EUROPEAN PARLIAMENT

DIRECTORATE GENERAL INTERNAL POLICIES OF THE UNION

NOTE

Policy Department C
Citizens Rights and Constitutional Affairs

COMPENSATION OF VICTIMS OF CROSS-BORDER ROAD TRAFFIC ACCIDENTS IN THE EU: ASSESSMENT OF SELECTED OPTIONS

LEGAL AFFAIRS

MARCH 2007
PE 378.292

EN

PARLAMENTO EUROPEO EVROPSKÝ PARLAMENT EUROPA-PARLAMENTET
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BRIEFING NOTE

IP/C/JURI/FWC/2006-171/LOT 1
PE 378.292

This note was requested by: The European Parliament's committee on Legal Affairs.

This paper is published in the following languages: EN

Authors: Andrea Renda and Lorna Schrefler - Centre for European Policy Studies

Manuscript completed in March 2007, updated in April 2007.

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Brussels, European Parliament

Acknowledgements: the authors would like to thank Marina Dombrovska, Jon Ender, Catalin Gherman, Ivo Greiter, Nikitas E. Hatzimihail, Aristides Hatzis, Urszula Karkowska, and Paul Kuhn for their valuable input.

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Executive summary

Cross-border road traffic accidents represent a small percentage of road traffic accidents in the EU27. Of these, the majority potentially create a risk of undercompensation of the non-resident victim, due to difference in the standard of living as in the calculation of the *quantum* of damages in member states. The problem of victims' undercompensation in the event of a cross-border traffic accident has so far been approached mostly under the aegis of the need to achieve further harmonisation in European Tort Law, especially within the debate on the "Rome II" regulation on non-contractual obligations. Already during first reading, the European Parliament proposed to address this issue by mandating the application of *lex damni* when assessing the quantum of damage awards.

In this background note, we explore existing and *de lege ferenda* options to solve the problem of undercompensation. We identify the countries most concerned as those countries where the problem of undercompensation is more likely to emerge. These countries are, according to our analysis, Spain, Greece, Cyprus and Austria. However, in one of these countries – i.e. Austria – judges seized to assess the *quantum debeatur* must take into account what the victim would have obtained as compensation in his/her own country of habitual residence. In the other three countries, the level of damage award may be significantly lower than in other jurisdictions, especially when the victim's country of habitual residence is located in Northern Europe.

We identify five main options in addition to the "zero option" (or "do nothing" option).

- *Option 1: judges apply the* lex damni *to assess the* quantum *of the claim;*
- *Option 2: judges apply the 'principle of ubiquity';*
- *Option 3: relying on common principles for the assessment of damages;*
- *Option 4: coverage through first-party insurance;*
- *Option 5: European fund for victims of cross-border traffic accidents.*

We find that Option 1 potentially pursues the objective of securing *restitutio in integrum* for victims of cross-border road traffic accidents, at the same time avoiding cases in which a victim is overcompensated as it was involved in an accident taking place in a country where damage awards are greater, also due to that country's higher standard of living. However, such option also creates significant problems in terms of adaptation of existing practices in national courts – with national judges having to get familiar with foreign legislation; and in terms of expected increase in insurance premia in countries with lower income and lower damage awards.

Compared with this option, we discard option 2 ("principle of ubiquity") as strictly dominated by Option 1. We also conclude that Option 3 and its sub-options would not reach the goal of achieving full compensation for the victims, and can increase administrative costs, especially in the short term. A full harmonisation of damage awards seems neither likely nor desirable. In contrast, Options 4 and 5 provide solutions based on insurance policies, which may be worth discussing as means to achieve *restitutio in integrum* for victims of cross-border road traffic accidents without imposing significant and burdensome adaptations in the way such claims are dealt with by national judges and medical experts.

COMPENSATION OF VICTIMS OF CROSS-BORDER ROAD TRAFFIC ACCIDENTS IN THE EU: ASSESSMENT OF SELECTED OPTIONS

Andrea Renda and Lorna Schrefler

1 Introduction: legal and regulatory framework at international and EU level

The need to ensure a more coherent legal framework for the compensation of personal injury resulting from cross-border road traffic accidents has been raised within the broader initiative on the harmonisation of the legal framework for non-contractual obligations in Europe, and particularly in the debate on the so-called "Rome II" regulation, now subject to second reading at the European Parliament. Even more generally, the idea of achieving further harmonisation (or, as was authoritatively defined, "Europeanisation"[1]) of European private law – even culminating in proposals to create a European Civil Code[2] – has ranked high on the agenda since the 1980 Rome Convention on the law applicable to contract law disputes.

A degree of convergence between tort legislations in Europe is already observable, to a certain extent, due to initiatives undertaken by networks of lawyers (e.g. PEOPIL-Grotius, the "Tilburg Group", the "Trier 2000 Group", the "Hamburg Group", etc.), but also official documents by the Council of Europe and decisions by the European Court of Justice and the European Court of Human Rights. The 1950 *European Convention for the Protection of Human Rights and Fundamental Freedoms* makes direct reference to the principle of *restitutio in integrum* as the criterion to be adopted in awarding compensation for personal injury, framed as a breach of a Human Right, and explicitly covers both pecuniary and non-pecuniary damages.[3] Also the Charter of Fundamental Rights of the European Union, signed in Nice in 2000, specifies the need to achieve uniform protection of civil rights for all European citizens.[4] Furthermore, the European Court of Human Rights has developed through its caselaw a broad definition of non-pecuniary damage, which includes also compensation to close relatives for loss of family life or "loss of consortium".[5] Finally, the Council of Europe has also played an important role in the harmonisation process in respect of various areas of the protection of individuals against unlawful acts causing personal injury or death.[6]

In the 1990s, initiatives such as, *i.a.*, Council Directive 85/374/EEC of 25 July 1985 on liability for defective products, but also analogous initiatives in the fields of sales of goods and associated guarantees[7], package travel, working environment and motor insurance have contributed extensively to the convergence of legislation on contractual and non-contractual liability in EU

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[1] See Zweigert, K., & Kötz, H. (1998), *An introduction to Comparative Law*, 3rd ed., Clarendon Press, Oxford; Snyder, F. (Ed.) (2000), *The Europeanisation of Law – The Legal Effects of European Integration*, Oxford, Hart Publishing,; Werro, F. (Ed.), *L'Européanisation du droit privé vers un code civil européen?*, Fribourg; and Bona, M. (2003), *Towards The "Europeanisation" Of Personal Injury Compensation? Contexts, Tools, Projects, Materials And Cases On Personal Injury Approximation In Europe* (published in *Personal Injury Compensation in Europe*, edited by Marco Bona & Philip Mead, Deventer, Kluwer).

[2] European Parliament (1989), OJ C 158/400.

[3] European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 41 (former Article 50).

[4] See European Charter of Fundamental Human Rights, OJ C 364, 18.12.2000, at p. 1.

[5] For an excellent survey, see Bona, M. (2003), *cit.*

[6] Examples include the various conventions and recommendations in the field of road traffic accidents (e.g., the European Convention of 20th April 1959 on the compulsory insurance of motor vehicles; the European Convention of 14th May 1973 on liability for damages caused by motor vehicles).

[7] Directive 1999/44/EC of 25 May 1999, OJ L 171, 7/7/1999, p.12.

member states. More recent initiatives that are worth being mentioned are the Council Directive relating to compensation to crime victims, adopted on 29 April 2004 and in force since 1 January 2005; and the European Parliament's recent "Resolution with recommendations to the Commission on limitation periods in cross-border disputes involving injuries and fatal accidents", adopted on 1 February 2007, which advocates for the reduction of the starkly different limitation periods existing in member states' tort legislation, which hamper injured individuals in the exercise of their rights in Member States other than their own in case of cross-border accidents, or in all other cases where a foreign law applies.

As regards road traffic accidents, private international law rules are found in the Hague Convention of 4 May 1971, entered into force on 3 June 1975. The Convention addresses the choice of the applicable law in case of cross-border litigation on losses caused by road traffic accidents, by clarifying at Article 3 that in such cases, "the applicable law is the internal law of the State where the accident occurred" (*lex loci delicti commissi*). The application of *lex loci*, however, is hardly satisfactory for victims having their habitual residence in countries with high standard of living; such victims face poor compensation when injured in an accident occurred in a country with poorer standard of living, or with more narrow criteria for assessing damage.[8]

At EU level, already during the 1970s action was taken to approximate 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 purchase third-party insurance coverage against such liability.[9] Directive 88/357/EEC of the Council adopted provisions on the coordination of laws, regulations and administrative provisions relating to direct (non-life) insurance and laying down provisions to facilitate the effective exercise of freedom to provide services. Later, the Fourth Motor Insurance Directive partly filled the gap between *lex loci* and *lex damni* by generalising (at Article 3) the right to take direct action against the insurance undertaking covering the responsible person against civil liability. Such a right is in addition to the right of action against the (allegedly) negligent driver; and the liability of the insurer is co-extensive with the liability of the driver.[10] The Fourth Directive confirms that, in the event of a dispute on the choice of applicable law, *lex loci* must be applied.[11]

The Fourth Motor Insurance Directive acknowledges the difficulties for foreign victims having to deal with a foreign legal system, foreign language, unfamiliar claims settlement procedures, and unreasonable delay.[12] It raised the possibility that a satisfactory solution "might be for the injured parties suffering loss or injury as a result of a motor vehicle accident falling within the scope of this Directive and occurring in a state other than that of their residence to be entitled to claim in their Member State of residence".[13] Accordingly, the Directive provided for minimum levels of compulsory insurance throughout the EC and simplified mechanisms for claiming against European drivers from "abroad" through the requirement that "claims representatives" be appointed by motor insurers in each state.[14]

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[8] The UNIDROIT Principles for International Commercial Contracts (1994) contain some provisions on damages and personal injury losses. Article 7.4.2., for example, provides for full compensation (*restitutio in integrum*) "for harm sustained as a result of the non-performance", which includes "any loss which it suffered and any gain of which it was deprived, taking into account any gain to the aggrieved party resulting from its avoidance of cost or harm". In addition, such principles specify that compensation includes non-pecuniary losses, physical suffering and emotional distress.

