of liability,³² and in the procedural rules which govern the bringing of claims, between the Member States. These differences make the determination of the applicable law important in the context of a cross border RTA.

The Rome II Regulation³³ entered into force on 11 January 2009 and provides uniform choice of law rules which govern the determination of the law governing a non-contractual obligation in all EU Member State courts apart from Denmark. It will determine the law governing most claims which arise out of cross border RTAs, including which rules of limitation will apply.³⁴

A Commission study looking at Rome II and the specific problems faced by visiting victims of road accidents, along with the options for improving the position of such victims,³⁵ was published in January 2009.³⁶ It looked in particular at the levels of compensation awarded in different Member States and at the limitation periods in force. The study identified a number of potential problems which could be faced by visiting victims in relation to both levels of compensation and limitation periods. It suggested a variety of ways in which these problems might be overcome. The study does not provide an overall recommendation but in relation to limitation periods it concludes that:

*"A degree of harmonization of European limitation periods was recommended by most country experts. It seems that some form of harmonization at the European level is the only way of ensuring a degree of simplicity in the rules defining limitation periods."*³⁷

Following publication of the study the Commission undertook two public consultations. The first addressed both levels of compensation and limitation periods and asked

³¹ See *FBTO Schadeverzekeringen NV v. Odenbreit* Case C- 463/06 [2007] ECR I-11321.

³² The Directive does not affect rules relating to civil liability as stated in Article 20.

³³ Regulation (EC) No 864/2007 on the law applicable to non- contractual obligations (Rome II) (2007) OJ C 343/7.

³⁴ It is submitted that claims arising out of RTAs are likely to be classified as matters relating to tort at the Private International Law level in accordance with the reasoning of the CJEU in C 548/12 *Marc Brogsitter v Fabrication de Montres Normandes EURL and Karsten Fräßdorf*.

³⁵ Penultimate clause.

³⁶ Report, prepared by law firm Demolin Brulard Barthélémy for the Commission Compensation of victims of cross border RTAs in the EU: comparison of national practices, analysis of problems and evaluation of options for improving the position of cross border victims <http://ec.europa.eu/internal_market/insurance/docs/motor/20090129report_en.pdf>.

Hereinafter referred to as 'the Commission 2009 report'.

³⁷ *Ibid* at 241.

stakeholders and other interested parties to comment on various options for reform.³⁸ The second, in a similar vein, focused on limitation periods only.³⁹ Responses to the consultations were mixed. The Commission produced a summary of the responses to each consultation and indicated in its 2010 report on the implementation of the Stockholm programme⁴⁰ that limitation periods for insurance claims arising out of cross border traffic accidents would be addressed in a new Regulation.⁴¹ However, there has been no indication since then of what further action might be taken. In light of this, the European Parliament has indicated its intention to produce an own initiative proposal for the purpose of harmonising limitation periods for the victims of cross border RTAs.⁴² This report aims to facilitate that process. It demonstrates the undesirable consequences of complexity and obstacles to access to justice, that the current situation generates and concludes that minimum standards harmonisation should be used to resolve the current difficulties.

III Report Structure and Methodology

This report deals with a multifaceted issue which requires a number of complex areas of law to be brought together for consideration. The authors have utilised mainly doctrinal methods in order to provide a systematic account of the current situation with regard to rules of limitation for visiting victims. Accordingly, the report consists, in the main, of analysis of data which has already been published in the form of reports of the EU institutions, reports of bodies representing insurers and responses to public consultations, as well as cases decided in both national and other courts, academic work published in books and scholarly articles and legislative provisions in the form of the Treaties of the EU, secondary legislation of the EU and International Conventions.

A comparative analysis looking at the domestic rules of different EU Member States, illustrates the complexity of the current situation. Data about existing rules of limitation is primarily drawn from an empirical study conducted by the Pan European Organisation of Personal Injury Lawyers (PEOPIL) in preparation for the publication of a book *Personal Injury and Fatal Accident Compensation in Europe*,⁴³ along with data about limitation periods presented in the Commission 2009 report.

In addition, owing to a complete lack of information or evidence on some issues, a small scale empirical survey was conducted for the purpose of quantifying some of the costs generated by the current situation, as outlined below.

Given time and financial constraints the authors consulted with practising claimant lawyers, using existing networks provided by the Pan European Organisation of Personal

³⁸ http://ec.europa.eu/internal_market/consultations/docs/2009/cross-border-accidents/rome2study_en.pdf

³⁹ http://ec.europa.eu/justice/newsroom/civil/opinion/121031_en.htm.

⁴⁰ The five year programme adopted by the European Council for the period 2009-2014. See <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3Aj10034>.

⁴¹ European Commission *Delivering an area of freedom, security and justice for Europe's citizen Action Plan Implementing the Stockholm Programme* (2010) COM 171.

⁴² See 2015/2087(INL).

⁴³ PEOPIL, Forthcoming. The empirical data is used with the kind permission of PEOPIL.

Injury Lawyers (in short: PEOPIIL). This organisation has a European wide membership of practising personal injury lawyers some of whom deal with cross border traffic accidents. A questionnaire was sent by email to members of the organisation asking for information about: the numbers of cross border traffic accidents cases lawyers had dealt with in the last five years, how many of those cases gave rise to issues of limitation, how many cases gave rise to a need for expert foreign advice and how many additional hours were spent on cases owing to limitation issues.

13 responses from lawyers in 9 different EU Member States were received. This gives some valuable data for use in this report, but the potential for sampling error is very high. In the absence of any other data, the figures generated by the consultation are scaled up to give indications of annual numbers of relevant accidents in the EU and of the additional costs which might be incurred due to unfamiliar rules of limitation. However, the accuracy of these indications cannot be guaranteed.

The report begins in Section 2 by providing a brief comparative overview of some of the main features of limitation laws in nine EU Member States. The comparative analysis highlights the differences between national schemes of limitation and the potential difficulties these differences can generate in cross border RTA cases.

This section of the report is not designed to be a comprehensive account of the system of rules in each Member State, for which space does not allow. Instead the main features of schemes of limitation for tortious claims of eight Member States are set out in tables. This allows for comparison of those Member State systems and provides a catalyst for discussion of the impact of the divergences on cross border victims. The Member States used are: Croatia, England and Wales, Germany, Hungary, Italy, Luxembourg, The Netherlands and Spain. They represent a spread of Member States in a geographical sense and also encompass a range of different cultural and legal traditions. The Commission 2009 report contains a very detailed comparative analysis of rules of limitation in the majority of EU Member States. The analysis in this report does not aim to replicate the work done in the Commission report, but rather it aims to illustrate divergences and to articulate the difficulties those differences can cause.

Section 3 considers the private international law position with regard to traffic accidents. Analysis of the main relevant provisions of the Brussels I (recast) Regulation,⁴⁴ the Rome II Regulation on the law applicable to non-contractual obligations,⁴⁵ the Hague Convention on the law applicable to cross border RTAs⁴⁶ and the Motor insurance Directives⁴⁷ reveals which courts are likely to take jurisdiction of claims arising from cross border traffic accidents and which law is likely to apply to determine the action. This analysis is used to reveal the likelihood of a visiting victim facing the application of a foreign limitation period.

⁴⁴ Regulation (EU) 1215/2012 on jurisdiction and enforcement of judgements in civil and commercial matters (recast) OJ L351/2.

⁴⁵ n12 above.

⁴⁶ Of 4 May 1971.

⁴⁷ n5 above.

Section 4 explores whether a process of harmonisation of rules of limitation would respect the fundamental principles of subsidiarity and proportionality and whether there is an appropriate legal basis for such action in the Treaties. The various options with regard to harmonisation, put forward by the Commission in its 2009 report are analysed, along with the responses to those various options by the stakeholders who responded to the Commission's public consultations, and the views expressed in academic literature. Statistical data and the results of the empirical survey are used to present indications of the likely number of traffic accidents, involving a visiting victim, occurring annually in the EU and in how many cases limitation issues will arise.

Section 5 of the report is given over to the consideration of what the content of harmonising legislation might be. A minimum standards form of harmonisation is proposed, with the exact contents being guided by an analysis of existing harmonised rules of limitation in the field of RTAs, as well as harmonised rules for passengers of other modes of transport and for product liability; general principles expounded by the ECtHR and the CJEU with regard to rules of limitation; and existing proposals for harmonisation.

The analysis leads to the formulation of a proposal for the minimum content of harmonising legislation.

Section 6 sets out the added value of EU action if harmonisation in the terms recommended is undertaken. The costs to victims of the current situation are highlighted here and quantification of them in monetary terms is carried out where possible. Quantification is done using data from the empirical survey, along with data on average hourly legal fees in the EU and the average cost of expert evidence, as set out in the Commission 2009 report. Figures are given for the average costs associated with the uncertainty and unfamiliarity of foreign applicable rules. Further data presented in reports by a Europe wide insurance industry body and a UK governmental department regarding average claim values is also used to give some indication of the average costs per claim if the ability to claim is lost altogether.⁴⁸

2. Rules of Limitation for Traffic Accidents in the EU49

I Introduction

There are wide-ranging differences among European countries in respect of rules of limitation for traffic accidents. The rules may relate to a number of different types of claim including claims made against the party responsible for the accident, the injured parties' direct action against the insurer of the party responsible, or a claim made against

⁴⁸ See 6(a) below.

⁴⁹ The information contained in this Chapter about national systems comes from the following studies: Commission 2009 report n15 above; M. Bona, P. Mead And S. Lindenberg (eds) *Fatal Accidents and Compensation of Secondary Victims in Europe* (London, 2005); M. Bona and P. Mead (eds) *Personal Injury Compensation in Europe* (Deventer, 2003). This Chapter is also based on the updated information provided by the national reports that will be published in the forthcoming book *Personal Injury and Fatal Accidents Compensation in Europe* (PEOPIL, forthcoming).

the compensation body or guarantee fund responsible for the provision of compensatory payments. The divergences relate to the overall time limit, the beginning of the limitation period (the “*dies a quo*”), the procedural requirements for stopping the limitation period, suspension of the running of limitation periods, the protection of victims after expiry of the limitation period, the discretion granted to the courts to extend limitation periods and the protection of minors and persons with disabilities.

The differences which exist in respect of limitation periods as between the Member States may be an expression of national legal and cultural traditions in the organisation of the legal system. They may reflect constitutional and social identity and arrangements for wealth distribution.⁵⁰ Rules of limitation are thought to create certainty, particularly for the defendant, who should not have to face the indefinite possibility of a claim. They also address the problem that evidentiary difficulties will arise with the passage of time when documentary evidence may have been destroyed or witnesses can no longer remember events with clarity.⁵¹ However, how these policies manifest themselves differs between states, giving rise to differences in rules of limitation.

II Comparative Overview

1. Overall Time Limits

With regard to the rules governing overall time limits, there are significant differences among the MS. Time-limits differ in length ranging from one year to up to 30 years. The relevant time limit is determined on the basis of a number of factors, including who the claim is made against, whether there are related criminal proceedings and whether the claim is considered to be tortious or contractual, at the substantive level. As will be seen from the table below, no two Member States operate exactly the same basic time limit. A detailed knowledge of the applicable rules is required to answer this most basic question.⁵²

It should also be noted that in the field of RTAs it can be very difficult for a visiting victim to get basic information about the accident from the foreign jurisdiction within a relatively short time, such as the identity of the defendant and liabilities potentially involved. Furthermore, it may also take considerable time to identify which claims representative⁵³ or insurer should deal with the case. For victims in a coma and victims

⁵⁰ Tulibacka ‘Europeanization of Civil Procedures: In Search of a Coherent Approach’ (2009) CMLR 1527 at 1533.

⁵¹ A. McGee *Limitation Periods* (Sweet and Maxwell 2010) p14.

⁵² The following country reports were of valuable assistance in the preparation of Table 1 below: A. Sihtar and I. Vretenar ‘Personal injury and fatal accidents compensation in the Republic of Croatia’; P Kuhn ‘Personal Injury Compensation in Germany’; S. Pavlakis-Moschou ‘Personal Injury and Fatal Accidents Compensation in Greece’; Dr. T. Pataky ‘Personal injury and fatal accident compensation in Hungary’; Arsène Kronshagen & Philippe Wadlé ‘Personal Injury Compensation In The Grand-Duchy Of Luxembourg’; S. Lindenbergh and R. Verburg ‘Personal Injury and Fatal Accidents Compensation in The Netherlands’; M. Martín-Casals & J. Solé Feliu ‘Personal Injury and Fatal Accidents Compensation in Spain’ all in *Personal injury compensation in Europe* (PEOPIL Forthcoming);

⁵³ See 3(a) below on the role of the claims representative.

with severe injuries it may take a long time before the full extent of their damage is known.

For example, the table below shows that in Italy the limitation period applying to RTA claims is 2 years. However, this description does not correspond to what happens in practice under Italian law. Whenever there is a personal injury or a fatal accident, Italian courts apply the longer time-limits provided by the Criminal Code. Hence, a bodily or mentally injured person can rely on at least a six year limitation period and secondary victims on an even longer time-limit (from 14 to 20 years).⁵⁴

In some jurisdictions there is also a general distinction between short (“subjective”, “relative”, or “minimum”) periods of limitation, whose expiry depends on various factors including the victim's subjective knowledge and which are subject to temporary interruption or suspension, and long-stop (or “objective”, “absolute”, “maximum”) limitation periods, beyond which no claim can be brought, regardless of the victim's knowledge of the injuries or of the identity of the wrongdoer. Such long-stop limitation periods are generally conceived of as absolute barriers.