[9] Directive 72/166/EEC.

[10] The insurer would probably, under the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, have to be sued in its domicile, the place where the policy was written, or the place where the accident happened. From the point of view of the claimant, the last 2 are very likely to be "abroad".

[11] Directive 2000/26/EC of 16 May 2000, OJ L 181, 20/7/2000, p. 65.

[12] *Id.*, Preamble paragraph 6.

[13] *Id.*, Preamble paragraph 11.

[14] Id., Article 4.

Furthermore, the Fifth Motor Insurance Directive[15] further strengthens the legal protection of victims of road traffic accidents by providing that "the minimum amount of cover for personal injury should be calculated so as to compensate fully and fairly all victims who have suffered very serious injuries", and mandating a minimum amount of cover of: a) for personal injury claims, EUR 1,000,000 per victim or EUR 5,000,000 regardless of the number of victims; and b) in the case of damage to property, EUR 1,000,000 per claim, whatever the number of victims.[16]

Finally, the first set of amendments proposed by the Parliament on the draft Rome II Regulation – which, once in force, will prevail over the Hague convention – reaffirmed, for road traffic accidents involving personal injury, that the applicable law for determining liability issues would be the law of the country where the accident occurred (*lex loci*); however, the Parliament proposed that the applicable law for determining the *quantum* of damages be the law of the victim's country of habitual residence (*lex damni*), unless this would be inequitable. In February 2006, the Commission published its amended proposal by rejecting the Parliament's amendment: the main reason for rejecting the proposal was the uncertainty that could be caused by the application of two different sets of rules for the determination of liability and for assessing the *quantum debeatur*. The Commission agreed with Parliament on the need to consider how to achieve a more uniform approach to applying foreign law in the courts of the Member States, but considered that it would be too early to introduce such a rule, as "most member States would not be able to apply the rule as they do not have proper structures in place to enable the courts to apply the foreign law in this way".[17] The Commission proposed that the issue be considered in an implementation report to be adopted after five years after entry into force of the Rome II regulation.

Against this background, legal systems in the EU member states still differ noticeably: the landscape of legislation on personal injury was defined as a "tower of Babel of definitions" and a "damage lottery" by authoritative commentators.[18] The major differences can be grouped in three main categories:

- *Liability*: criteria used to determine the liability for harm caused by a road traffic accident vary amongst member states, with some countries (most civil law countries, including France, Germany, Belgium, Italy, Spain, the Netherlands, Austria) adopting strict liability rules[19]; and other countries (e.g. the UK, Cyprus, Ireland, Malta, Romania) relying on fault-based rules. In addition, even in countries that have adopted a strict liability the legal rule regime varies significantly: for example, under the French *Loi Badinter* the driver is deemed liable for all harm caused by his vehicle without any fault, and without any defence of *force majeure* and with significant restrictions to the defence of contributory negligence; whereas the German

[15] 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, OJ L 149, 15.06.2005, p. 14.

[16] *Id.*, Article 2, amending Article 1 of the 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 (OJ L 8, 11.1.1984, p. 17).

[17] See the Explanatory Memorandum attached to the European Commission's amended proposal, COM(2006)83 Final, 21.2.2006, at p. 7.

[18] Busnelli F.D. (2001), *Prospettive europee di razionalizzazione del risarcimento del danno non economico*, in Danno e responsabilità, pp. 5-6. (2001); and Atiyah, P. (1997), *The Damages Lottery*, Hart Pub., Oxford.

[19] Most often, these countries include motor vehicle operation in the category of "risky" activities, warranting at least a reversal of the burden of proof (so-called "relative" strict liability). This means that the liability of the offender is presumed, unless the latter proves – depending on the formulation of the rule – that the accident did not occur as a result of negligent behaviour; that the accident was caused events that he or she could not control (*force majeure*); or that the accident was caused by negligence or intentional behaviour of the victim. Such proof is normally termed "escape clause".

Straßenverkehrgesetz contains a risk liability provision (*Gefährdungshaftung*) providing for a more flexible interpretation of contributory negligence, although some further restrictions to such defence have been introduced since August 2002, especially for children under 10 years of age. In other jurisdictions, escaping liability is easier than in these two countries.

- *Assessment of the damage award*: although most EU countries allow for full compensation of past, actual, and future losses (*restitutio in integrum*) including both pecuniary and non-pecuniary damages, in practice the level of damages awarded may vary quite significantly. As will be explained in more detail below, the upper limit on compensation varies considerably from one country to another – for example, it is unlimited in France, it reaches € 9.6 million in Denmark, € 600,000 in Poland and € 127,823 in Estonia. Compensation is likely to be higher in countries such as the UK or Ireland when compared to countries where the risk of incurring a road traffic accident is higher – such as in the so-called "SEC belt" of Southern and Eastern European countries.[20] A comparative study done in the UK in 2003 found that the range of damages in respect of the instantaneous death of a 20-year-old legal secretary ranged from only funeral expenses (Finland) to £176,368 (Italy).[21] Significant past initiatives in this field include the proposal to establish a "European Disability Rating Scale" by the CEREDOC, with the backing of the Rothley Group, discussed by the Parliament in 2003.[22]
- *Limitation periods*: legal systems in the EU27 differ noticeably as regards limitation periods for exercise of individual rights, ranging from 3 to 30 years. The extent of such divergence may give rise to undesirable consequences for the victims of accidents in cross-border litigation, creating obstacles for injured individuals when exercising their rights in Member States other than their own, and in some cases potentially also their own State, when required to rely upon foreign law. A Resolution adopted by the European Parliament on 1 February 2007 called on the Commission "to carry out an inquiry on the effects of differing limitation periods on the internal market", which "should also seek to quantify the number of personal injury cases involving a cross-border element".[23] Accordingly, the issue of limitation periods will be dealt with only marginally in the present study.

Differences in member states' legal systems as regards the assessment of the *quantum* of damages become particularly significant in the case of cross-border traffic accidents. As was authoritatively pointed out, differences in legislation in the member states "can be of almost dramatic importance to European citizens … Due to the different levels of protection in the national tort law systems and the related regimes of third party liability insurance, it can be of crucial importance for the whole of the rest of the victim's life and those of his relatives, in both financial and personal respects, whether the accident took place one hundred meters in front of, or beyond a given (often not even manifest) national border".[24]

This background note briefly describes the rules applicable in the EU27 for the attribution of liability for road traffic accidents, as well as for the assessment of the amount of damages to be awarded to victims. Accordingly, Section 2 surveys the criteria used for determining the *an* and the *quantum* of damages awarded in the EU27 for personal injury or fatality occurred in the case of a road traffic accident. In addition, Section 3 provides statistical data to determine which jurisdictions are most likely to create concerns as regards the undercompensation of victims of cross-border road

[20] See e.g. the Final Report of the "SEC Belt project", available at http://www.etsc.be/secbelt.php.
[21] See Holmes, M. and McIntosh, D. (2003), *Personal Injury Awards in EU and EFTA Countries* (Kluwer Law).
[22] See below, Section 4, for a description of this proposal.
[23] European Parliament resolution with recommendations to the Commission on limitation periods in cross-border disputes involving personal injuries and fatal accidents (2006/2014(INI)), 1 February 2007.
[24] See von Bar, C. and Drobnig, U. (2003), *Study on Property Law and Non-Contractual Liability as they relate to Contract Law*, submitted to the European Commission Directorate General on Health and Consumer Protection (SANCO B5-1000/02/000574).

traffic accidents, with special emphasis on the award of non-pecuniary losses. Section 4 compares possible solutions available in international private law with the proposed application of the *lex damni*. Section 5 concludes.

2 Overview of legal rules on liability for personal injury in the EU27

The landscape of legal rules in force in the EU27 on liability for damages resulting from road traffic accidents portraits a patchwork of legal solutions, which can be considered as expression of each country's specific legal tradition. To be sure, legal transplant and/or circulation of models from other jurisdictions have exerted a significant impact on the development of national legislation, leading, *i.a.*, to the introduction of strict liability, and the adoption of *restitutio in integrum* as a general criterion for assessing the *quantum* of damages. A less visible convergence can be found for what concerns the criteria for the assessment of pecuniary and non-pecuniary damages, the choice of law (*lex loci delicti commissi* v. *lex damni*), the award of medical expenses and the consideration of the amount of damages non-resident victims would be awarded in their home countries.

In this section, we provide a helicopter view of existing legal rules and court practice in EU member states, whereas a more detailed, country-by-country illustration of existing regimes is found in our companion study.[25] Table 1 reported at the end of this note summarises our findings as regards the different legal systems applied in the EU27.

2.1 Differences in liability rules

As regards the attribution of liability, EU member states can be divided in three large groups: a first group includes most civil law countries, which adopted strict liability rules for cases of risky activities, including the operation of motor vehicles. Secondly, common law countries such as the UK and Ireland, but also Cyprus, Malta, Portugal and Romania apply a fault-based rule, which requires that the victim proves the negligence or intent of the tortfeasor, the occurrence of damage and the causal link between the defendant's behaviour and the damage occurred. Thirdly, Scandinavian countries – particularly Sweden – have initially introduced strict liability rules (since the 1950s), and have then replaced or integrated such rules with a system based on extensive insurance coverage of damages.

Within each group, as already recalled, legal rules may vary widely. For example, civil law countries where a strict liability rule is applied adopted significantly different rules, especially as regards the scope of the escape clause and the treatment of contributory negligence. For example, in **Austria** liability is excluded in case of unavoidable accident (§9 (1) EKHG), and contributory negligence on the part of the injured person is often taken into account to apportion the damage (§ 7 EKHG).

In **Germany** there is no liability where there is *force majeure* (para 7(2) StVG), and a contributory fault on the part of the victim leads to a reduction in liability or, as the case may be, a complete immunity (§9 StVG). In addition, since 2002 children up to 10 years of age lack tortuous capacity and their contributory negligence does not lead to any reduction of liability on the side of the offender.

In **Italy**, article 2054 of the Civil Code provides for a strict liability regime for the circulation of motor vehicles, and the escape clause provided in this article is interpreted quite narrowly by Courts, to the extent that escaping liability *ex* article 2054 was authoritatively defined a "*probatio diabolica*".[26]

Also countries such as the **Czech Republic**, **Greece**, **the Netherlands**, **Hungary**, **Poland** and **Slovenia** apply strict liability rules with a (partial) defence of contributory negligence, although

[25] See Renda, A and L. Schrefler, *Compensation of victims of cross-border road traffic accidents in the EU*: *economic impact of selected options*, Study for the European Parliament JURI Committee, forthcoming, May 2007.

[26] See G. Alpa, quoted in Comandè, G. and Domenici, R. (2005), *La valutazione delle macropermanenti*, ETS, p.26.

court practice has led to diverging interpretation of cases – besides *force majeure* – where the liability of the offender can be reduced according to the negligent behaviour of the victim.

When compared with these national experiences, France, Sweden and Belgium exhibit remarkable peculiarities, for differing reasons. On the one hand, according to the **French *Loi Badinter*** the victim cannot be met with a defence of *force majeure*, nor with a defence of *fait d'autrui*.[27] The only basis on which the carrier is freed from liability is a *faute inexcusable* on the part of the victim. The rule is applied in an even stricter way when victims are pedestrians, minors (below 16 years old), elderly (over 70 years old) or disabled persons (below 20% of the normal working capacity). This makes up for an almost absolute strict liability regime.

On the other hand, **Sweden** adopted strict liability for road traffic accidents since the 1950s, but the system has been *de facto* replaced since 1975 by an extensive no-fault insurance system for all road accident victims. In the case of bodily injury suffered in motor accidents, the first tier of compensation is paid in the form of co-ordinated benefits through the social insurance system, through pension funds, or through sickness payments by employers. At the second stage (the tort stage) the social insurance benefit payments are deducted from the tort damages awarded. Thus, tort damages represent a small proportion of total compensation paid and are largely in respect of non-economic loss. Where another driver is alleged to have caused the accident, the insurance company that settles the claim with its insured can invoke its right of subrogation to pursue reimbursement from the negligent driver's insurance company.

Finally, in **Belgium** the system is still based on the principle of liability for *faute* (fault). In addition, fault of the victim which contributes to the occurrence of damage leads to a sharing of the liability between the victim and the tortfeasor (contributory negligence), so that the victim cannot receive complete compensation from the tortfeasor.[28] However, Courts limited the possibility of considering the contributory fault of persons suffering damages in road traffic to instances in which the claimant intentionally caused the accident. Against this background, the provider of liability insurance for the vehicle that caused the accident is required to pay for the damage even if the policyholder is not deemed to be at fault (Art. 29*bis* de la loi du 21 novembre 1989 relative à l´assurance obligatoire de la responsabilité en matière de véhicules automoteurs). This essentially makes up for a combination of personal liability insurance and third-party accident insurance.

Differences exist also as regards the right for secondary victims to claim damages before a court. For example, in many countries – including Austria, Italy and France –where passengers are killed their close relatives have a claim for compensation for bereavement; but the same does not occur in Germany and the Netherlands, and in the UK such a claim is recognised only in restricted circumstances – loss of society and relatives (*loss of consortium*) was substituted by a fixed amount for bereavement by the *Administration of Justice Act* of 1982. More generally, only in some jurisdictions the concept of "pain and suffering" has been gradually interpreted as not necessarily arising from a previous or existing physical injury.[29]

2.2 Award of damages

Also based on the liability and insurance regimes, countries have adopted different criteria for the calculation of the *quantum debeatur*. Almost all EU countries can be said to rely on the principle of *restitutio in integrum*, with the notable exception of **Spain**, where the complex system put in place

[27] Artt. 1 and 2 of *Loi* no. 85-677 of 5 July 1985.

[28] The rule is different in case the victim is a minor up to 15 years of age. In this respect, Belgian law follows the example of French *Loi Badinter*.

[29] See Comandè, G. (2006), Towards a Global Model for Adjudicating Personal Injury Damages: Bridging Europe and the United States, Temple Int'l & Comp. Law Journal, Vol. 19, No. 2, January.

by Law 30/1995 introduced a compulsory tariff system for the assessment of personal or bodily injury, leaving no possibility for judges to depart from the tables or to assess damages using other criteria.[30] The Spanish system applies in a fully automatic way, and as such does not take into account any specific possibility to assess whether the damage award would fully compensate the primary or secondary victim for the loss suffered.

Other, significant differences exist as regards the assessment of the *quantum* of damages, especially for what concerns the headings of damages awarded as pecuniary loss and the *an* and the *quantum* of non-pecuniary damages awarded by judges. For example:

- In **Austria** the maximum amounts which have been awarded by Austrian courts for non-pecuniary damages are €120 daily for light pain, €220 daily for moderate pain, €350 daily for severe pain and €400 daily for extreme pain.[31]
- In **Belgium**, in case of fatal accidents no compensation is awarded for the mere loss of a human life. In addition, no compensation for pain and suffering is awarded in case the victim was always in coma between the accident and the death. Amounts compensated for pain and suffering before dying are reported by De Kezel[32]: in one case where the victim had tried to escape from a car while drowning, the court awarded €1,250 for pain and suffering; in a case where the victim was seriously injured in a fire accident and was in great pain for 5 days, an overall award of €2,500 was granted. In another case, where the victim had died after 36 months after the accident, a lump-sum payment of €25 per day was awarded. Finally, when the victim was aware of his reduced life expectancy but died after four years from the date of the accident, an overall compensation of €1,250 was awarded.
- In **Denmark**, damages for personal injury are obtained by multiplying the percentage of permanent disability by a specific amount (close to €800 in 2002). In case of accidents with unknown or insured motor vehicles, the injured party can claim damages from the Danish Motor Insurance Bureau, which can be held directly liable. The Danish law provides some restrictions on the amount of compensation that can be awarded: in the case of loss of earning capacity, the primary victim will be able to seek compensation up to a maximum amount specified every year (being approximately €850,000 in 2001); likewise, the dependents are not likely to obtain full compensation for the loss of a "breadwinner" with very high income.
- In **Germany**, for the case of fatal accidents compensation for pain and suffering (*Schmerzensgeld*) is granted when death occurred a few hours (e.g. three) after the accident. Amounts awarded for pain and suffering before death are reported by Kuhn[33]: for example, the KG Berlin (Court of Appeal in Berlin) awarded €2,400 where the victim survived one day; where a victim survived an accident in an artificial coma for 10 days the OLG Hamm held that €14,000 would be adequate compensation. The OLG Koblenz ruled that damages for pain and suffering of €6,000 were sufficient where the victim lost consciousness immediately after the accident and did not regain consciousness before his/her death eight days later. Where a victim survived for 3 to 4 weeks, according to the OLG München damages for pain and suffering should amount to between €5,000 and €20,000. In the case of survival for five months the OLG München awarded damages of €25,000. The OLG Oldenburg in a case where a victim survived for 3½ months awarded damages for pain and suffering of €17,500.

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[30] Ley de ordenacion y de supervision de los seguros privados (hereinafter "LOSSP").

[31] Non-pecuniary losses include: a) pain and suffering of the injured and of close relatives (including the spouse and other family members) that have suffered illness as a consequence of the accident; and b) compensation for harm suffered due to death of a close relative. See Greitner, I., *PEOPIL Web Guide Book 1*.

[32] *PEOPIL Web Guidebook 2*.

[33] Id.