⁵⁴ See M. Bona *La responsabilità civile per i danni da circolazione di veicoli*, (Milano, 2010) pages 694-695.

| Overall Time Limits – Non-Contractual Obligations | | | | | | | | |
|---|--|--|---|--|---|--|---|----------------------------|
| Member State | Croatia | England/Wal es | Germany | Hungary | Italy | Luxembou rg | The Netherlands | Spain |
| General Time Limit | 3 years Civil Obligations Act (COA) Art 230 | 3 years if personal injury Limitation Act 1980 (LA) s11 6 years if notLA s2 | 3 years The Bürgerliches Gesetzbuch, (BGB) s195 | 5 years S6:22(1) Civil Code (3 years if result from hazardous operation eg use of motor vehicle) S6:538 Civil Code | 5 years Art 2946 Civil Code or 2 years for claims arising out of RTAs Art 2947 Civil Code | 30 years Art 2262 Civil Code | 5 years Art 3:310(1) Dutch Civil Code (DCC) | 1 year Art 1968 Civil Code |
| Absolute Time Limit | Yes – 5 years COA Art 230 | no | 10 years (including for motor insurer claims). The Pflichtversicherungsgesetz s3(1)3 30 years for personal injury claims. BGB s199 | no | no | no | Yes - 20 years Art 3:310(1) DCC | No |
| Different period for claim against insurer | no | no | no | no | no | Yes – 3 years Art 44(1) Law of 27 th July 1997. | Yes – 3 years Art 10 Wet Aansprakelijkheid sverzekering Motorrijtuigen (WAM) | No |
| Impact of Criminal Proceedings | Period is longer where the damage arises as a result of a criminal offence and the criminal proceedings are subject to a longer period. COA Art 231 | None | none | Yes – period is 5 years S6:533(1) Civil Code | Period is longer where the damage arises as a result of a criminal offence and the criminal proceedings are subject to a longer period. | none | Period is longer where the damage arises as a result of a criminal offence and the criminal proceedings are subject to a longer period. Art 3:310 (4) | None |

Table 1 – Overall Time Limits

2. Beginning of the limitation period: the *dies a quo*.

Once the applicable time-limit has been identified, it is then necessary to assess when it starts to run. European jurisdictions address these types of issues in different ways, as demonstrated in the table below. In many states limitation periods can run from the date of the accident or from the victim's "date of knowledge", which may be after the date of the material occurrence of the damage. However, considerable differences exist in relation to the way of conceiving the concept itself of the "date of knowledge". In some countries the notion is sufficiently broad and, in particular, it is not limited only to knowledge of the damage sustained, but other factors may also be taken into consideration such as the knowledge of the attributability of the injuries to the conduct of the defendant and the knowledge of the identity of the person against whom a claim can be made.

In some jurisdictions the concept of "date of knowledge" is generally limited to knowledge of the extent of the injury sustained while other factors such as the identity of the defendant or the knowledge of attributability of the damage to the defendant are not generally taken into account. It can be observed that in all legal systems the courts retain some discretion as to the interpretation of the concept of the "date of knowledge".

It is clear that in calculating the relevant limitation period, at present it is important to have local knowledge of the way in which the date of knowledge concept is interpreted. This is a daunting task requiring expert advice, usually from a local lawyer. It should also be noted that there is some variation in the effect of limitation rules on minors. In some Member States minors are protected and time does not run against them until they reach the age of majority. In others time may run where the minor has a representative. In some MS minors are not protected by special rules.

| Start of Limitation Period | | | | | | | | |
|----------------------------|---|--|--|--|--|--|---|---|
| Member State | Croatia | England/Wales | Germany | Hungary | Italy | Luxembourg | The Netherlands | Spain |
| Time Runs From | Date awareness of existence of damage and identity of person against whom the claim can be brought. COA Art 215 | Date of accident or date of knowledge that injury significant, that injury attributable to a breach of duty and the identity of the person against whom a claim can be brought. LA s14(1) | The end of the calendar year in which the right to claim arose and where the claimant knew of the circumstances giving rise to the claim, as well as the identity of the person against whom the claim can be brought. S199 BGB | From occurrence of the damage. s6:22, s6:532, s6:533 Civil Code | Date on which the substantial consequences of the impairment become manifest. Supreme Court, Third Civil Division, 24 February 1983, no. 1442, in Resp. civ. prev., 1983, 627. | Date of accident or Date the loss is revealed to the claimant if that person had no knowledge of the accident. Art 22262 Civil Code | Date awareness of damage and identity of person against whom the claim can be brought. Art 3:310 DCC | Date of knowledge of existence of harm, scope of it and the identity of the person against whom the claim can be brought. Art 1968(2) Civil Code |
| Arrangements for Minors | If no legal representation then a limitation is 2 years from the date the claimant reaches majority. COA Art 239 | Limitation runs from the date at which the claimant reaches majority. S38 LA as amended by the Mental Capacity Act 2005. | No special arrangements | No special arrangements | Limitation is suspended until a legal representative is appointed and for six months after, or for six months after the claimant reaches the age of majority. Art 2942 Civil Code | Limitation runs from the date at which the claimant reaches majority. Art 2252 Civil Code | Limitation same as for adults. | No special arrangements |

Table 2 – The Start of the Limitation Period

3. Substantive and procedural requirements to stop the running of the limitation period.

Various means for the interruption of time-limits have been developed in Europe. The Commission 2009 report identified 11 different methods in use.⁵⁵ This gives rise to a significant level of divergence among MS and can result in complexity and uncertainty for victims and their advisors when trying to navigate foreign rules.

All jurisdictions provide for the interruption of limitation periods where the defendant acknowledges the claimant's right. Interruption may also occur when the claimant takes the initiative to claim for damages. There are two basic, but opposite, approaches in relation to the fundamental requirements of such an initiative. The claimant can interrupt the limitation period either by sending a letter of claim to the defendant or his insurer, or by issuing court proceedings. These basic methods are reflected in the table below for the purposes of illustration.

It should be noted however, that there may be differences between MS as to what information a letter of claim must contain and whether notification of the relevant party is sufficient or whether there needs to be an acknowledgement from that party before interruption is effective.⁵⁶ There are also differences concerning whether court proceedings must be issued or also served on the defendant.⁵⁷ This has obvious implications for visiting victim claimants and their legal representatives, who will not be familiar with the requirements of the applicable law.

⁵⁵ Commission 2009 report n15 above at p208 – 218.

⁵⁶ Ibid.

⁵⁷ Ibid.

Table 3 – Interruption of the Limitation Period

| Interruption of the Limitation Period | | | | | | | | |
|---------------------------------------|--|--|---|---|---|--|--|--|
| Member State | Croatia | England/Wales | Germany | Hungary | Italy | Luxembourg | The Netherlands | Spain |
| Basic Method of interruption | Acknowledgement of the debt by the debtor Or Issuing of proceedings before a court or other competent body. Art 240-244 COA | Acknowledgement of the debt by the debtor Or Issuing of proceedings before a court. See for example <i>Lefevre v White</i> [1990] 1 Lloyd's Rep. 569. | Limitation is not interrupted but suspended by the commencement of negotiations, court proceedings or out of court proceedings. At the end of six months after the conclusion of the action taken, the limitation period restarts. Art 203 BGB | Acknowledgement of the debt by the debtor Or Issuing of proceedings before a court. S6:25 Civil Code | Acknowledgement of the debt by the debtor Or Letter of claim to the defendant Or Issuing of proceedings before a court. Art 2943 (4) Art 1219 Civil Code | Acknowledgement of the debt by the debtor Or Issuing of proceedings before a court or other competent body. Or Making of a claim directly against a third party insurer. Art 2244 and Art 2248 Civil Code | Any act of recognition of the debt by the debtor Or Issuing of court proceedings Or Any negotiations between an insurer and an injured party. Art 3:316 – 3:319 DCC | Any act of recognition of the debt by the debtor Or Issuing of court proceedings Or An extra judicial claim by the creditor. Art 1972 Civil Code. See also cases SSTS 20.11.2007 [RJ 2007\10]; 19.12. 2008 [RJ 2009\24]; STS 24.3.2006 [RJ 2006\1819]) SSTS 21.7.2004 [RJ 2004\4874], 27.9.2005 [RJ 2005\7152]. |

III Conclusion

As stated above, the comparative overview provided here is not designed to be comprehensive in nature, but the information presented clearly demonstrates the level of complexity involved in rules of limitation. There can be issues in understanding which is the applicable overall time limit, when and how time begins to run and how this is suspended or interrupted. National lawyers need in-depth knowledge of the relevant rules in order to give accurate advice in any given circumstance. The difficulties which arise when the rules are foreign to the victim, the victim's legal advisers, and to the court, are obvious. Where issues of limitation arise specialist local legal advice is likely to be required. At this point, it is vital to understand which nation's rules to apply. In a cross border scenario, the rules of private international law are crucial.

3 Rules of Private International Law

When a road accident occurs and damage is incurred by someone who is not normally resident in the country in which the accident takes place, it must be determined in which jurisdiction a claim may be brought and which law, including which law of limitation, will govern the claim. In this section the relevant legislative measures, dealing with issues of jurisdiction and applicable law, will be examined and the likely limitation issues will be highlighted.⁵⁸

I Jurisdiction

In the EU, the issue of jurisdiction for RTAs occurring within the EU, where the defendant is domiciled in the EU, is primarily governed by the Brussels I recast Regulation.⁵⁹ The claimant has an option under the Regulation. If the claim is brought against the tortfeasor⁶⁰, the claim may be brought either in the courts of the defendant's domicile,⁶¹ or, as a matter relating to tort,⁶² in the courts for the place where the harmful event occurred.⁶³ In a traffic accident scenario this is the court of the place where the accident occurred.

⁵⁸ It should be noted that only the main provisions of the main relevant instruments are considered here. Specialist works should be consulted for more in-depth analysis of the instruments and the issues discussed. See for example, R. Merkin and M Hemsworth *The Law of Motor Insurance* (2edn, sweet and Maxwell 2015); A. Dickinson *The Rome II Regulation* (OUP 201); J. Papettas, 'Direct Actions Against Insurers of Intra Community Cross Border Traffic Accidents: Rome II and the Motor Insurance Directives' (2012) 8 *Journal of Private International Law* 297; F. Marongiu Buonaiuti *Le obbligazioni non contrattuali nel diritto internazionale privato* (Giuffrè, 2013); A. Dickinson and E. Lein *The Brussels I Regulation Recast* (OUP 2015); A. Briggs *Civil Jurisdiction and Judgments* (6th edn, Informa 2015).

⁵⁹ Regulation (EU) 1215/2012 on jurisdiction and enforcement of judgements in civil and commercial matters (recast) OJ L351/2

⁶⁰ The 'at fault' driver or operator of the vehicle which has caused damage.

⁶¹ Brussels I (recast) n37, Article 4.

⁶² It is submitted that claims arising out of RTAs are likely to be classified as matters relating to tort at the Private International Law level in accordance with the reasoning of the CJEU in C 548/12 *Marc Brogsitter v Fabrication de Montres Normandes EURL and Karsten Fräßdorf*.

⁶³ Brussels I (recast) n38, Art 7(2).

Under both of these options, a visiting victim will be bringing an action in a court which is outside of their country of residence and it has been recognised that organising a claim under an unfamiliar legal system, possibly in a foreign language and from another country, can be particularly onerous and a daunting prospect.⁶⁴ For this reason the fourth Motor Insurance Directive (MID)⁶⁵ (as amended by the fifth MID⁶⁶) made a number of changes to the position of the visiting victim of a road accident.

The fourth MID importantly ensured that a direct right of action against the insurer, covering the person liable for the loss, is available in all Member States.⁶⁷ Article 4 of the fourth Directive provides that insurance undertakings must appoint a representative who can handle and settle claims on their behalf, in all Member States other than the one in which they received their official authorisation. This representative will be able to deal with any claim from a victim of a cross border RTA.⁶⁸ The representative must be capable of examining cases in the official language of the state of residence of the victim.

This provision enables victims to deal with a representative of the insurance company in their own country and in their own language. This was reiterated again recently by the CJEU. In the case *Spedition Welter GmbH v Avanssur SA*⁶⁹, it was held that the powers granted to a claims representative under the Directive must include the power to accept service of judicial documents on behalf of the insurer. The court found that if this were not the case, the aim of the provisions of the fourth MID of making it easier for visiting victims to claim, particularly by allowing them to proceed in their own language, would be deprived of its effectiveness.⁷⁰

To complete the package of measures which would overcome the perceived obstacles to a third party victim bringing a claim, the fourth MID (as amended by the fifth MID) relied upon a particular interpretation of Arts 9(1)(b) and 11(2) of Brussels I. Recital 16a (inserted by the fifth MID) states:

Under Article 11(2) read in conjunction with Article 9(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, injured parties may bring legal proceedings against the civil liability insurance provider in the Member State in which they are domiciled.