- In **Italy**, compensation for pain and suffering (*danno morale*) is often quantified as a proportion of the loss of physical/mental integrity – between 25% and 50%. On the other hand, the assessment of loss of quality of life is entirely discretionary, with the only exception of minor injuries, ranging from 1% to 9% of permanent invalidity from road accidents (so-called *micropermanenti*), which are the subject of statutory tables under the provisions of Article 5 of Law n. 57/2001. A compensation fund for road-accident victims was created since 1969 to ensure that victims of traffic accidents are compensated (only for personal injury) even when the vehicle could not be identified; back in 1993, the Supreme Court of Appeal (*Corte di Cassazione*) ruled that even in case of cross-border road traffic accidents, the right to compensation is independent of the existence of an equivalent fund in the victim's country.[34]
- In **Poland**, a 1977 judgment on 15-months old child that incurred a 100% disability as a result of a tram accident stated that compensation *ex* art 445 of the Polish Civil Code had to be exceptionally high in that case (i.e. 150,000 zlotys), but that usually for the total and permanent disability of a person the amount of the compensation should not exceed 100,000 zlotys.[35] In a 1972 judgment, it was established that compensation exceeding 50,000 zlotys can be awarded only in extraordinary cases, meaning when the injury is particularly serious: total blindness, loss of both legs, paralysis.[36] On year later, it was clarified that compensation should equal 50,000 zloty or even higher if the permanent consequences of the body injury or health breakdown are of the kind that excludes the victims from normal life, especially because of the impossibility of leaving their premises.[37]
- In **Portugal**, non-pecuniary losses can be recovered only in case of "serious losses deserving legal protection" and is awarded by judges with an equitable assessment (Article 496(3) of the Civil Code). No tables or other criteria for the quantification of damages are reportedly in use. Insured victims will see their damages reduced by the amount of payments received by the insurer.[38]
- In **Sweden**, within the co-ordinated benefits system, compensation is provided for loss of income, whereas disability is compensated by an annuity payment or by a lump sum payment in the case of smaller loss. Compensation for non-economic loss, including pain and suffering and disfigurement and disadvantage, is paid during the period of acute sickness in accordance with standardised tables. To ensure fairness and uniformity in compensation for personal injury, compensation tables are regulated by the government.[39] In cases involving serious personal injury, insurance companies in Sweden are obliged to obtain an opinion from the Road Traffic Injuries Board, regarding the assessment of compensation, before entering into a settlement with the injured party.[40]
- In the **UK**, following Lord Woolf's opinion in *Heil v. Ranking*, in case of serious injuries with pecuniary damage award at £150,000, as in the case of tetraplegia or severe brain damage, the amount had to be increased by a third to £200,000; and between £10,000 and £150,000 there

[34] Cass., 10 February 1993, point 1681, *Foro it.* 1993, I, p. 3067.

[35] Wyrok S.N. z dnia 22.08.1977 II CR 266/77. Amounts in Zlotys are referred to 1977 values, and are in no way aligned with current values.

[36] Wyrok S.N. z dnia 03.05.1972 I CR 106/72

[37] Wyrok S.N. z dnia 09.03.1973 I CR 55/73

[38] Article 566 of the Civil Code, so-called *teoria da diferença*, or compensation *lucri cum damno*.

[39] The tables are based on previous judgments passed by the courts or by the RTIB and are continuously modified in accordance with the general rise in the standard of living, the development of money values, and changing medical opinion of the injury's degree of seriousness.

[40] As most personal injuries arising from traffic accidents in Sweden do not result in a disability they are settled directly by the insurance companies without referral to the Road Traffic Injuries Board.

was a progressive increase from 0 to 33.3% so that, for example, in the middle of the range, an award of £80,000 is to be increased by 17 per cent to about £95,000.[41]

When compared to these countries, other countries seem to award much lower (or no) amounts, especially for non-pecuniary damages. In particular:

- In **Malta** and **Slovakia**, non-material damages (pain and suffering) are not included in the definition of damage under civil law.[42]
- In **Romania**, back in 1952 the Supreme Court ruled that "no material compensation may be granted for moral damages". Gradually, however, corrections to this position have been attempted which allowed a limited grant of non-pecuniary damages for those asserting moral damages.[43]
- In **Slovenia**, bodily distress or damage to health is categorized according to degrees of distress into different categories, ranging from light cases (damages are awarded in the frame of € 50 to € 500) to extremely serious cases (damages are awarded in the frame of € 1,000 to € 10,000). Mental suffering can be awarded to a limited amount of € 10,000. Compensation for loss of alimonies can be awarded according to the Act in one sum in the amount set by special social law provisions for state pensions. This type of damages can be awarded only if the applicant is not entitled to income from either a state pension or disability insurance. The awarded damages are limited to an amount of € 20,000. Damage to property is capped at €500.
- In other countries, very low amounts are awarded: these include **Estonia** (max. € 320) or **Lithuania** (max. € 500).

In addition, in all EU member states liability for personal injury and damage to property is complemented and integrated by compulsory third-party insurance. However, minimum insurance varies noticeably among member states; on the one hand, it is virtually unlimited in most Western and Northern European countries; on the other, coverage is particularly low in some of the new member states. For instance, in **Latvia** the minimum limits are approximately € 14.000 for material damage and in the range of € 16.000 for personal injury. **Hungary** for example set a limit of approximately € 1.9 million for material damage and € 1.1 Million per person for personal injury. In the **Czech Republic**, Act no. 168/1999 Coll. sets the limit (for insurance compensation) for injuries to health at CZK 35 million (€1.25 million), and for material damages at CZK 18 million (as of May 1, 2004).

As already recalled, while the Second Motor Insurance Directive required Member States to provide for an insurance requirement covering at least 350,000 ECU per victim in the case of personal injury, the Fifth Directive almost doubles that amount (even if adjusted by inflation) to €1,000,000. The other figures were multiplied by ten: the optional overall cap of 500,000 ECU per accident was raised to €5 million per claim, the new minimum coverage for property damage was put up to €1,000,000. In order to provide for a smooth transition, the new limits will not necessarily take effect immediately, but shall be gradually introduced within five years from the date of the Directive's implementation if the Member States so decide. The new limits will then be updated every five years in line with the European Index of Consumer Prices (EICP). Once the new limits have become mandatory, all the countries applying maximum caps to compensatory awards that do

[41] See *Heil v. Ranking,* [2000] 3 All ER 138, [2000] 2 WLR 1173, [2000] PIQR Q187. For a comment, see Lewis, R. (2001), *Increasing the Price Of Pain: Damages, The Law Commission And Heil v Rankin*, Modern Law Review, 64 (1).

[42] In Slovakia, the Civil Code also contains a general obligation for persons threatened by damage to adequately intervene to avert damage (OZ, § 417)

[43] The problem has been partially solved pursuant to the fall of communism in Romania, as the award of compensation for moral damages has been acknowledged by various post-communist statutes.

not comply with the Fifth Directive will not be able to apply such caps.[44] Table 2 at the end of this background note summarises the minimum and maximum amounts covered by insurance in selected EU member states.

Finally, in principle, all European jurisdictions allow the recovery in tort of medical expenses and costs necessitated by personal injury, on the basis that pecuniary losses are to be compensated in full. The recoverability of any particular item of expense is universally subject to a test of reasonableness. Some countries do not allow recovery of luxury services in hospital (e.g. France), whereas in others (e.g. Austria and Germany) plaintiffs are entitled to the cost of treatment to the standard they enjoyed by reason of their economic position and standing before the accident, even where this means first class care. In France and Germany, any damages awarded for time spent in hospital may be reduced by a daily amount representing the patient's savings on meals. Similar provisions exist in Sweden, Austria and Belgium. In France and Belgium visiting expenses are recoverable either in the victim's action or directly by the third party.

2.3 A thought experiment

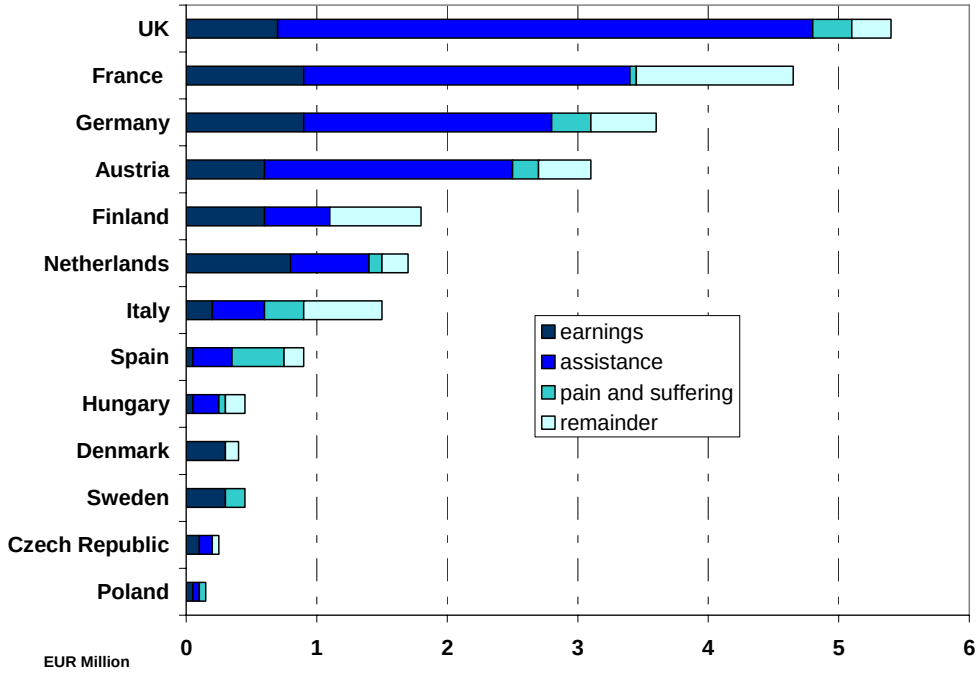
The best way to illustrate the differences existing in EU member states as regards the award of damages for personal injury or fatal accidents is to describe what amount of damages would be awarded in different countries for the same type of accident. As already recalled in the introductory section, a comparative study done in the UK in 2003 found that the range of damages in respect of the instantaneous death of a 20 year old legal secretary ranged from only funeral expenses (Finland) to £176,368 (Italy).[45]

A similar exercise is provided by Swiss Re (2004), which takes as benchmark an accident occurred to a 30-year old man, with unemployed wife, two children aged 2 and 5, an average income in dependent employment, which remains 100% disabled due to severe spinal or head injury, requiring no ventilation but highest assistance levels. The levels of indemnity calculated for this theoretical case in 13 EU member states are shown below in Figure 1. As is clearly visible in the figure, the compensation in Poland – although including loss of earnings, assistance and pain and suffering – would be less than 3% of the amount awarded in the UK. Of the 13 countries analysed by Swiss Re, the top four are countries where assistance is included in the amount of damages. To the contrary, in Denmark and Sweden reimbursement of assistance expenses is provided mostly through social insurance systems, and is not included in the indemnity figure. In addition, the "remainder" category reportedly includes lawyers' fees, costs for adapting accommodation, or compensation for reduced social integration (as occurs, for example, in Italy).

[44] See the ECJ Decision in *Daniel Fernando Messejana Viegas v Companhia de Seguros Zurich SA and Mitsubishi Motors de Portugal SA*, Case C-66/02, ruling that Article 1(2) of the Second Motor Insurance Directive "precludes national laws which provide for a number of types of civil liability applicable to road-traffic accidents laying down, in respect of one of them, maximum amounts of compensation that are lower than the minimum amounts of cover laid down by that article."

[45] See Holmes & McIntosh (2003), Personal Injury Awards in EU and EFTA Countries, *cit*.

Figure 1 – indemnity for 100% disability of a 30-year old married man

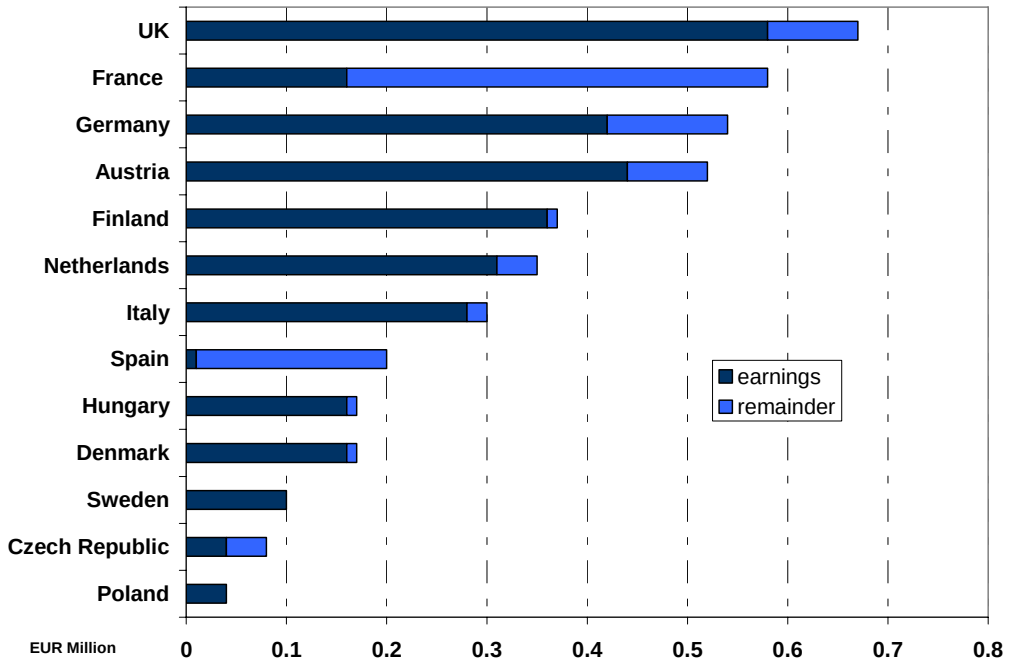


When the four headings of damage are analysed separately, it emerges that:

- Spain, Poland and Hungary are the countries where loss of earnings is most poorly compensated, whereas in France, Germany and the Netherlands such heading leads to the most substantial awards.
- In Poland, Czech Republic, Hungary, Italy, Spain, Finland and the Netherlands the awards for medical assistance are much lower than in Austria, Germany, France and UK. In Denmark and Sweden, as already explained, medical assistance is not included in the damage award.
- As regards pain and suffering, the set of countries analysed can be divided in three groups: a) Denmark, Finland, the Czech Republic, Poland and France exhibiting low levels of compensation; b) the Netherlands, Sweden and Austria allow for higher awards; and c) in Italy, Germany, UK and – most notably – Spain the award for pain and suffering is higher than in other countries.
- France, Italy and Germany award significant damages in the "remainder" category, including lawyers' fees, costs for adapting accommodation, or compensation for reduced social integration.

A similar situation occurs when it comes to death indemnities, as depicted in Figure 2 below, which assumes that the deceased was in the same condition as the person considered for Figure 1. As shown in figure 2, in countries like Poland, Hungary and the Czech Republic the indemnity for death of a 30-year old married person earning a normal income is much lower than in countries such as France, Italy, the Netherlands and UK. Some countries mostly or exclusively provide for calculation of lost earnings, whereas in Spain, as recalled in Section 2.2. above, compensation for loss of earnings is normally very low.

Figure 2 –indemnity for death of a 30-year married person with two children



2.4 Applicable law

The description of legal regimes for the attribution of liability and the assessment of the *quantum* of damages shows remarkable differences between member states. This also implies that EU citizens suffering personal injury as a result of an accident in another EU country will hardly receive the same compensation they would have been granted in their home countries, if the *lex loci delicti commissi* applies. In this respect, most of the EU member states actually apply the law where the accident occurs when attributing liability and also when deciding on the *quantum* of damages. This is actually the rule prescribed at article 3 of the Hague Convention of 4 May 1971 on the law applicable to traffic accidents, according to which "[t]he applicable law is the internal law of the State where the accident occurred". Article 8(4) of the Convention further specifies that the law of the state where the accident occurred specifies not only the basis and extent of liability, but also the kind and extent of damages to be awarded.

The Hague convention was ratified only by approximately half of the member states. Only Austria, Belgium, Czech Republic, France, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Slovakia, Slovenia and Spain to date have officially ratified its text, including the provision that mandates the application of the *lex loci*. In any event, most of the other countries apply the *lex loci*, with some exceptions:

- In Austria, courts have to take into consideration what the victim would have earned in his own country. The loss of income or medical and nursing costs, where the victim has received medical treatment in his own country, has to be considered according to the respective foreign standards.
- In Belgium and Sweden, the level of award the victim would have obtained in his or her own country is sometimes taken into account by judges.

A more flexible interpretation of the choice of law emerged in the UK, where the applicable law is selected according to part III of the Private International Law (Miscellaneous provisions) Act 1995.

An example is the leading UK case *Boys v Chaplin* [1971] AC 356, in which the plaintiff had been injured in a traffic accident (with another UK resident) in Malta. By the law of Malta, as explained above, non-economic damage (pain and suffering, loss of amenity) was not actionable. Only financial loss could be compensated. The plaintiff brought proceedings in England and one of the questions raised by the appeal was whether the rule excluding liability for non-economic damage was part of the substantive law of Malta or concerned only the remedies which a Maltese court could provide. Lord Hodson, Lord Wilberforce and Lord Pearson agreed that the rule was part of the substantive law of tort liability. In Malta, causing non-economic damage was not an *injuria*; not an actionable wrong. Lord Hodson said that "questions such as whether loss of earning capacity or pain and suffering are admissible heads of damage must be questions of substantive law. The law relating to damages is partly procedural and partly substantive, the actual quantification under the relevant heads being procedural only".[46]

[46] *Id.*, at p. 379.

3 Countries most concerned

In the previous sections, we have described the main differences in the legal treatment of personal injury and damage to property when resulting from a road traffic accident. A major purpose of this background note is to address the specific issue of cross-border road traffic accidents. Accordingly, the first issue we deal with in this section is whether available data suggest that the number of cross-border road traffic accidents is really significant.

As reported by the European Commission in 2005, it is actually "very difficult to draw accurate statistics on the number of accidents occurring in Member States and falling under the scope of the Directive". The cross border factor makes it "difficult to assess the exact number of accidents involving "visiting victims" … Moreover, the collection of statistical data of this kind is not centralised at national or at Community level".[47] The available data are related to Germany, where in 2004 9,200 out of 450,000 road traffic accidents involved foreigners with habitual residence outside Germany. This makes up to 2% of road traffic accidents involving a cross-border dimension.[48] Furthermore, according to Irving Mitchell, there are 6,000 new cases each year involving British citizens injured in Europe.[49]

A study completed in 2000 for the European Commission by the Austrian *Kuratorium für Schutz und Sicherheit* found that mortality risk from injuries is highly increased for non-domestic tourists. The study – which, however, was based on a very limited set of data for the EU15 – estimated an average injury mortality of non-domestic tourists of 170 fatalities per 100.000 person-years of exposure, of which 132 fatalities were due to road accidents. This translated into an estimate of approximately 3.000 non-domestic tourist fatalities per year in the EU-15 due to road traffic accidents.[50] Road traffic accidents account for approximately 5% of all non-fatal and 40% of fatal unintentional injuries in the EU15. In 2001, in Austria 19% of fatal traffic accidents involved tourists, whereas the corresponding figure for France was 7.5%, and for Greece 3.2%.