It was not clear that the terms contained in Article 9(1)(b) (policyholder, insured or beneficiary) were capable of extending to a third party direct claimant however, until this

⁶⁴ See the Proposal for the Fourth MID Proposal for a EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and amending Directives 73/239/EEC and 92/49/EEC (Fourth Motor Insurance Directive) COM (97) 510 final, p2.

⁶⁵ Directive 2000/26/EC of the European Parliament and of the Council of 16 May 2000, [2000] OJ L181/65.

⁶⁶ Directive 2005/14/EC of the European Parliament and of the Council of 11 May 2005, [2005] OJ L149/14.

⁶⁷ Article 18 of the consolidated Directive 2009/103/EC.

⁶⁸ Now Article 21 of Dir 2009/103/EC.

⁶⁹ C-306/12.; ECR [2013] 00000.

⁷⁰ Ibid at [24].

position was confirmed by the CJEU in the case of *Odenbreit*.⁷¹ In this case the effect of Article 11(2) was felt to be to widen the category of claimants that Article 9(1)(b) applied to, so as to include third party victims, on the basis that one purpose of the provisions was to guarantee more favourable protection to weaker parties.

These measures effectively ensure that all aspects of a direct claim against a third party motor insurer can be dealt with from the state of residence of the victim. However, the claimant again has a jurisdictional choice where the claim is brought directly against an insurer. The claim can be brought in the courts of the victim's country of residence, or under Article 11(1)(a) of the Brussels I recast Regulation, in the Member State of the insurer's domicile. It is to be anticipated (and recently decided cases also support⁷²) that the majority of claimants will choose to bring their claims before the courts of their state of residence for reasons of cost and convenience, as well as for the comfort of a more familiar legal environment and more readily accessible legal advice. However, it should be noted that this is not universally true.⁷³

Lastly, in the case of uninsured or unidentified tortfeasors, Article 1 of the second MID along with Articles 6 and 7 of the fourth MID stipulate that each MS must establish a compensation body to act as a guarantee fund, meeting the claims of victims of such tortfeasors, as well as claims by victims who have not received timely responses from either an insurer or an insurer's claims representative. In each of these cases the victim may make a claim to the body established in their country of residence. Where the victim is in dispute with the compensation body, there is a right to bring an action against the body before the courts of the state of the body, which will also be the state of habitual residence of the victim.⁷⁴

II Applicable Law

Among the EU Member States (with the exception of Denmark) the law applicable to a claim arising out of an RTA is determined, in cross border cases, through the application of the Rome II Regulation. The Regulation entered into force on the 11 January 2009 and it unifies the Member State rules on the law applicable to non-contractual obligations. However, Art 28 of Rome II ensures that the application of international conventions, which lay down conflict of laws rules in relation to non-contractual obligations and to which one or more Member States were parties at the time of adoption of the Regulation, are not prejudiced. Article 28 ensures that the Hague Convention on the Law Applicable to Traffic Accidents will continue to apply in the courts of those Member States which are signatories to it and this will preclude the application of any measure of Rome II dealing

⁷¹ FBTO Schadeverzekeringen NV v. Odenbreit Case C- 463/06 [2007] ECR I-11321.

⁷² See for example: *Vann v Ocidental-Companhia De Seguros SA* [2015] EWCA Civ 572; *Winrow v Hemphill* [2014] EWHC 3164 (QB); *Hyde v SARA Assicurazioni SPA* [2014] EWHC 2881 (QB); *X v Y* [2014] I.L.Pr. 30; *Cox v Ergo Versicherung AG (formerly Victoria)* [2014] UKSC 22.

⁷³ See for example the recent case of *Bianco v. Bennett* [2015] EWHC 626 (QB) where an Italian claimant brought a claim against an English insurer of an English registered vehicle before the English courts in respect of an accident which occurred in England.

⁷⁴ See C-541/11: Order of the Court (Fourth Chamber) of 17 January 2013 (request for a preliminary ruling from the Vrhovno sodišče - Slovenia) - *Jožef Grilc v Slovensko zavarovalno združenje GIZ* OJ C 79, 16/03/2013 p. 2.

with the same issue. The Regulation and the Convention take different approaches to the question of applicable law and it is possible that the choice of law outcome will also be different in some circumstances

1. Rome II

Under Rome II there are no rules specific to RTAs with the result that the law applicable to a claim arising out of such an accident will usually be determined by Art 4 of the Regulation.⁷⁵ Art 4 is relatively straight forward for traffic accident cases. It provides under Art 4(1) that the applicable law will be that of the place where the direct damage occurred. Thus, it is not to be determined on the basis of any indirect damage which might arise.⁷⁶ This is reinforced by Recital 17. Article 4(1) will in most cases designate the law of the place of the RTA, this being the place where the direct damage occurs.

The rule in Art 4(1) is subject to two exceptions. Art 4(2) provides that where the parties share habitual residence the law of that state will apply. A further exception to both of the rules in Art 4(1) and 4(2) is contained in Art 4(3). This rule provides that where it is clear, from all the circumstances, that the tort is manifestly more closely connected to a country other than that provided for under Art 4(1) or 4(2), the law of that country shall apply. Use of the word '*manifestly*' in the Article indicates that there is a high threshold of close connectivity which must be met before the exception will be triggered.⁷⁷

Article 15 of Rome II provides a non-exhaustive list of issues to which the applicable law will apply. It determines the scope of the applicable law. Article 15 makes clear that the designated law will determine, amongst other things, the basis and extent of liability, the grounds for exemption from liability, the existence and assessment of damages, who is entitled to compensation, liability for the acts of another person and, importantly for the purposes of this study, the applicable law will determine the rules on limitation.⁷⁸

If we take a common example of a cross border road accident, whereby an EU citizen is injured in a car accident whilst on holiday in another Member State, by a driver resident in that state, Rome II will often produce the outcome that the applicable law to a claim arising out of the accident, is the law of the place of the accident (*lex loci damni*). It will be less common to see the exceptions applying, or to find that an agreement about applicable law had been reached between the parties.⁷⁹ However, there remains some uncertainty about how and when the exceptional rules of Article 4 will apply. As such there is potential for the issue of applicable law to remain contentious under Rome II.⁸⁰

⁷⁵ An attempt by the European Parliament to insert a traffic accident specific rule during the legislative process of Rome II was unsuccessful. See the Report on the proposal for a Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations Rome II 27.6.2005,A6-0211/2005 FINAL.

⁷⁶ Case C-350/14 *Lazar v Allianz SpA*. [2015] ECR 00000

⁷⁷ The Commission, in its original proposal for Rome II was clear that the application of Art 4(3) should remain exceptional. See COM (2003) 427 FINAL, 12.

⁷⁸ Specifically Art 15 (h).

⁷⁹ Agreements as to applicable law are governed by Art 14 of Rome II.

⁸⁰ See the Commission 2012 Consultation response by A. Dickinson at http://ec.europa.eu/justice/newsroom/civil/opinion/121031_en.htm.

2. Hague Convention

Thirteen EU Member States are signatories to the Hague Convention on the Law Applicable to Traffic Accidents.⁸¹ Under Article 28 of Rome II these countries can continue to apply the Hague Convention to claims arising out of cross border traffic accidents, in place of Rome II. Indeed, the signatory states notified the European Commission that they intended to continue to apply the Hague Convention in derogation from Rome II.⁸²

The French Supreme Court has recently confirmed that, in its view, since the Convention was not only concluded between EU Member States, but also between other third countries, Article 28(2) of Rome II would not apply to exclude the application of the Convention, such that the Convention will take precedence over Rome II.⁸³

The policy of the choice of law rules in the Convention is quite different to that under Rome II. The Convention contains a basic rule in Article 3, which designates as applicable the law of the place of the accident. It can be noted that the basic rule will, by and large, produce the same result as Art 4(1) of Rome II since, as already stated, the place where the damage arises is likely to be the place of the accident in a cross border traffic accident. However, under the Convention this rule is then subject to a cascading system of rigid exceptions.

The exceptions to the basic rule are contained in Articles 4, 5 and 6 of the Convention. Article 4 provides that the law of the state of registration of the vehicle shall apply to claims made by: the driver, owner or other person having control of the vehicle; by passenger victims who are habitually resident in a country other than that where the accident occurred; and by persons outside of the vehicle who are habitually resident in the country of registration of the vehicle.⁸⁴ This is so in all accidents involving one vehicle⁸⁵ (where a vehicle collides with a tree for example) and in accidents involving two or more vehicles if all the vehicles concerned are registered in the same state.⁸⁶ If those vehicles are registered in different states then the general rule in Art 3 will be applicable. Under Article 5 the law designated by either Art 3 or 4 in respect of claims made by a passenger will also govern any claims for damage to property being carried in the vehicle belonging to that passenger. Claims for any other goods being carried in the vehicle will be governed by the law designated by Art 3 or 4 in respect of claims by the owner.

Both the general rule and the exceptions are based on the need to apply a law which will, in the majority of cases, accord with the expectations of the parties and be the law of the place where the majority of connecting factors converge.⁸⁷ For example, in a one vehicle

⁸¹ Austria, Belgium, Croatia, Czech Republic, France, Latvia, Lithuania, Luxembourg, The Netherlands, Poland, Slovenia, Slovakia and Spain

⁸² See Notifications under Article 29(1) of Regulation (EC) No 864/2007 on the law applicable to non- contractual obligations (Rome II) (2007) OJ C 343/7.

⁸³ *Societe AXA France IARD, Re* Unreported April 30, 2014 (Cass (F))

⁸⁴ Article 4(a).

⁸⁵ *Ibid.*

⁸⁶ Article 4(b)

⁸⁷ See E. Essen, *Explanatory Report on the Convention on the Law Applicable to Traffic Accidents* (1970) available at <http://www.hcch.net/upload/expl19e.pdf>, p3 and 15.

accident brought by the vehicle owner against the driver for property damage, the law of the place of registration of the vehicle will likely accord with: the habitual residence of the owner, the place of establishment of the insurer, the place where the insurance contract was concluded, the law which governs the insurance contract and possibly the habitual residence of the driver.

Of overriding importance in the construction of rules for the Convention was the notion that, bearing in mind that most accidents are resolved outside of the litigation process,⁸⁸ those rules should be easy and straightforward to apply.⁸⁹ It can be noted that in trying to ensure that the resolution of claims can be achieved quickly and easily it is the law which corresponds to the law under which the insurer operates, which is designated by the exceptions. This was acknowledged as being more favourable to the insurer who can process the claim in accordance with familiar laws, the consequent effect being that claims could be settled more expeditiously.⁹⁰ This approach is in contrast to that of Rome II where the aim is to find a solution which balances the interests of the parties. It also contrasts with the MID which seeks to favour and protect the victim as discussed above.

Article 8 of the Convention provides for those matters which the applicable law will apply to and is very similar in scope to Article 15 of Rome II. Again, it is important to note that the applicable law will determine the rules of limitation which will apply to the bringing of a claim. Regardless of which Member State court proceedings are brought in.

Again under the Hague Convention, the applicable law in many circumstances will be the law of the place of the accident. It is even more exceptional for another law to apply to claims given that the shared habitual residence of the parties does not, of itself, mean that a different law will apply.⁹¹

III Private International Law Outcomes

In combination, the rules on jurisdiction along with rules on choice of law can have a routinely difficult effect in practice. The majority of cross border road accident claimants, who are resident in the EU, are likely to make use of the ability to bring an action in their state of residence. But in most cases, this will lead to the court of that state applying the law of another Member State. Some practical examples will help to illustrate this point further:

⁸⁸ See in relation to the English system, R. Lewis 'Insurance and the Tort System' 25 LS (2005) 85 at 88. Also see the General Report of Mr. E.W. Essen, in Conference de La Haye de Droit International Prive, "Actes et Documents de la XIN Session," 1970, t.III, 200 at 206 in respect of evidence presented by the Swiss delegation to the eleventh session of the Hague Conference which showed that out of 1000 traffic accident cases insurers settled 995 out of court.

⁸⁹ Supra n64 above.

⁹⁰ See Report Of United States Delegation To Eleventh Session Of Hague Conference On Private International

Law [April 1969] 8 International Legal Materials (1969)785 at 802.

⁹¹ As was the case in *Societe AXA France IARD, Re Unreported April 30, 2014 (Cass (F))*.

Table 4 – PIL Outcomes

| Accident | Action | Jurisdiction | Applicable Law (including rules of limitation) |
|---|---|--|--|
| Italian pedestrian knocked down and seriously injured in London⁹² | Direct action against the English third party motor insurer | England (domicile of the insurer) or Italy (habitual residence of the victim) Claimant chose to bring the claim in Italy. | English Law (Rome II Art 4(1)) |
| French passenger of a French owned and insured car injured by the fault of the French driver upon collision with a Spanish car in Spain⁹³ | Direct action against the French third party motor insurer | France (domicile of the insurer and habitual residence of the victim) Claimant chose to bring the claim in France. | Spanish Law (Hague Convention Art 4(b)) |
| English cyclist fatally injured in a collision with a Spanish registered and insured car in Spain.⁹⁴ | Direct action against the Spanish third party motor insurer | Spain (domicile of the insurer) or England (habitual resident of the victim) Claimant chose to bring the claim in England. | Spanish Law (Rome II Art 4(1)) |
| English pedestrian seriously injured in by a Polish registered and insured car in Poland⁹⁵ | Direct action against the Polish third party motor insurer | Poland (domicile of the insurer) or England (habitual residence of the victim) Claimant chose to bring the claim in England. | Polish Law (Rome II Article 4(1)) |

Rules of limitation are complex and navigation of them, even at the domestic level requires in-depth knowledge. However, limitation laws have a considerable impact not only on the injured parties' right to access to justice, but also on their substantive rights: there cannot be an effective right without proper and adequate protection of it. The application of a limitation period may affect the substantive rights that a claim for compensation aims to protect.