In this section, we assess which countries can be deemed as being most concerned by the issue of cross-border road traffic accidents. In doing so, we interpret countries most concerned as those countries where the problem of undercompensation of victims of cross-border road traffic accidents is more likely to emerge, if the *lex loci delicti commissi* is applied. We then selected those countries based on the following criteria:

- the likelihood that a non-resident citizen will be involved in a road traffic accident in a given country; and
- the likelihood that, if an accident occurs in a given country, the victim will be a non-resident person.

3.1 Likelihood of an accident occurring

Figure 3 below shows the number of road fatalities per million inhabitants in the EU25 in 2005, according to the Eurostat CARE database. In addition to the data reported in Figure 3, we add

[47] Commission Staff Working Document addressed to the European Parliament and to the Council on certain issues relating to Motor Insurance, SEC(2005)1777, 19.12.2005.

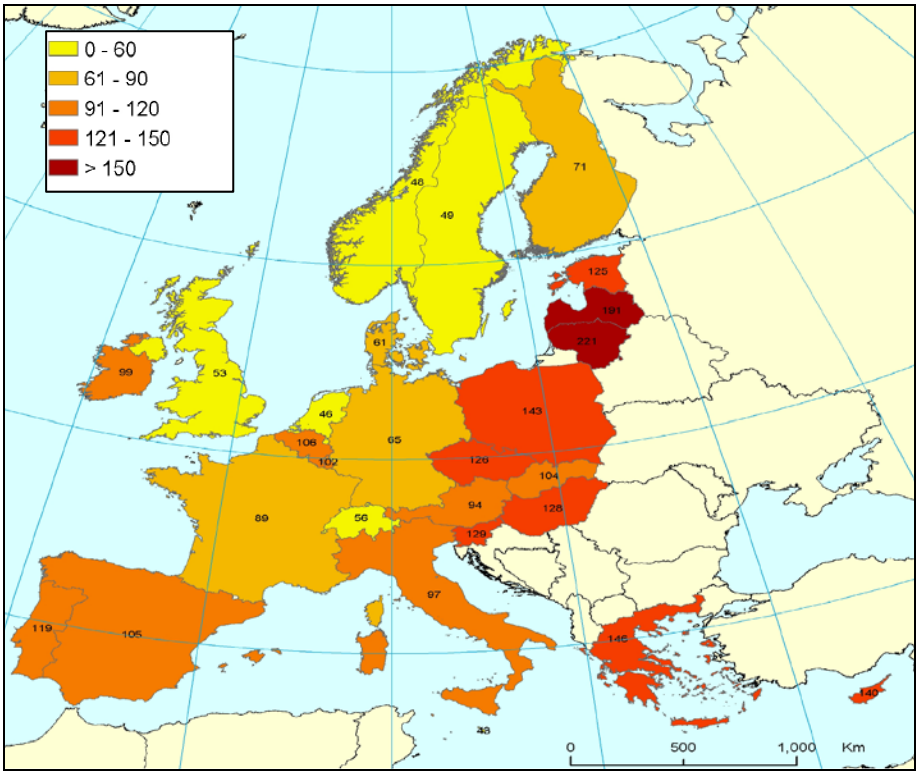
[48] In Germany, another 41,000 road accidents involved foreigners resident in Germany. This figure, however, should not be taken as representative of cases involving jurisdictional issues, as the application of both *lex damni* and *lex loci* would lead to the application of German law.

[49] These cases, however, are not limited to road traffic accidents, but include, for example, products liability accidents.

[50] Such figure cannot be used as a basis for our analysis for several reasons: first, because it is based on the EU15 and on data from the 1990s; secondly, because tourist injuries considered in the dataset include injuries caused by the tourists themselves. In other words, the figures reported do not give an adequate estimate of how many non-residents are actually *victims* of a road traffic accident.

figures from the two new entrant member states. In 2004, for every million inhabitants Bulgaria had 121 killed on a road accident, whereas Romania had 109.[51]

Figure 3 – Road fatalities per million inhabitants in the EU25, 2005



Source: Eurostat - CARE (2006) and national databases

Based on these indicators, Lithuania and Latvia would be the countries most concerned, with Poland, Greece and Cyprus exhibiting very high rates as well. In Western Europe, Portugal, Spain and Belgium exhibit a high incidence of road fatalities. As shown in the figure, countries where the damage award is normally higher – such as the Scandinavian countries, the Netherlands, UK, Ireland, Germany and France – also exhibit a lower riskiness for non-resident drivers.

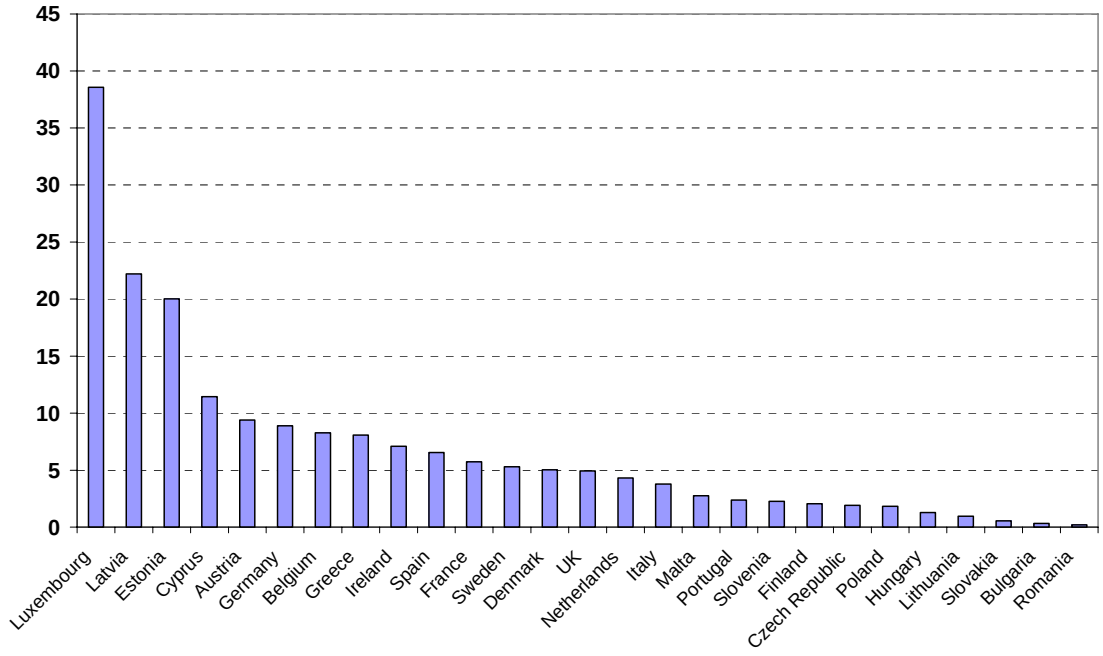
3.2 Flows of non-resident citizens in the EU27

Countries most concerned by the problem of cross-border road traffic accidents are, of course, those countries with a greater stock and flow of non-residents, be that for temporary stay, tourism or business travel reasons. In the previous section, we addressed the question: how likely it is that a non-resident travelling in an EU member state is victim of a road traffic accident? To the contrary, in this section we tackle a different issue: how likely is it that an accident in a given EU member state involves a non-resident person as victim?

Looking at available data on the stock and flow of non-nationals is the only possibility to answer this question. Figure 4 below illustrates the percentage of non-nationals on total population in the EU27. Countries such as Luxembourg, Latvia and Estonia exhibit high percentages of non-nationals, with Cyprus, Austria, Germany Belgium and Greece also deserving mention.

[51] See OECD, *Country Reports on Road Safety Performance*, September 2006.