⁹² *Folino v. Link Motor Insurance Ltd and others* Lamezia Terme Court, 29.10.2009 No. 1024

⁹³ *Societe AXA France IARD, Re* Unreported April 30, 2014 (Cass (F))

⁹⁴ See the PEOPIIL contribution to the Commission 2012 public consultation on limitation periods at http://ec.europa.eu/justice/newsroom/civil/opinion/121031_en.htm.

⁹⁵ *Ibid.*

In a cross border scenario it may not be certain from the outset which law is the applicable law so as to determine which law of limitation will apply. Alternatively, and more likely, the applicable law may be known, but it may be a law which is foreign to both the victim and the court. In both cases it will be more difficult to organise the claim because it relates to events which occurred in another country. It clear that in cross border cases the complexity faced by the parties and the court is significantly heightened.

Ostensibly then, there is a basis for the consideration of the harmonisation of the rules of limitation relating to cross border traffic accidents in the EU, on the grounds that the current complexity has a limiting effect on the realisation of the right to claim compensation given to victims of traffic accidents by the MID. The situation would benefit from simplification, in order to assist the parties to a claim arising from an incident.

4 Harmonisation of Limitation Periods

In the public consultation held by the Commission in 2012,⁹⁶ respondents were asked to comment on four possible options for remedying the perceived difficulties arising from divergent limitation periods faced by visiting victims of RTAs. The options were

- Option 1:** Improving information to 'accident-abroad victims' in concrete cases - optional
- Option 2:** Improving information to 'accident-abroad victims' in concrete cases - mandatory
- Option 3:** Improving general information on limitation periods
- Option 4:** New rules harmonising limitation periods for cross border traffic accidents

These options, along with another focusing on a choice of law solution, are considered in this section. Arguments put forward during the 2012 Consultation in support of and in opposition to them are also taken into account.

The objective of harmonisation of limitations periods would be to support the free movement of persons, by furthering the scheme of the MID in securing access to justice for victims of cross border road accidents, in a way comparable to that in purely domestic cases. The current complexity created by the application of foreign limitation periods impedes rather than supports this aim. This objective underpins the discussion on which would be the most suitable way to amend the current situation, whether that method meets the requirements of proportionality and subsidiarity and whether there is a correct and sufficient legal basis for action under the Treaties of the European Union.

I Options for Harmonisation

1. Choice of Law Approach

Firstly, there is an option which could be considered, although it was not put forward for consideration in the Commission consultations. A choice of law approach could be taken whereby the law of the visiting victim's MS of habitual residence would apply to issues of

⁹⁶ See n17 above.

limitation for direct actions against insurers. This could be enacted through a revision of the Rome II Regulation. A more comprehensive reform in this regard has previously been suggested by Dr Papettas, which would see the victim's 'home' law govern a direct claim in its entirety.⁹⁷

An argument made by some respondents to the consultation is that harmonisation would be an unnecessary and unwarranted interference with national rules and national legal systems. In particular it is said that harmonisation would remove rules from their wider national context and would therefore conflict with the coherence and rational structure of each national system, risking further confusion and complexity.⁹⁸ It was also said that homogenised rules would lead to unforeseen consequences and potential injustice and may be ill suited to the general law in some jurisdictions.⁹⁹ These arguments raise issues in relation to proportionality. Under Art 5(4) Treaty on European Union (TEU) the content and form of Union action shall not exceed what is necessary to achieve the objectives sought.

The choice of law approach would involve a minimum of interference with national legal systems. It would revise the choice of law rules of Rome II, which are directly effective in all Member states (except Denmark), but would leave national rules of limitation unaltered. This option would support the aim of the MID in allowing claimants to proceed with claims under familiar procedures and would entail an application of laws with which the court and the claimant's lawyers were familiar. Where the claim is being dealt with by a claims representative or a compensation body, the rules would also be familiar to the defendant. Rules would not be familiar to defendants who are insurers, but insurers have the resources available to obtain the necessary advice require to defend claims and are not considered to be the party in need of protection under the MID. Arguably, this approach would satisfy the principle of proportionality. It would not affect substantive law provisions at all and would involve a fairly minor amendment to an existing EU legislative instrument.

This option is not free from difficulty, however. Applying the rules of limitation of the victim's country of residence would affect the scheme laid down in Rome II by carving out an exception for limitation rules in cross border road accident claims brought directly against insurers or compensation bodies. This would rupture the current coherence of Rome II making it more complex in its application. It would also mean that rules of limitation are potentially divorced from rules of liability, which could give rise to a particular detriment or a particular advantage to the claimant. For example, the claimant may have to adhere to a short limitation period, but may also have to prove fault, whereas in a domestic situation the limitation would be short because liability is strict.

⁹⁷ J. Papettas, 'Direct Actions against Insurers of Intra Community Cross Border Traffic Accidents: Rome II and the Motor Insurance Directives' (2012) 8 *Journal of Private International Law* 297.

⁹⁸ See the Bank of Greece response at http://ec.europa.eu/justice/newsroom/civil/opinion/121031_en.htm.

⁹⁹ See the FOIL response, *ibid*.

An obvious solution to these issues would be to deal with traffic accidents as a special category of non-contractual obligation under Rome II, where the victim's home law governs the entire claim. This is a more far reaching revision to make, which would do away with fragmentation at the substantive law level, but which would also require considerable political support and specific discussion going beyond the remit of this report.¹⁰⁰

2. Provision of Information to Victims

The first two options listed for consideration in the Commission 2012 public consultation concern the provision of information to victims of cross border accidents about the rules of limitation in force in each Member State, on either a voluntary (option 1) or mandatory (option 2) basis. These options involve the provision of information to individual victims and are not aimed at the convergence of national rules.

The effectiveness and desirability of these options has been roundly criticised by all sides. Respondents representing the insurance industry did not think that insurers should bear the responsibility of informing accident victims of the applicable limitation rules, because of the complexities of those rules, which require in-depth local knowledge.¹⁰¹ Claimant lawyers give practical examples showing the need for legal practitioners to seek expert opinions on the operation of foreign rules before they are able to properly advise their clients and make progress with individual claims.

The analysis conducted above in Section 2 demonstrates the complexity of national limitation rules and supports the objections raised by respondents to the consultation. Each case will require expert knowledge of the applicable rules to ensure that the claim does not fall foul of them. Indeed the complexity of the rules was also acknowledged in the Commission 2009 report which states that:

*"... many differences exist between the different limitation periods systems of the Member States. Again the differences are not straight-forward and it is not clear which Member State offers the longest limitation period. Exceptions and specific suspension or interruption rules blur the apparent simplicity of the solution."*¹⁰²

It is submitted that the provision of information on MS limitation periods by insurers, as envisaged by options 1 and 2 of the Commission 2012 consultation, would not be a suitable option for improving the position of cross border RTA victims. Claimants currently require expert advice tailored to their specific circumstances and it would not be sufficient for insurers to provide basic information about rules of limitation. It would be equally inappropriate to expect insurers to provide detailed legal advice to victims making claims against them.

3. Soft Convergence

The third option given by the Commission can be seen as relating to a process of what has been referred to as 'soft convergence'. A 'soft convergence' approach facilitates the

¹⁰⁰ For in-depth discussion of this issue, see Papettas n74 above.

¹⁰¹ See the responses from the ABI and Insurance Europe.

¹⁰² n15 above at p45.

exchange of information between Member States and then employs soft law options such as recommendations, opinions or optional instruments, as a means of encouraging spontaneous convergence by Member States. Option 3, according to the Commission, would see Member States making general information available about their rules of limitation. This could be done through a virtual platform such as the e-Justice portal.¹⁰³ The option itself does not hint at convergence, but the sharing of information in this way is what academics see as the first step in a spontaneous convergence process.¹⁰⁴ Once information has been shared the EU institutions would be in a position to formulate a recommendation or optional instrument aimed at assisting Member States in making choices which would result in the eventual harmonisation of rules.

Taking a 'bottom up' approach and using flexible mechanisms to build a harmonised system in which Member States have played an active role¹⁰⁵ is said to avoid the difficulties which can be associated with a centralised regulatory approach. It has been argued that formal harmonisation does not always achieve the desired result because national legislatures and courts resent the enacted rules and so seek to modify them or avoid them through the implementation or interpretation process.¹⁰⁶ This method of convergence would have the advantage of not interfering with national legal systems, but would rather allow a natural evolution of national systems towards approximation.

However, it is difficult to envisage such a process being successful in relation to limitation periods. Soft law options are not legally binding and it is anticipated that they would not have the desired effect. As Zekoll points out, national procedural systems are subjected to political, constitutional and ideological constraints. Where substantive laws manifest policy choices, so too the procedural rules which service them, will be a manifestation of the same choices, making them '*resistant to change*'.¹⁰⁷ Rules of limitation are manifestations of policy choices. They define the balance between effective access to the courts by a claimant and legal certainty for the defendant. They are also linked in some instances to schemes of liability so that where liability is strict, so that it is easy for a claim to be made, the basic time limit which applies can be short, as in Spain where the limit is one year.¹⁰⁸ Member States are likely to resist change on the grounds of policy. The position is summed up by Vernadaki:

*"... a soft law instrument ... could hardly address the exigencies of effective enforcement of EU rights and obligations. The main reason is that it completely lacks binding force, ... Member States' national legislatures have little incentive to undertake reforms in national civil procedural rules in accordance with the mandates incorporated in the soft-law instrument."*¹⁰⁹

¹⁰³ See <https://e-justice.europa.eu>.

¹⁰⁴ n28 above.

¹⁰⁵ Tulibacka 'Europeanization of Civil Procedures: In Search of a Coherent Approach' (2009) CMLR 1527 at 1547. Also see Vernadaki 'Civil procedure Harmonization in the EU: Unravelling the Policy Considerations' (2013) J CER 297, at 308.

¹⁰⁶ Ibid.

¹⁰⁷ Zekoll 'comparative civil procedure' Reimann and Zimmermann (eds) *Oxford Handbook of Comparative Law* (OUP 2006) 1328 at 1352.

¹⁰⁸ See above Table 1.

¹⁰⁹ Vernadaki n82 above at 308.

The aim of harmonisation of rules of limitation of improving access to justice for cross border victims is unlikely to be achieved using this method. Furthermore, the point demonstrates the need for action by the EU, where the proposed action would “*be better achieved at Union level*”¹¹⁰ indicating that action to harmonise would also satisfy the principle of subsidiarity. It is submitted that the current divergence is such that only action at the Union level will be sufficient to address it. Action by the Member States could not achieve the level of coordination required to generate the certainty which would allow victims to bring claims expeditiously and at a cost resembling that of a domestic claim.

4. Comprehensive Harmonisation

The fourth option expressly envisages a more traditional approach to harmonisation of rules. Rules are harmonised or, in some circumstances, unified, using Union legislation such as Directives or Regulations. Comprehensive harmonisation would involve unification of Member State rules on limitation and appears to be the target for a great deal of criticism in the consultation responses, on the basis that it would have the greatest impact in terms of interference with national legal systems.

There are some advantages to comprehensive harmonisation. It would do away with divergence altogether, making for a clear system of rules which could achieve greater uniformity of application in the Member States. This would give rise to significantly less need for local expert advice and would reduce the instances where limitation issues were raised, thereby reducing delay, legal costs and uncertainty. It would also allow for a policy to be determined whereby an appropriate balance could be decisively struck between the rights of the victim to effective access to justice and the rights of the defendant to certainty and finality.

On the other hand it would be the most intrusive option in terms of interference with national legal systems and if the rules were not correctly balanced, the impact would be greater and more difficult to rectify. In addition, there would be a greater cost of transposition for Member States owing to the nature of the changes, which would be more far reaching in many instances. It should also be noted that there would be a period, following the implementation of comprehensive harmonisation, whereby the application of the new rules, which would require autonomous definition and interpretation, may be uncertain. This is likely to lead to a short term increase in transaction costs for the parties to disputes. It is to be doubted whether this approach could meet the principle of proportionality, bearing in mind that minimum standards harmonisation is also an option.

5. Minimum Standards Harmonisation

A less controversial option would be to utilise a minimum standards approach. Here an instrument (usually a Directive) sets down minimum standards which must be complied with whilst leaving the method of compliance to each Member State and, importantly, allowing Member States the option of applying any rules which are more favourable to the desired outcome. This method of harmonisation is less interventionist than complete

¹¹⁰ Article 5(3) TEU.

or hard harmonisation. It could secure a minimum level of protection in order to address some of the issues faced by victims of cross border road accidents, such as the increased time it takes to organise a claim, but also means that some Member States' current rules may not be affected at all. This would be the case, for example, with a rule which aimed to provide a minimum standard of 4 years as the overall time limit before a claim became time barred. Such a rule would leave intact any existing Member State rule which is four years or more in this respect, thus preserving a degree of national autonomy and lessening the sense in which EU centralised regulation interferes with the national legal framework.