Figure 4 – Stock of non-nationals in the EU27, 2004

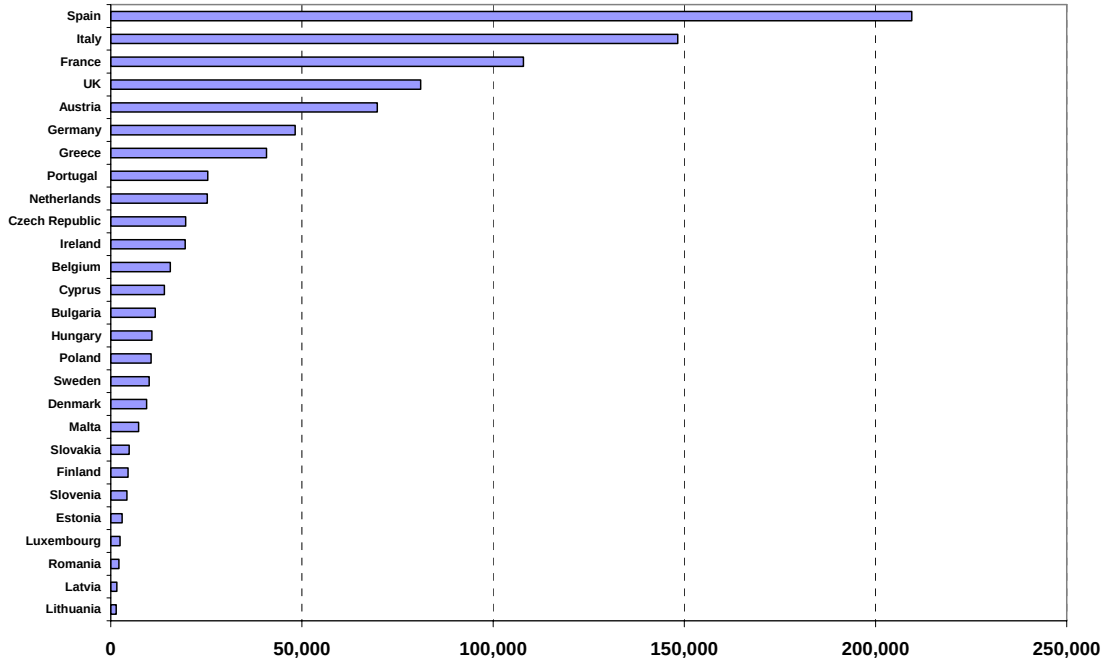


Source: Own elaboration on GEDAP, *Foreign Population Overview*, 2000-2004.

However, looking only at the stock of non-nationals would give only a partial picture of the problem at hand. Information on nights spent by non-residents in EU member states is also important as it explains the flow of tourists and business travellers in each EU country, and thus represents the relative presence of non-residents in each of the EU27.

Figure 5 below is based on data from Eurostat (2007). As is shown in the picture, Spain, Italy, France, Austria, UK, Germany and Greece are countries that host the highest number of tourists, here expressed in number of nights. As already recalled, these figures include both business and leisure travellers.

Figure 5 – Nights spent by non-residents in the EU27 (thousands)



Source: Eurostat pocketbook, *Tourism Statistics* (2007)

Finally, in order to establish a relationship between the country of destination and the country of origin, we show in Figure 6 the most preferred destination for most of the EU member states. Again, Spain is the preferred destination for most nationals of Northern European countries. As reported by Eurostat (2006), citizens of 9 of the 23 countries for which data were available preferred Spain as their main destination, with percentages ranging between 36% for Portugal and 12% for Denmark. France was the favourite destination for travellers from four countries, Germany for tourists from three and Italy for citizens of two European countries. Czech Republic and Slovakia prefer each other as their respective main destinations, though at a low percentage.

Figure 6 – Country of preference by outbound tourists per country

Source: Eurostat, *Inbound and Outboud Tourism in the European Union*, Statistics in Focus, 5/2006 .

3.3 Likelihood of disparities in damage award

Based on the evidence reported in the previous sections, we are able to identify those countries that raise most significant concerns in terms of the likelihood of significant differences in the *quantum* of damages between the *lex loci* and the *lex damni*. These countries certainly include the Baltic States, Hungary, the Czech Republic, Slovakia, Slovenia, Bulgaria, Romania and Poland. For example, in Hungary or Czech Republic, the indemnity for personal injury or death is not likely to exceed 10% of what a UK resident would be awarded in his or her own country.

However, also in other countries, such as Spain, Portugal, Greece, Cyprus, Belgium, Italy and the Netherlands the *quantum* of damages is likely to be lower than what a UK, a German or French victim would be awarded in his/her own country. Among these countries, some are countries with a relatively high rate of road fatalities and a large number of inbound visitors. For this reason, these countries are more likely to qualify as countries "most concerned" for the purposes of this background note.

3.4 Countries most concerned

Based on the analysis of the EU27 on the three criteria identified – road safety, non-resident inflow and likelihood of low damage award – we have built a relative ranking of countries in order to observe the relative likelihood of a problem of cross-border road traffic accident. This ranking is illustrated in table 1 below.

Table 1 – Average ranking

	Road safety	Stock of non-nationals	Inbound tourism	Average ranking
Greece	3	8	7	6.00
Cyprus	5	4	13	7.33
Spain	14	10	1	8.33
Austria	19	5	5	9.67
Latvia	2	2	27	10.33
Belgium	13	7	12	10.67
France	20	11	3	11.33
Germany	22	6	6	11.33
Estonia	9	3	23	11.67
Italy	18	16	2	12.00
Portugal	11	18	8	12.33
Ireland	17	9	11	12.33
Czech Republic	8	21	10	13.00
Luxembourg	16	1	24	13.67
UK	24	13	4	13.67
Poland	4	22	16	14.00
Hungary	7	23	15	15.00
Slovenia	6	19	22	15.67
Bulgaria	10	26	14	16.67
Netherlands	27	15	9	17.00
Lithuania	1	24	26	17.00
Denmark	23	13	18	18.00
Sweden	25	12	17	18.00
Slovakia	15	25	20	20.00
Malta	26	17	19	20.67
Finland	21	20	21	20.67
Romania	12	27	25	21.33

Source: own elaboration

Table 1 reports the average score of each of the EU27 for the criteria we have illustrated in previous sections. For each criterion, a score of "1" would mean that the country at stake is the most "concerned"; whereas a score of "27" indicates the least concerned. As shown in the right column of the table, the countries most concerned by the problem of cross-border road traffic accidents are Greece, Cyprus, Spain and Austria.

However, the legal regime and court practice in the four countries differ in many respects.[52]

- In Austria courts seized to assess the *quantum* of damages have to take into account what the victim would have been awarded in his/her own country. This is not the case in Greece, Cyprus and Spain.
- In Spain, the introduction of the LOSSP has resulted in many cases of poor compensation of loss of earnings, and reliance on the principle of *restitutio in integrum* is questioned by some commentators, give the wide application of standard tables, which take only partially into account the actual and future income of the victim.
- In Greece, non-pecuniary losses are strictly limited to bodily injuries; this leads to a lack of compensation for grief and suffering, which in turn jeopardises the full restoration of the victim's condition before the accident.
- In Cyprus, the award of general damages has been increasing overtime, as observed in the case *Kyriakos Mavropetri v. Georgiou Louca*.[53] However, special damages – as confirmed in *Emmanuel and Another v. Nicolau and Another*[54] – are not inferred from the nature of the act, and must be "claimed specially and proved strictly".[55] These damages include medical expenses and expenses occurred after the victim's death.

[52] For a more detailed description of the legal regime in these and the other European Member States, see the companion study by Renda, A. and Schrefler, L., *cit.*, forthcoming.
[53] Kyriakos Mavropetri v. Georgiou Louca (1995) 1 CLR 66, p. 74.
[54] Emmanuel and Another v. Nicolau and Another (1977) 1 CLR 15, p. 34.
[55] See Neocleous, A. (2000), *Introduction to Cyprus Law*, Yorkhill, at 573.

Overall, the main problem in the four countries seems to lie in the award of non-pecuniary damages, more than in the compensation for pecuniary loss. Apart from this, especially in Greece and Cyprus the level of award will reflect the relatively lower standard of living in these countries compared to Northern European countries such as the UK, France, Germany, Belgium and the Netherlands. In three of the four countries (excluding Austria), the average income of a non-resident victim is not taken into account by courts, which can lead to undercompensation – i.e. failure to realise a *restitutio in integrum* – whenever the victim is resident in a country with a higher standard of living.

4 Assessment of the legal impact of selected options

In this section, we draw on the main conclusions of the previous sections to discuss the potential for departing from the principle of *lex loci delicti commissi* as the standard choice of law in case of road traffic accidents in EU member states. In addition, we compare this solution with alternative options, which are in principle suited to solve the problem of undercompensation of victims of cross-border road traffic accidents, especially when such accidents take place in one of the countries most concerned. In particular, we compare the following options:

- *Option 1: judges apply the law of habitual residence of the victim to assess the* quantum *of the claim;*
- *Option 2: judges apply the 'principle of ubiquity';*
- *Option 3: relying on common principles for the assessment of damages;*
- *Option 4: coverage through first-party insurance;*
- *Option 5: creation of a European compensation fund for victims of cross-border road traffic accidents.*

Before we compare the different options chosen, it is worth recalling that in many civil law countries, the choice of a strict liability rule for road traffic accidents makes up for an exception to the general principle of fault-based liability for torts. This choice results most often in a reversal of the burden of proof, coupled with a contributory negligence and more or less stringent escape clauses, sometimes even requiring a *probatio diabolica*, or even the impossibility of escaping liability when the accident was caused by *force majeure*. These rules are the results of a trade-off between the need to secure that victims of road traffic accidents are fully compensated in the event of a personal injury, and the need to ensure that traffic participants face efficient incentives to behave diligently, by internalising (almost) all the negative externalities arising from their negligent behaviour.