However, the main difficulty with this approach would be that it would not deal with the complexity of divergent national rules in full. There is some indication that the uncertainty created by the application of foreign limitation rules can cause costs to be increased through an increase in the numbers of hours the legal adviser spends dealing with the claim, an increase in the court costs which need to be paid and the need to seek local expert advice. This situation, arguably, runs counter to the rationale behind the provisions of the MID which ensure a right of direct action in the Member State of residence of the victim, where it was felt important to simplify the claims process for victims in support of the free movement of persons in the EU.

With harmonisation of minimum standards some of the costs incurred due to the need for expert local knowledge will remain, because there will not be a single, uniform system for determining limitation. However, many of the issues visiting victims currently face could be addressed by minimum standards, which could be an important first step for the approximation of Member State rules and might facilitate a more natural and spontaneous convergence of rules in time, as part of a continuing and gradual process, whilst supporting the effective realisation of the rights granted by EU law, particularly as regards access to justice.

There is also the possibility for this method of harmonisation to create less fragmentation of national rules. Where national rules already meet the minimum standards, there will be no fragmentation of the rules as between cross border and domestic claims or between claims against the insurer or claims against the wrongdoer. This is not to say that those countries where amendment is necessary for the protection of minimum standards would not experience some fragmentation in this regard, but a process of harmonisation is designed to bring about some change and this cannot be a perfect process bearing in mind the complexity of the task.

II Recommended Option

It is submitted that, on balance, it would be better to approach the harmonisation of rules of limitation using minimum standards harmonisation. In this way the requirement of proportionality is more clearly met since the aim of the harmonised rules to protect access to justice and lower claimant's transaction costs to a level commensurate with those in domestic cases is met in the least obtrusive way for national systems.

However, it is important to be clear about which claims any harmonised rules ought to be applied to. There are a number of options here. Rules could be implemented covering all

claims arising from a road accident whether cross border or not. Alternatively, rules might apply to all claims of a cross border nature, or only to those claims made available under the MID i.e. claims against insurers and compensation bodies either domestically and cross border, or cross border only.

It is submitted that the option which fits best with the principle of proportionality is that where rules are harmonised only for claims made available by the MID which are of a cross border nature. The availability of these claims is already standardised across the EU by the MID. This option supports the aims and objectives of the MID in trying to ensure that visiting victims have an effective means of accessing justice and compensation following a cross border accident.

This approach may cause some fragmentation, with harmonised rules applying to cross border claims against insurers or compensation bodies, but national rules applying to other types of claims.¹¹¹ However, as will be shown below, unless the harmonising measure can be said to have as its object the establishment and functioning of the internal market, then harmonising measures will be restricted by the appropriate legal base to situations having cross border implications.¹¹² Moreover, there does not appear to be any concern in relation to the operation of national rules of limitation in the context of domestic accidents at present. Nevertheless, as discussed above, any potential fragmentation would be minimised owing to the use of minimum standards, in the main, and would be offset by the advantages of certainty and more effective access to justice.

With regard to claims arising out of cross border accidents which are brought against the person said to be liable (as opposed to that party's insurer), such claims must be brought in either the country of residence of the defendant or in the country of the place where the accident occurred, in accordance with the Brussels I (recast) Regulation. This situation will entail the application of foreign substantive and procedural law and will require the appointment of a local legal expert to advise on a whole range of legal matters. In this situation it is not obvious why harmonised rules of limitation would be required. Although this will create a further degree of fragmentation, this approach would better accord with the principle of proportionality in doing only what is required to achieve the desired aims.

¹¹¹ See generally G. Wagner 'Harmonisation of Civil Procedure - Policy Perspectives' in X.E. Kramer and C.H. van Rhee (eds) *Civil Litigation in a Globalising World* (Springer 2012). See also See 'COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations' COM(2004) 4002 final, p11.

¹¹² See below at 4(d).

III Specific Issues Relating to Proportionality

1. The Numbers of Relevant Accidents

It was clearly the view of some of those who responded to the public consultations¹¹³ that the number of accident victims who might be adversely affected by a lack of harmonised limitation rules was too low to warrant any form of harmonising action. This is an issue with potential implications for the proportionality of any harmonising action.

It should be made clear first of all that it is the opinion of the authors that the number of relevant accidents should not be of primary concern. In keeping with the ideal of creating a single area of freedom, security and justice within the EU,¹¹⁴ it should not matter how many people are unable to effectively access justice. Where EU law grants rights, with a view to facilitating movement across borders in support of economic and social integration, such rights must be fully supported by procedures which allow for effective enforcement of them. This point was also made in the Commission 2009 report, where it was stated that:

*“Even if the numbers concerned are very limited this does not mean that the amounts involved are themselves limited. Further, one may say that the problem remains so long as even one EU citizen suffers the injustice of being under-compensated.”*¹¹⁵

In the context of other forms of transport, where harmonised measures relating to limitation have been adopted at the EU level,¹¹⁶ it does not appear that there was ever a debate surrounding the number of people who would be affected. No cost benefit analysis was demanded, even though accidents involving trains or aeroplanes are far less frequent than those involving road vehicles.¹¹⁷ Providing effective means of redress following an RTA is of essential importance, regardless of how many people are affected each year.

Nevertheless, this report will address the arguments put forward which suggest that action to harmonise rules of limitation would not be proportionate because the numbers of people affected are very small. It is submitted that the numbers are not as low as has been suggested.

Firstly, it must be reiterated that there are no entirely accurate statistics on the numbers of traffic accidents occurring which involve foreign or visiting victims.¹¹⁸ Figures put forward on the total number of accidents can be misleading where they relate only to accidents involving death or serious injury. In the Commission 2009 report a figure of 3,540,000 is used to represent annual fatalities and serious injuries resulting from RTAs in

¹¹³ See n17 and 18 above.

¹¹⁴ Art 3(2) TEU.

¹¹⁵ n15 above at 54.

¹¹⁶ See Table 6 below.

¹¹⁷ See http://ec.europa.eu/eurostat/statistics-explained/index.php/Transport_accident_statistics.

¹¹⁸ See Renda A and Schrefler L, 'Full Compensation Of Victims Of Cross-Border Road Traffic Accidents In The EU: The Economic Impact Of Selected Options' (2007) a study prepared for the European Parliament PE. 378.30; Commission 2009 report n15 above.

the EU.¹¹⁹ However, Eurostat statistics suggest that in 2007 9.6% of EU citizens aged between 14-64 reported a RTA.¹²⁰ The population of the EU 28 in 2007 was 498,300,775,¹²¹ 65% of whom were aged 14-64.¹²² This means that there were 31,093,968 reports of accidents made by those aged 14-64 in that year. This of course is not a definitive guide to the number of accidents. Many accidents will be reported by more than one person. Many accidents (particularly minor collisions) will not be reported at all. Accidents reported by those over the age of 64 or under the age of 14 are not included. However, it is likely to be a more representative figure than that given in the Commission report, since that figure appears to relate only to fatalities and serious injuries, thereby excluding accidents resulting in minor injuries or property damage.

This figure seems high and is much higher than any figure postulated in the context of the debate around cross border accidents before. However, there is evidence to support that this level of accidents might be occurring throughout the EU. The UK Department for Transport, in a report in 2012, states that there were 145,571 reported accidents involving deaths, serious injury and slight injury in the UK. However, the report also estimates that 360,000 slightly and seriously injured casualties go unreported each year along with 2.2 million damage only accidents. This pushes the number of accidents in the UK from the reported 145,000 to an estimated 2.5 million overall. In this context the figure for the EU of 31 million appears far more plausible.

The next point to consider is how many of those accidents will involve a visiting victim. The Commission 2009 report suggests that the figure will be far less than one percent.¹²³ This is calculated on the basis that 7.5% of accidents involve foreign parties, but that this should be reduced by excluding many accidents on the basis of a range of factors. Some of the exclusions can be questioned however.

For example, excluding accidents involving cross border workers and commuters on the basis that these parties are covered by labour laws or special insurance arrangements, or may in some instances have contractual claims against their employers is troubling. It is true that all EU Member States have in place schemes of workers compensation. The schemes vary in scope and mode of operation as between the different Member States, but all seek to ensure the compensation of workers who are injured due to work related activities. However, there are some important features of worker compensation schemes

¹¹⁹ See also the European Transport Safety Council 9th Road Safety Performance Index Report June 2015.

¹²⁰ See <http://appsso.eurostat.ec.europa.eu/nui/show.do> accessed on 20 October 2015.

¹²¹

See <http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tps00001&plugin=1> accessed on 20 October 2015.

¹²²

See [http://ec.europa.eu/eurostat/statisticsexplained/index.php/File:Population_age_structure_by_major_age_groups,_2004_and_2014_\(%25_of_the_total_population\)_YB15.png](http://ec.europa.eu/eurostat/statisticsexplained/index.php/File:Population_age_structure_by_major_age_groups,_2004_and_2014_(%25_of_the_total_population)_YB15.png) accessed on 20 October 2015.

¹²³ Commission 2009 report n 14 above at p52.

which mean that it is not appropriate to exclude cross border workers and commuters from consideration in relation to applicable law and limitation periods.

- i. Not all schemes cover the journey to and from work, so that protection is not offered to commuters uniformly.¹²⁴
- ii. No scheme compensates fully, when compared to a civil action. None of the schemes in force in Member States compensates for property damage or for pain and suffering. Schemes only partially replace lost earnings as compensation is not directly linked to actual rates of pay and a cap on the maximum amount payable is in operation under some schemes.¹²⁵
- iii. Where schemes allow for compensation to be topped up by recourse to a claim against the employer, the claimant must still establish the fault of the employer, or at least show that the injury was attributable to the employer.¹²⁶

Where an accident occurs and the victim is carrying out activities relating to employment, but the accident is clearly the fault of the other road user, the victim may have the option to claim under the relevant workers compensation scheme. This is unlikely to provide full compensation and the victim may well wish to pursue the wrongful driver's insurer. The victim is unlikely to be able to attribute the accident to the employer, ruling out a claim for employer's liability (where this is possible at all) making a motor insurer claim all the more important in terms of securing adequate compensation. The right to make a civil claim against the wrongful driver or his insurer is not extinguished by the existence of a workers compensation scheme and it is not right to exclude consideration of these types of victims when assessing matters of applicable law and limitation.

A more representative figure for the number of accidents involving visiting victims may be that provided for in the European Parliament study of 2007. Here Renda and Schrefler report that in 2004 statistics suggest that 2% of accidents in Germany involved visiting victims (as opposed to a foreign party more generally).¹²⁷ This may provide a more reliable basis to work from since it is based on data relating specifically to numbers of visiting victims. This figure cannot be reliably scaled up to cover the entire territory of the EU for 2015 since it is acknowledged that the number of cross border accidents is increasing and, in any event, one figure cannot represent the situation in every country where there are differences in tourism or cross border commuting, for example. However, in the absence of any more reliable data, the figure of 2% is preferred as an indication of the likely numbers of accidents where victims are likely be resident in an EU Member State which is different to that where the accident occurred.

If we use the figure of 31 million as a rough indication of the number of accidents occurring annually, this would put the number involving visiting victims (2%) at 775,000

¹²⁴) Commuting is covered in Austria for example but not in England and Wales. See Oliphant and Wagner (eds) *Employers' Liability and Workers Compensation* (De Gruyter 2012), pages 70 and 150 respectively.

¹²⁵Ibid, p 564 - 567.

¹²⁶ Ibid.

¹²⁷ EP report n95 above at p15.

accidents per year. This certainly suggests that the numbers of accidents we are concerned with for the purposes of this report are not insignificant.

2. How Often Are Limitation Issues Raised?

A number of respondents to the 2012 public consultation raised the point that in the vast majority of claims limitation does not expire before a claim can be made, so that it is very rare for a claim to be defeated on the grounds of limitation.¹²⁸ Although some responses cited cases or instances where it was known that a claim had been defeated on this issue,¹²⁹ there is certainly no empirical evidence to suggest that it is a widespread problem.

However, when it is stated that it is rare for a claim to be defeated by issues of limitation and, therefore, action to harmonise is disproportionate, the costs associated with disputes about overall limitation rules, which can be attributed to their cross border nature, are not being taken into account. For example, the Association of British Insurers, in its response to the consultation, suggested that since 90% of claims are settled out of court, on an estimate of 2% of all victims being 'visiting victims'¹³⁰ then only 0.4% of victims would face limitation issues. The examples given by PEOPIIL demonstrate very clearly that it is not only claims which proceed to court trial which give rise to issues relating to limitation and the costs associated with them.

Having said that, limitation will not be raised as an issue in all cases. The consultation with claimant lawyers, carried out for the purposes of this report, sought information about the numbers of cross border traffic accident cases which raised issues of limitation and how many additional hours the legal representative spent on the case as result of limitation being at issue.

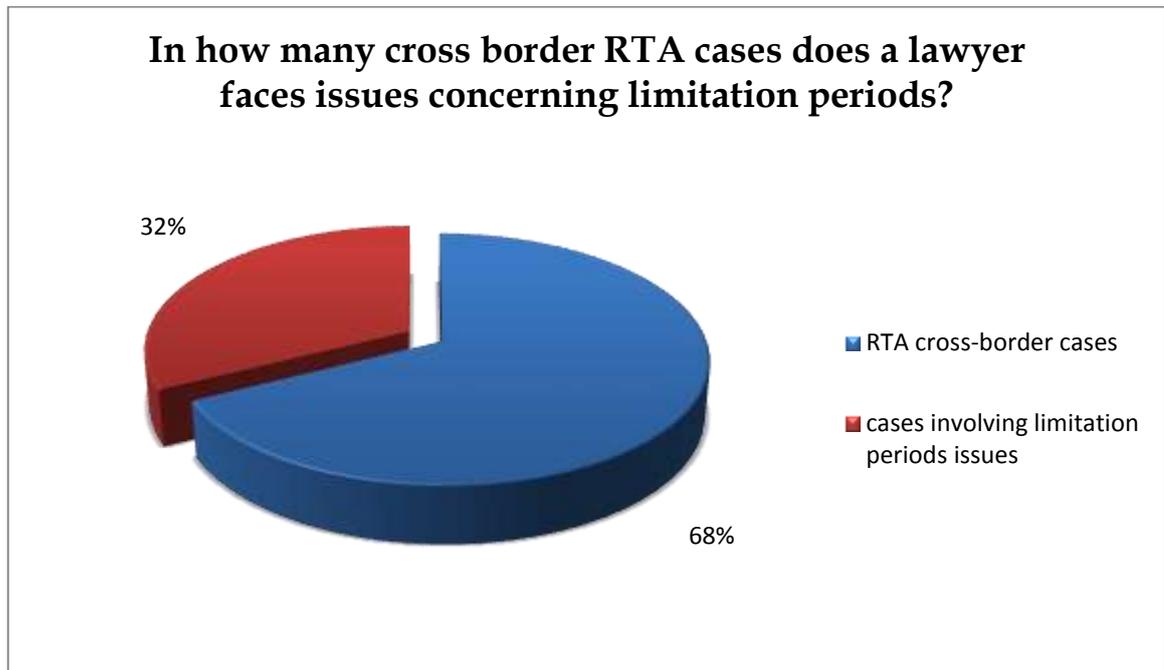
The consultation revealed that on average limitation issues were raised in 32% of cross border cases. 32% of the total number of accidents concerning visiting victims (775,000) amounts to 248,000 accidents per year, involving injury or property damage to visiting victims.

¹²⁸ See the ABI response for example at http://ec.europa.eu/justice/newsroom/civil/opinion/121031_en.htm.

¹²⁹ See for example the responses by PEOPIIL, FIA, AMICE, ACA and FEVR *ibid*.

¹³⁰ Based on the figure given by Renda and Scheffler. See above n95.

Table 5 - How Often Are Limitation Issues Raised?



This figure represents a very small proportion of the total number of accidents each year. However, this in itself is not a reason to leave the situation unchanged and to therefore subject future claimants to increased financial and emotional costs. In any event, it is submitted that it is unrealistic to say that an issue affecting a quarter of a million people does not warrant attention. It is notable that the introduction of harmonised rules of limitation in relation to other areas of law, such as product liability and transport by air, railway and sea, has been undertaken despite the numbers of relevant incidents that the measure is designed to address being far less, in each case, than 250,00 per year.¹³¹

IV Legal Basis for Action

Of all the arguments put forward in opposition to the idea of harmonising limitation periods, it is interesting that the lack of a correct legal basis for action was not one. There are two main Treaty measures which might be used as a basis for a legislative initiative, each giving rise to slightly different issues.

The desire to establish an area of freedom, security and justice in the EU¹³² and the removal of the policy area of judicial cooperation in civil and commercial matters from the third to the first pillar under the Treaty of Amsterdam, signalled quite clearly the willingness of the EU to ensure effective enforcement of EU substantive rights, through harmonisation of the rules necessary for that effective enforcement. The amendment of Art 65 EC, to its current form in Art 81 TFEU, includes the insertion of Art 81(2)(e). This specific section grants the power to adopt measures which are necessary for ensuring the

¹³¹ See for example http://ec.europa.eu/eurostat/statistics-explained/index.php/Transport_accident_statistics.

¹³² Now expressed in Art 3(2) TEU

proper functioning of the internal market, in matters with cross border implications, which are required to ensure effective access to justice.

Article 81 states:

- (1) *The Union shall develop judicial cooperation in civil matters having cross border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.*
- (2) *For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring: ...*
 - (e) *effective access to justice;*¹³³

The rules provided by the Motor Insurance Directives (MIDs) instituted a structured system aimed at the promotion of the “free movement of persons and vehicles” and the protection of victims' rights, by granting them the right to a direct action against the insurance and other bodies. The rights granted to victims of accidents by the MID clearly support the internal market by facilitating the free movement of people and vehicles. This can be viewed as essential to cross border trade and commerce. Any measure enabling effective enforcement of the rights granted to accident victims can consequently be viewed as supporting the proper functioning of the internal market.

Moreover, the newer conceptualisation of a Union based on a broader understanding of an area of freedom, security and justice, which supports fundamental rights of access to justice as well as the assertion by citizens of the rights granted to them by EU law,¹³⁴ would encompass the issues faced by the parties to a cross border action in light of the complex and uncertain nature of divergent rules on limitation. The addition of ‘effective access to justice’ as an area of specific competence for the EU can be seen as taking for granted that such issues are important for the development of the Union and an area of freedom, security and justice.¹³⁵

It is submitted that the issue under consideration here, namely the ability of victims of cross border RTAs to assert their rights to compensation, and the effects of the existence of a multiplicity of different and complex rules of limitation on the assertion of those rights, would fall within the ambit of Art 81(2)(e). Unfamiliarity with foreign rules of limitation can lead to the loss of the right to make an otherwise valid claim, or to obstacles to accessing justice, in the form of additional costs and delay.

¹³³ Emphasis added.

¹³⁴ See the Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions ‘*Delivering an area of freedom, security and justice for Europe's citizens, Action Plan Implementing the Stockholm Programme*’ (2010) COM 171 final, p2.

¹³⁵ See Storskrubb *Civil Procedure and EU Law* (OUP 2008), p44-45.

It should be noted that this legal basis is not aimed specifically at measures which relate to substantive legal measures only. It is broad enough to encompass changes to rules which may be considered to be procedural in nature in some Member States. There is no restriction on the types of rules which may be affected by harmonisation inherent in the text or meaning of Article 81. Indeed the harmonised rules of limitation contained in the Product Liability Directive¹³⁶ will have had a similar effect in national legal systems to the rules being proposed in this report. Although that Directive is based on Article 114 (discussed below), it provides a demonstration that the nature of the rules affected will not restrict the use of particular Articles of the TFEU as legal bases for harmonising action.

The alternative legal base for harmonisation action would be Art 114 TFEU. This article empowers the EU institutions to enact provisions which are necessary for the establishment and functioning of the internal market. This provision has provided a legal basis for a number of sectorial provisions which have encompassed rule of limitation, such as the Product Liability Directive.¹³⁷ Under Art 114 the provision does not need to relate to matters having cross border implications. Using this legal base would enable a more expansive rule to be adopted which applied to all traffic accident cases, domestic and cross border. This would address the issue of complexity and fragmentation. It would also allay any concerns there might be about the possibility of reverse discrimination, whereby cross border victims are seen as being treated more favourably than domestic victims.

However, measures adopted under Art 114 must have as their object the removal of actual or potential barriers to trade, as held in the Tobacco Advertising case.¹³⁸ The MID itself is based on Art 114, being a measure which is important for the establishment of the internal market in insurance services, as well one which facilitates the free movement of persons and vehicles.

A rule which is directly linked to the EU right of direct action against an insurer or compensation body, granted to citizens under the MID, as recommended above, might be enacted as an amendment to the MID. The rule would not apply in respect of claims made against tortfeasors, but only those made directly against insurers, whether of a cross border nature or not. This would build on and complement existing provisions, but it would also be questionable whether harmonised rules could really be said to concern the establishment and functioning of the internal market for the purposes of Art 114. Art 114(2) does not permit the internal market legal base to be used to support the free movement of persons. Although the MID supports the internal market more broadly, it is the authors' view that the harmonisation of limitation rules can only be said to support the internal market by facilitating free movement of persons. This effectively rules out the use of Art 114 as a basis for action on the matter of limitation periods.

¹³⁶ Dir 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. OJ L 210/29.

¹³⁷ *Ibid.*

¹³⁸ C-491/01; ECR [2002] I-11453. See also, S. Weatherill 'Why Object to the Harmonization of Private Law by the EC?' (2004) ERPriv L 633, 634 - 640.

It is therefore relevant to note that legislative measures taken with a view to preventing victims from losing their right to access justice, would be correctly based on Art 81(2)(e) and would be consistent with the right to an effective remedy and to a fair trial as granted by Article 47 of the Charter of Fundamental Rights of the European Union. Harmonised rules would therefore be limited in their application to those situations have cross border implications.

V Conclusion

This section of the report has defined the nature of the issues which must be considered when deciding how rules of limitation should be harmonised. It has undertaken a balancing exercise, considering those arguments put up by way of opposition to the idea of harmonisation, and has balanced these against the arguments which suggest that harmonisation is necessary. The balance falls in favour of harmonisation. Much of the opposition to harmonisation, based in large part on the idea that such action would not respect the fundamental principles of proportionality and subsidiarity, appears to be falsely premised on the idea that the numbers of cases which might be affected by the complexity and uncertainty of the current situation are insignificant. Analysis of the numbers would suggest otherwise, and it is anyway questionable whether numbers should be taken into account when important rights are at stake. The other false premise appears to be that the only action which would be taken would be comprehensive harmonisation, which would disproportionately interfere with national systems. But, as has been demonstrated, comprehensive harmonisation is not the only, or the most appropriate form of harmonisation in this instance and this affects the weight of the arguments which are based on this point.

On the other side, the arguments in favour of beginning a harmonisation process are quite compelling. The need to take action to safeguard effective access to justice and to fully support the aims of the MID in ensuring that victims have the means to claim compensation following an accident are clear from the difficulties the current situation gives rise to in terms of increased costs, delays and uncertainty, as well as the possibility that the right to claim might ultimately be lost owing to a lack of understanding of the operation of foreign rules.

What remains to be done in this report is to set out a proposal for appropriate minimum standards and then to calculate, as accurately as possible the added value of EU action to implement such a proposal

5 Proposed Minimum Content

In this section, following on from conclusions in the previous section that harmonisation would be desirable in the field of cross border traffic accidents, existing harmonising measures for limitation rules are examined, along with the general principles which can be discerned from the case law of the European Court of Human Rights (ECtHR) and the CJEU. This analysis is then used in the formulation of proposals for the harmonisation of limitation rules.

I Existing Harmonised Rules

There are a number of sources of international law that provide for a harmonised approach to issues of limitation for claims relating RTAs, as well as for claims by passengers of other modes of transport. None of these schemes follows the same structure. As demonstrated in the table below there are different time limits in each of the instruments, as well as different arrangements for when time begins to run and interruption, suspension and extension of the limitation period.

Table 6 – Passenger's Rights Regulations

| Existing Harmonised Limitation Rules | | | | | |
|--|--|---|---|--|---|
| Issues | European Convention on Compulsory Insurance in Respect of Motor Vehicles(1959) | Convention on Contracts for International Carriage of Passengers and Luggage by Road (1973) | Passengers by sea Regulation 329/2009 <i>Athens Convention Model</i> | Passengers by air Regulation 889/2002 <i>Montreal Convention Model</i> | Passengers by rail Regulation 1371/2007 <i>CIV/COTIF Model</i> |
| distinction between subjective/short and objective/long limitation periods | no | yes | Yes | no | yes, but for fatal accidents only |
| subjective/short time-limit | 2 years | 3 years (personal injury) 1 year - other claims | 2 years | 2 years | 3 years |
| objective/long time-limit | - | 5 years | 3 years | - | 5 years (secondary victims only) |
| provisions on “date of knowledge” | no | for personal injury claims only | Yes | irrelevant, or law of the Court seized or law applicable under Rome II? | national law? |
| provisions on suspension | yes - suspension upon making a written claim to the | yes - suspension upon making written claim to the carrier | none, law of the Court seized applies subject to time limits above | no suspension, or law of the Court seized or law applicable under Rome II? | national law |

| | | | | | |
|------------------------------------|----------|------------------------|--|--|--------------|
| | insurer. | | | | |
| provisions on interruption | none | none | none, law of the Court seized applies subject to time-limits above | no interruption, or law of the Court seized or law applicable under Rome II? | national law |
| extension by carrier's declaration | none | law of the forum court | Yes | no extension, or law of the Court seized or law applicable under Rome II? | national law |
| extension by parties' agreement | none | law of the forum court | Yes | no extension, or law of the Court seized or law applicable under Rome II? | national law |

When viewed together, the above instruments demonstrate a considerable lack of coherence of EU law in relation to the passengers' access to justice and remedies. It is unclear why, despite comparable infringements of rights (health, life, family, property) and similar losses, a passenger by air should be treated differently from a passenger by sea or by rail or by coach?

This is not a desirable situation. The enactment of a new regime in relation to cross border RTA victims will add further complexity to the situation, making future reforms aimed at producing a coherent approach to issues of limitation more generally all the more difficult. However, it also means that at present there is no uniform model which the legislator must follow when formulating new rules.

II General Principles from ECtHR and CJEU: access to justice and victims' protection.

It is important to consider relevant rulings from the ECtHR and the CJEU on the subject of limitation periods. The fundamental freedoms guaranteed by the ECHR and which '*result from the constitutional traditions common to the Member States, shall constitute general principles of the Union*'.¹³⁹ As such, the rulings of the ECtHR on the interpretation of those rights, is an important guide to the principles which must be reflected in EU law. Furthermore, the previous rulings of the CJEU give an indication of the likely approach of the court to interpretation of any measure of Union law.

1. ECtHR and National Limitation Laws

Domestic limitation laws may be subject to ECtHR scrutiny, mainly under Article 6(1) of the European Convention on Human Rights (ECHR), which secures the right to have a claim, relating to civil rights and obligations, brought before a court or tribunal.

In *Stubbings and Others v. United Kingdom*¹⁴⁰ the applicants argued that the operation of English limitation rules was contrary to Art 6(1) ECHR when their claims relating to sexual abuse became time barred.

The European Court ruled that limitations to right of access to justice "*are permitted by implication since the right of access by its very nature calls for regulation by the State*"¹⁴¹ and that in this respect "*the Contracting States enjoy a certain margin of appreciation.*"¹⁴² However, it was also stated that in light of the particular circumstances of the case it must be satisfied that: 1) "*the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired*"; 2) the limitations pursue a legitimate aim which is proportionate to the aim sought to be achieved.¹⁴³

On this basis, the Court found that English rules of limitation satisfied such requirements, as the law allowed a period of six years from the claimants' eighteenth birthdays for the bringing of a claim. The time limit was not unduly short. Moreover the rules were proportionate to the aims sought, in particular that it is difficult to adjudicate on claims which relate to events that have happened a long time ago. The continuing possibility of a criminal action also meant that the victim's right to access justice was not unduly impaired.

¹³⁹ Art 6(3) TEU.

¹⁴⁰ Judgment of 24 September 1996, Recueil 1996-IV.

¹⁴¹ Ibid p1502-1503

¹⁴² Ibid.

¹⁴³ Ibid.

Had English law been like many other continental laws where serious criminal offences are subject to time-limits and/or minors do not benefit of a *dies a quo* starting from their eighteenth birthday, it is arguable that under the same logic, the judgment would have resulted in the finding of a violation.

This last scenario is not merely hypothetical, it is confirmed by *Stagno v. Belgium*.¹⁴⁴ Here the ECtHR held that there had been a violation of Article 6(1) where an action brought by the applicants, complaining that the money from their deceased father's life insurance had been partly squandered by their mother while they were still minors, had been rejected.

It had been practically impossible for the applicants to defend their property rights against the insurance company before reaching the age of majority. When they did come of age, their claim against the company had become time-barred. The Court took the view that the strict application of a statutory limitation period, without taking into account the particular circumstances of the case, had prevented the applicants from using a remedy that in principle was available to them.¹⁴⁵ Limitation of their right of access to a court was disproportionate in relation to the aim of guaranteeing legal certainty and the proper administration of justice, in violation of Article 6(1).¹⁴⁶

Furthermore, the ECtHR has also addressed domestic laws and judicial practices preventing claimants from benefiting from postponements of the *dies a quo* whenever they lack knowledge of their damage, causation or identity of the defendants. In *Szwagrún-Baurycza v. Poland* the Court concluded that there had been a violation of Art 6 because the applicant was made to shoulder “an unfair burden in the course of the proceedings to the point where she was denied effective access to court” on the ground that the domestic courts did not take into consideration her “difficulty in establishing the names and addresses” of the persons potentially interested in the outcome of the case.¹⁴⁷

In *Eşim v. Turkey*¹⁴⁸ the Court established the general principle that “in personal injury compensation cases, the right of action must be exercised when the litigants are actually able to assess the damage that they have suffered.” More recently, in *Howald Moor and Others v. Switzerland*¹⁴⁹ the Court held that in cases where it was scientifically proven that a person could not know that he or she was suffering from a certain disease, that fact should be taken into account in calculating the limitation period.¹⁵⁰

In the light of all above precedents it is clear that consideration of the requirements of Art 6 is important when formulating rules of limitation. The rulings of the ECtHR give important guidance for the formulation of rules of limitation for claims arising out of cross border traffic accidents. For example, although there is no indication from the ECtHR as to what would be acceptable in terms of a minimum overall time limit, it does seem that any restrictions based on the need for legal certainty in relation to the reliability of evidence will need to be proportionate. It is relevant in this regard that in many road accidents, evidence is generally based on the information collected by local authorities, which is not subject to any particular deterioration due to the passage of time. The cases also seem to indicate that absolute, or long stop limitation, should be avoided.

¹⁴⁴ Judgment of 7 July 2009, at www.hudoc.echr.coe.int.

¹⁴⁵ “La Cour estime que l'application rigide du délai de prescription, qui ne tient pas compte des circonstances particulières de l'affaire, a, en l'espèce, empêché les requérantes de faire usage d'un recours qui leur était en principe disponible”.

¹⁴⁶ In particular, the Court's conclusion: “la Cour estime qu'en l'espèce la limitation au droit d'accès à un tribunal imposée aux requérantes n'était pas proportionnée au but visant à garantir la sécurité juridique et la bonne administration de la justice.”

¹⁴⁷ Judgment of 24 October 2006 (final 24 January 2007), in www.hudoc.echr.coe.int.

¹⁴⁸ Judgment of 17 September 2013, in www.hudoc.echr.coe.int.

¹⁴⁹ Judgment of 11 March 2014 (final 11 June 2014), in www.hudoc.echr.coe.int.

¹⁵⁰ “... la Cour estime que, lorsqu'il est scientifiquement prouvé qu'une personne est dans l'impossibilité de savoir qu'elle souffre d'une certaine maladie, une telle circonstance devrait être prise en compte pour le calcul du délai de péremption ou de prescription.”

With regard to the calculation of time, it is clear that time-limits should not start to run until the claimant is able to assess the damage that they have suffered. Moreover, they should be in a position to know the identity and addresses of potential defendants. In relation to the claims of minors and people with disabilities, it is clear that ECtHR case-law is against any strict application of time-limits. A reasonable protection of such claimants may be obtained by postponing the commencement of the relevant time-limit to their eighteenth birthday or, at least, by granting courts an additional discretionary power to consider the particular circumstances of the case.

2. CJEU Case Law

There is some CJEU case law which also deals with the issue of limitation periods. The CJEU made it clear that Member States, when implementing a Directive which does not provide for limitation periods, are not entirely free to establish time-limits for claims which are within the scope of the Directive. The introduction of a time-limit by national law is not precluded by EU law “*provided that the time-limit is no less favourable than those governing similar domestic applications (principle of equivalence) and is not framed in such a way as to render impossible in practice the exercise of rights conferred by Community law (principle of effectiveness).*”¹⁵¹

If the domestic law does not satisfy this key principle then the CJEU has held that:

*“It is settled case-law that if the national court finds that the national provision laying down the time-limit is not compatible with the requirements of Community law and that no compatible interpretation of that provision is possible, that court must refuse to apply it.”*¹⁵²

With regard to the principle of effectiveness the CJEU has held that it is intended to ensure that limitation periods be extended where the claimant's delay in bringing a claim is attributable to particular objective and subjective factors affecting his awareness of the circumstances and the rights substantiating his action. For instance, the Court has developed the general principle that time-limits do not start to run against individuals who are “*unable to ascertain the full extent of their rights*”. Hence, the claimants' “*state of uncertainty*” should be taken into consideration.¹⁵³

In the light of the so construed principle of effectiveness the CJEU has also confirmed its negative view of domestic laws providing for time-limits running from the date of the tortious conduct without considering the claimants' situation. In *Vincenzo Manfredi and Others v. Lloyd Adriatico Assicurazioni SpA and Others* it held that it is for the national court to determine whether a national rule which provides that the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under Article 81 EC begins to run from the day on which that prohibited agreement or practice was adopted. Nevertheless the CJEU pointed out that

*“A national rule under which the limitation period begins to run from the day on which the agreement or concerted practice was adopted could make it practically impossible to exercise the right to seek compensation for the harm caused by that prohibited agreement or practice, particularly if that national rule also imposes a short limitation period which is not capable of being suspended ... In such a situation, where there are continuous or repeated infringements, it is possible that the limitation period expires even before the infringement is brought to an end, in which case it would be impossible for any individual who has suffered harm after the expiry of the limitation period to bring an action.”*¹⁵⁴

¹⁵¹ C-125/01 *Peter Pflücke v. Bundesanstalt für Arbeit* [2003] ECR I-09375.

¹⁵² *Ibid.*

¹⁵³ See *Theresa Emmott v. Minister for Social Welfare and Attorney General*, CJEU, 25 July 1991, Case C-208/90, ECR 1991 I-04269.

¹⁵⁴ CJEU (Third Chamber), 13 July 2006, Joined Cases C-295/04 to C-298/04, ECR 2006 I-06619.

It is possible to discern some similarities between the approach of the CJEU and that of the ECtHR. There is no indication from the CJEU as to the minimum requirement for an overall time limit. There are however, indications that the domestic courts should always enjoy a certain margin of appreciation in order to guarantee the principle of effectiveness of the remedies provided by EU laws, thereby suggesting that absolute or long stop limitation should be avoided. CJEU rulings seem to confirm the view that time-limits should not start to run until the claimants are actually able to assess their rights and damages.

III Existing Proposals for Harmonisation

The issue of limitation periods for cross border traffic accident victims has already been addressed in a number of proposals on the matter. It is worth taking note of these proposals when considering what the minimum content of a new proposal ought to be.

In 2002 a proposal was put forward by a group, consisting mainly of representatives of the insurance industry and national compensation bodies together with lawyers. The proposal was supported by the promoters of the Third European Traffic Law Seminar held in Trier on 7 and 8 November 2002 at the Academy of European Law (ERA).¹⁵⁵

The main features of the proposal were:

- ❖ That it cover the claimants' direct actions against insurers and guarantee funds in relation to cross border RTA cases only;
- ❖ That it provided for a single limitation period of 4 years; Member States remain free to provide for longer time-limits;
- ❖ The time-limit starts to run from the date of the accident; there is no provision as to the relevance of the claimant's knowledge of damage, causation and/or identity of defendants;
- ❖ For suspension of the running of time in the period between the claimant's submission of his claim to the company/body (insurer, claim representative, compensation body) and the defendant's rejection of the claim;
- ❖ For a duty on the foreign insurer or his claims representative to inform the injured party of the rules of limitation once he/she has declared his/her loss or damage.

The Trier proposal was considered by the Committee on Legal Affairs of European Parliament in the course of the debate in 2003, on the future 5th Motor Insurance Directive for RTAs and whether the Directive should contain harmonised rules of limitation. The Committee made a proposal which included:

- ❖ The following new recital: *“Regulation of the period within which accident victims' damage claims lapse varies widely in the European Union. The limitation periods laid down in law range from one year (Spain), through two years (Italy), three years (Germany, Austria, Finland and Portugal), five years (Belgium, the Netherlands and Denmark) and 10 years (France) to 30 years (Luxembourg). Moreover the beginning of the limitation period is determined by either objective or subjective criteria. It therefore seems appropriate to establish a uniform limitation period. The competence of the European Union to introduce a direct claim includes the power to lay down the limitation period. A four-year period from the date of the accident would seem to be appropriate”*

¹⁵⁵ The recommendations of the Third European Transport Law Seminar are attached to the following Session document by the European Parliament's Committee on Legal Affairs and the Internal Market: *Report on the proposal for a directive of the European Parliament and of the Council amending Council Directives 72/166/EEC, 84/5/EEC, 88/357/EEC, 90/232/EEC and Directive 2000/26/EC of the European Parliament and of the Council on insurance against civil liability in respect of the use of motor vehicles (COM(2002) 244 – C5-0269/2002 – 2002/0124(COD))*, 10 October 2003, Final A5-0346/2003.

- ❖ An additional paragraph stating: *“That right shall lapse after four years. The limitation period shall run from the time of the accident”*¹⁵⁶

On 27 November 2003 the Council of the European Union reached a political agreement¹⁵⁷ that rejected the Parliament's suggestion.¹⁵⁸

It can be noted that both of these proposals suggest the adoption of the same basic time-limit: 4 years. There is no suggestion of an objective/long limitation period. The proposals also unanimously recommend that time should run from the date of the accident and that the running of the limitation period should be suspended where a claim has been submitted to the claim representative, the insurer, the compensation body or the guarantee fund in the Member State in which the claimant resides, until the claim is rejected by that party.

A further proposal was made by PEOPI in 2012 in response to the Commission 2012 public consultation.¹⁵⁹ The proposal is lengthy and very detailed, covering all aspects of limitation. Whilst such an approach would not fit with the minimum standards approach recommended in this report, it is worth noting that the proposal also suggests a 4 year limitation period for claims against insurers or compensation bodies and interruption of time upon the making of a claim to an insurer, claims representative or compensation body. These aspects are shared by all of the proposals.

IV Suggested Minimum Contents

As set out in Section 4 of this report, the best solution to the problem of the application of foreign limitation rules would be to harmonise rules for actions available under the MID. The form of harmonisation which would best accord with the principles of subsidiarity and proportionality would be harmonisation of minimum standards wherever possible, leaving Member States free to apply domestic standards which are more favourable to the claimant.

With regard to the precise content of a harmonising measure, the discussion in this section of the case law of the ECtHR and the CJEU, along with existing and proposed harmonisation measures, provides a useful guide to what should be included. However, it is impossible to distill from the examination of these sources many rules which are common to all of them. There are only two common points which arise from the proposals which are specific to RTAs. These are:

- **rule 1:** introduction of a four year limitation period applying to actions against:
 - (1) the insurance undertaking covering the person responsible against civil liability under Article 18 MID
 - (2) the compensation body provided by Articles 24 and 25 MID in respect of any loss or injury or death resulting from accidents occurring in a Member State other than the

¹⁵⁶ The Committee's justification being: *“Regulation of the period within which damages claims by accident victims lapse varies widely in the European Union. The limitation periods laid down in law range from one year (Spain), to two years (Italy), three years (Germany, Austria, Finland and Portugal), five years (Belgium, Netherlands and Denmark), ten years (France) to thirty years (Luxembourg). The details (beginning of the limitation period according to objective or subjective criteria) present an even more confusing picture. It therefore seems appropriate at least to harmonise the limitation period for direct claims, which is in practice of overwhelming importance. The competence of the European Union to introduce a direct claim includes the power to lay down the limitation period applicable.”*

¹⁵⁷ See the Common position adopted by the Council on 26 April 2004 with a view to the adoption of a Directive of the European Parliament and of the Council amending Council Directives 72/166/EEC, 84/5/EEC, 88/357/EEC and 90/232/EEC and Directive 2000/26/EC of the European Parliament and of the Council relating to insurance against civil liability in respect of the use of motor vehicles, 16182/2/03 REV 2 ADD 1.

¹⁵⁸ The Council did not provide an explanation as to this last comment.

¹⁵⁹ Available at: http://ec.europa.eu/justice/newsroom/civil/opinion/files/121031/organisations/pan-european-organisation-of-personal-injury-lawyers-annex1_en.pdf.

Member State of residence of the injured party which are caused by the use of vehicles insured and normally based in a Member State.

- **rule 2:** the running of the time-limit provided by rule 1 is suspended during the period between the claimant's submission of his claim to
 - (1) the insurance undertaking of the person who caused the accident or its claims representative provided by Articles 21 and 22 MID, or
 - (2) the compensation body provided by Articles 24 and 25 MID, and the defendant's rejection of the claim.

These two rules could form part of harmonizing legislation and could both be formulated as minimum standards. A time-limit of 4 years takes into account that in cross border litigation the length of time for investigations about the accident, assessment of damages and gathering information about legal initiatives is generally much longer than in domestic claims. A four year period is also common to all proposals addressing the harmonization of limitation law in this area.

The rule relating to suspension of the running of time takes into account the fact that it is not uncommon in cross border road traffic cases for the claimant to be very close to the expiration of a time limit before negotiations can be started with the defendant. This is because the gathering of information about an accident, which occurred in a country foreign to the claimant, can take considerable time. The rule, as expressed here, provides for the suspension of the period as soon as a claim is made to the insurer or the compensation body, thus allowing the claimant an opportunity to negotiate the settlement of the claim, whilst at the same time only suspending the running of time once the defendant is aware of the claim and is actively considering it. This is different to the more onerous position (for the claimant) in some states at present, where time can only be suspended by the issuing of formal court proceedings. Time will begin to run again as soon as the claim is rejected by the defendant, thus balancing the position of the two parties, however, it would also be advisable to grant to the claimant a minimum period of six months after the end of the suspension period, if, when the period of suspension ends, the remaining part of the limitation period is shorter than that. This measure considers that in cross border litigation cases the steps enabling the claimant to issue court proceedings generally involve a considerable amount of time and various lengthy activities (for example, there may be the need for a particular notarized/legalized power of attorney, or of the translation of the writ of summons into the foreign defendant's language; the drafting of the writ of summons itself as well as the lawyer's mandatory explanation of its contents to the claimant takes time, especially whenever foreign lawyers and/or claimants are involved).

The adoption of these rules would leave some significant problems, arising from divergences in national rules, unaddressed. Although there is no consensus in the existing proposals, issues concerning when time should begin to run and what the position ought to be with regard to children and those with disabilities also deserve attention.

With regard to the *dies a quo*, it has been shown in section 2 above, as well as in this section, through analysis of the jurisprudence of the ECtHR and the CJEU, that there has been a tendency to expand rules of limitation in the claimant's favour, so as to take account of the claimants' knowledge of the extent of the damage suffered, issues of causation and the defendants' identity. There is also a tendency towards considerable margins of judicial appreciation of the particular circumstances of the individual case. Nevertheless, the system should also enable defendants to have some certainty about the extent to which they are exposed to the obligation of providing compensation. The proposal for harmonisation of limitation rules should make it clear that time will run from the date of knowledge of the victim. The date of knowledge is the date on which the injured party knows or his able to know the following facts: the extent of the injury, loss or damage (including the stabilisation of the injuries/diseases); that the injury, loss or damage is attributable in whole or in part to the accident;

the identity of the person liable and/or the insurance undertaking covering the person responsible against civil liability and/or the claim representative and/or the compensation body which is responsible for providing compensation.

Finally, with regard to children and those with disabilities, as was shown above, it can, in effect, be impossible for such persons to access justice until they reach the age of majority or until they are no longer affected by the disability. Rules which do not reflect this position run the risk of breaching Art 6 ECHR and Art 47 of the Charter of Fundamental Rights. As such it would be important for harmonised rules to provide that time should not begin to run against such claimants until they reach the age of majority or are no longer affected by disability.

V Conclusion

The suggestions here are for rules covering four essential areas of a regime of limitation. They do not resolve the uncertainty concerning every possible issue which might arise. Instead they cover those rules which are most likely to give rise to uncertainty and dispute following a cross border RTA. It is submitted that the adoption of the measures described here would provide a predictable baseline minimum standard and would remove the vast majority of issues which currently cause uncertainty, additional cost and delay. On the other hand, the rules are purposely kept as simple as possible in order to keep interference with national regimes to a minimum. Any remaining issues not covered by the proposed harmonised rules set out here could be dealt with by the national rules of the forum. Whilst this would not produce an entirely coherent approach, it is submitted that it would be a way of beginning a process of convergence which would address the need for harmonization, whilst respecting the principles of subsidiarity and proportionality.

6 Conclusion – The Added Value of Harmonisation

This report has identified a number of ways in which visiting victims of a cross border RTA will experience detriment because of the current situation with regard to rules of limitation. Such victims have the right to bring an action before the courts of their Member State of residence, in accordance with the rights granted to them by the MID. The measures of the MID aim to provide a level of protection, ensuring that the claim is dealt with in a comparable way, regardless of where in the Union the accident occurs. However, victims still face the prospect of having the dispute determined in accordance with a foreign law, including the foreign rules of limitation. This gives rise to the potential for the following 'costs' for victims:

I Complete loss of claim where the claim becomes time barred or the right is extinguished

The cost to the claimant of having lost the right to claim obviously varies depending on the particular losses suffered. However, for cases involving bodily injury a recent Insurance Europe report states that the cost of bodily injury claims in Europe is, on average, €15,970.¹⁶⁰ This figure is used as an estimate of the average amount of loss for all cases involving bodily injury.

¹⁶⁰ Insurance Europe is a European insurance federation representing insurance undertakings across Europe. It's members are the national insurance associations of 34 European countries. The data is taken from a report: 'European Motor Insurance Market' November 2015 at p33, available at <http://www.insuranceeurope.eu/sites/default/files/attachments/European%20motor%20insurance%20market%20report%202015.pdf>.

For damage only claims there are no available figures covering the whole of the EU. For the UK, a national report suggests that the average cost of a damage only accident is £2,048 (€2540¹⁶¹).¹⁶² However, Insurance Europe reports that there is significant variation in costs between MS on account of the cost of repairs.¹⁶³ This makes it difficult to provide an average cost for damage only claims.

It is also not possible to calculate an overall annual cost for the loss of the ability to claim because it is unknown how many claims fail because a visiting victim has not complied with the applicable limitation rules.¹⁶⁴ The best that can be said in this regard is that personal injury claimants will lose on average €15,970 if their claim becomes time barred or extinguished.

II Increased legal costs due to the uncertainty of the application of foreign rules

In the majority of cases, the claimant will not lose the right to claim, but will face obstacles in accessing justice, owing to the application of foreign limitation rules. These obstacles result in a number of financial costs to the claimant, in the form of:

- Increased lawyers' fees
- Cost of expert evidence on foreign rules
- Cost of translation of documents
- Additional court fees

Claimants may also face an increase in the time taken to conclude claims owing to the contention of issues of limitation. This could lead to a possible delay in receiving compensation, as well as a possible delay in rehabilitative treatment.

Claimants can also experience emotional costs in the form of distress and anxiety created by the uncertainty about the application of foreign limitation rules.

It is not possible to quantify all of these costs in monetary terms. However, as part of the consultation with claimant lawyers,¹⁶⁵ information was gathered as to the number of additional hours of work by claimant lawyers limitation issues required. The claimant lawyers consulted report that they spend an additional amount of hours on account of limitation issues in the range of from 1-2 hours up to 10-15 hours. The mean number of additional hours spent is 3.5.

The Commission 2009 report suggests that average lawyer hourly fees are most likely to be €100 – €250.¹⁶⁶ Using the mid-range value of €175 per hour, the average additional cost of lawyers' fees generated by limitation issues would be €175 for 3.5 hours totalling €610 per claim. As set out above, there are estimated to be 248,000 cases annually concerning visiting victims who experience issues relating to limitation. €610 for each of these claims amounts to an overall additional cost of increased legal fees of €151,280,000 each year throughout the EU.

¹⁶¹ Conversion completed on 8 April 2016 using an exchange rate of £1.24.

¹⁶² 'A valuation of road accidents and casualties in Great Britain in 2012' UK Department for Transport, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/244913/rrcgb2012-02.pdf.

¹⁶³ n138 above.

¹⁶⁴ See the Commission 2009 report n15 above, at p240.

¹⁶⁵ As outlined at 1(c) above.

¹⁶⁶ n15 above at p120.

The cost of expert advice on foreign limitation rules will vary depending on whether the expert charges an hourly rate or a fixed fee. It will also vary depending on the complexity of the case and the MS where the expert is situated. However, statistics in the Commission 2009 report suggest that the fees most often charged are between €250 and €350.¹⁶⁷ Lawyers report that they acquire basic information about foreign limitation rules in 66% of cross border RTA cases. If the number of cases where limitation issues arise annually is 775,000, and advice is required in 66% of those cases, then advice is required in 511,500 cases. This gives an average of €300 across 511,500 cases per year at an overall estimated cost of €153,450,000.

This figure does not take into account any translation costs, or any additional court costs incurred on account of limitation issues, for which there is no available data. On the other hand, these figures represent potential overall estimates. It is important to acknowledge that not all accident cases are contentious, many cases are settled between a claimant and an insurer without the need to instruct lawyers, or obtain expert evidence. However, there is no way of knowing how many claims, of those identified as being likely to give rise to limitation issues, will actually do so. The best that can be said is that there is potential for such additional costs in the number of cases estimated.

Furthermore, many minor collisions may not warrant the expenditure of €900, or more, obtaining information of foreign limitation periods, because the value of the overall claim may be less than this. Such claimants may opt to give up their right to claim altogether. As such there is potential for the issue of limitation to create a barrier to the making of a valid claim for compensation in low value claims, which could be removed by the harmonising of rules of limitation.

The total calculable estimate of the additional financial cost of the application of foreign limitation rules to claims brought by visiting victims, is therefore, up to €304,730,000 per year when the costs of additional legal fees and of expert evidence are added together.

¹⁶⁷ n15 above at p121.

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Widely differing limitation periods for tort claims across the European Union (EU) Member States can lead to victims of cross-border road traffic accidents losing their right to compensation. This European Added Value Assessment (EAVA) sketches out the weaknesses of the relevant existing legal frameworks which create obstacles for victims of cross-border road traffic accidents in accessing legal justice. Furthermore, the EAVA identifies the costs that arise on account of differing rules on limitation periods, not only in terms of length of time but also with regard to the beginning of a limitation period, the procedural requirements for stopping the running of a limitation period, and application to minors and disabled people. The EAVA demonstrates that differing rules in the application of limitation periods can generate costs such as additional lawyer's fees and fees for expert evidence on foreign rules. Finally, the EAVA outlines two rules for harmonising limitation periods within the EU in the form of minimum standards that could generate European added value by simplifying the existing legal framework and offering greater legal certainty for victims of cross-border road traffic accidents.

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