Typically, strict liability rules such as those applied in France or – to a lesser extent – Germany and Italy award a priority to the first objective: by prescribing that victims should be compensated even when the tortfeasor was not at fault, these rules tilt the balance in favour of the victim, especially *restitutio in integrum* is applied when assessing the *quantum* of damage award. A strict liability rule, by partly lifting up the victim's burden of proof, facilitates access to justice for victims of road traffic accidents, and reduces costs for administration of justice. In turn, excessively strict rules can prove over-deterrent for potential offenders, who will be called to compensate damage even if they were not at fault.[56]

A full description of the main findings of the law and economics literature on road traffic accidents and corresponding liability rules would fall outside the scope of this briefing note[57]: however, it is worth recalling that such literature clarified the nexus existing between the type of liability rule chosen by the legislature, the availability of significant insurance coverage, and the amount of damages awarded by judges. More in detail, it can be fairly stated that strict liability rules, which mostly aim at securing victims' compensation, should not lead to over-deterrence as regards the behaviour of potential traffic offenders, especially when it comes to bilateral accidents. This may arguably lead to lower damage awards if compared to a full-fledged fault-based liability rule, where

[56] In the law and economics literatre, a defence of contributory negligence is normally considered as a desirable integration to strict liability rules, as it provides efficient incentives for the victims to behave diligently.

[57] See, e.g. Shavell, S. (1987), *An Economic Analysis of Accident Law*, Harvard University Press; for a concise explanation, see also Skogh, G. (2006), *Coverage of Accidental Damage: First-party versus third-party insurance from a Law and Economics standpoint*, 4th Liability Insurance Forum, Munich, available at http://www.munichre.com/publications/302-02703_de.pdf?rdm=1596.

tortfeasors award damages resulting from their negligent behaviour. For example, the possibility of awarding exemplary damages in the UK or Ireland is coupled with damage awards which normally lie above the average compensation in other jurisdictions where *restitutio in integrum* is fully applied – e.g. France, or Germany.

At the same time, both damage awards to victims of road traffic accidents and insurance coverage of resulting damages significantly depend on the relative standard of living in the country concerned. A full convergence of insurance premia in the EU27 would thus not be feasible: typically, in some Eastern European countries, insurance premia are much lower than in most Western European countries, reflecting the relative differences in the standard of living, notwithstanding the significant riskiness of roads.

The above considerations lead to two main conclusions: the type of liability rule, level of insurance premium for motor third-party liability and extent of damage awards are closely interrelated, and are functional to the sustainability of the overall road traffic system in each country. Separating these three elements is not an easy task, and should be dealt with extreme care. A different case emerges when countries with comparable level of income apply diverging criteria for compensating victims: here, differences in damage awards would simply amount to a "choice of law" problem, and the need to secure full compensation can be dealt with independently of issues related to the local economy.

4.1 Application of the "lex damni" for assessing the quantum

The overarching goal behind the proposal to mandate that judges apply the "law of habitual residence of the victim" is straightforward: in the context of European integration, and given the overarching goal of ensuring the free circulation of persons, exposing EU citizens to the risk of significant undercompensation for injuries occurring in cross-border road traffic accidents is not acceptable. For such reason, without imposing the full application of the law of habitual residence when it comes to attributing liability, judges seized to calculate damages may be required to consider the legal rule that would be applied to the victim in his/her own country.

This proposal can be interpreted in at least two different ways:

1. *Judges apply the criteria and the headings of damage provided for in the victim's home jurisdiction*: in this case, only the procedural steps followed by the judge in calculating the damage would change, according to the *lex damni*.
2. *Judges consider the level of damage award the victim would have obtained had the accident occurred in his/her own country*: under this option, judges would have to calculate compensation based on the specific definition of damages in the country of habitual residence of the victim, but also based on the amounts normally awarded in that country for the type of accident occurred.

The two options are starkly different. As an example, assume that a road traffic accident occurs in country A – where only pecuniary damages are awarded – but the victim *V* has his/her habitual residence in country B – where non-pecuniary damages are awarded, including loss of amenity and mental distress. Under this proposal, judges should be called to calculate the damage according to the more comprehensive definition of damage provided for in country B, where the loss is sustained (*lex damni*), instead of merely awarding pecuniary damages (*lex loci delicti*).

The first option requires that the seized judge knows the details of the legal regime applicable in country *B*, with exclusive reference to the way damages are calculated. This would require, at a minimum, the drafting of a reference handbook for national judges for the purposes of facilitating them in applying criteria enacted in foreign legislation; as is widely acknowledged, EU member states apply a "tower of Babel" of legal definitions, and often also identical headings of damages

hide widely different notions, interpretations and corresponding awards. There is no such thing as a common language or even a *koiné dialectos* in this field. In addition, medical experts appointed for calculating the damage would have to be trained in assessing types of damages that are not normally calculated in country *A* – for example, loss of amenity. Finally, if country *A* does not allow for compensation of close relatives, judges and medical experts would also have to get familiar with the headings of damages under which such relative qualify for compensation under the legislation applicable in country B. The impact on insurance companies under this option would probably be negligible: for countries with very low or incomplete damage awards, a very small increase in the average premium could solve the problem, as the percentage of cross-border road traffic accidents is estimated to be below 1% of all accidents. In addition, under the Fifth Motor Insurance Directive victims of an accident occurred abroad may bring legal proceedings against the civil liability insurer in the member state in which they are domiciled (*additional jurisdiction*); this would facilitate the application of the *lex damni*. However, this option would not guarantee that *restitutio in integrum* is achieved when country *A* has a relatively higher standard of living and greater damage awards than country *B*. Being involved in a road traffic accident in country *A* or *B* would still make a big difference for the victim *V*.

To the contrary, the second option is aimed at achieving full compensation for *V*, regardless of whether the accident occurs in country *A* or *B*. Also this option, however, creates some concerns. First, judges would not only have to get to grips with existing legislation/caselaw in country *B* for the purpose of correctly applying the corresponding headings of damages; they would also need to consider the relative standard of living of *V* in country *B* in order to successfully determine fully compensatory damages. This, in turn, also applies to medical experts appointed to assess physical injury or mental distress. Also legislation and average awards for close relative may have to be taken into account, depending on the specific legislation enacted in country *B*. Depending on insurance legislation and practice in country *A*, the impact of such option may be felt mostly by the tortfeasor or by all insured citizens. If sums insured and the terms of policy do not cover the (sometimes extremely) higher costs of having to fully compensate *V*, then additional damages will have to be compensated directly by the victim; if, on the contrary, insurance covers all damages, insurance companies will take into account expected higher costs by increasing insurance premia. The impact of this option on insurance companies would probably be more substantial than under the previous scenario: in particular, if we assume that – also as a result of the new minimum coverage introduced by the Fifth Motor Insurance Directive – insurance companies cover the damage, this will lead to an increase in third-party insurance premia in countries with lower level of income and damages awarded.[58] This option, however, would in principle pursue the objective of ensuring *restitutio in integrum* for the victim *V*.

In summary, also based on the new rules introduced by the Fifth Motor Insurance Directive, it seems that the application of the *lex damni* for cases of cross-border road traffic accidents, coupled with a need to secure *restitution in integrum*, would not come without costs and legal problems, nor without expected increases in insurance premia in countries with relatively unsafe roads and (often) low levels of income.

4.2 The 'principle of ubiquity'

Under the so-called principle of ubiquity, the applicable law is that which is more favourable to the victim as between the law of the place of the harmful event and the law of the place of injury. Under the assumption that EU institutions aim at maximising the potential for full compensation of

[58] The explanation lies in the expected level of claims received by insurance companies and the corresponding expected costs for indemnities. An insurance company in country *B*, foreseeing increased costs for compensating damages to foreign victims, will increase the premium accordingly.

victims of cross-border road traffic accidents, this provision may be taken into consideration. However, under this option:

- The situation of undercompensated victims in countries that award lower damages would remain substantially unaltered compared to the previous option, as in both cases *lex damni* would apply;
- Victims of road traffic accidents in a country with higher level of income and damage awards than their home country would be overcompensated with respect to what they would have obtained in their country of habitual residence;
- Insurance companies in low-damage countries would have to take into account the need to cover significantly greater damage awards, corresponding to cases in which their clients cause damage to victims that have their habitual residence in a country where damage awards are substantially higher, leading to an increase in insurance premia or in the decision not to cover this risk, where possible.

For such reasons, we discard this option as being dominated by option 1 above.

4.3 Relying on common principles for the assessment of damages

An alternative option for achieving more satisfactory compensation of victims of cross-border road traffic accidents would be reliance on a common set of principles for the calculation of the *quantum debeatur*, to be agreed upon at EU level. All these options would be consistent with the Charter of Fundamental Rights of the European Union, signed in December 2000, which calls for harmonisation of the protection of civil rights in terms of the available compensatory remedy.

Several sub-options can be considered, including:

1. *A European disability rating scale* such as the one proposed at the European Parliament in 2003 by CEREDOC with the backing of the Rothley Group. This proposal contained a clinical assessment of the degree of disability that any single injury will cause. Thus, for example, post-traumatic stress disorder (PTSD) is rated as causing between 12% and 20% disability, the amputation of a big toe at 6%, etc. The Annex to the draft Parliament Resolution makes clear that where there is more than one injury the overall rating is not necessarily the sum of individual ratings.
2. *A European reference list of damage awards for specific types of injuries*. This could be coupled with corrective factors that mirror the relative standard of living, tax and social security coverage in each of the member states;
3. *Harmonisation of the level of awards between member states* for each type of loss. This option would award priority to achieving uniformity of civil rights enjoyed by all EU citizens, by securing compensation for victims irrespective of their country of habitual residence.

Options 1 and 3 were already extensively discussed by scholars and practitioners. As regards the European Disability Rating Scale, implementing such an option would take some time, especially since assessment of bodily injury is performed in widely diverging ways in EU member states. As reported by Haque, "personal injury lawyers in the UK will have to markedly re-adjust the way they assess injuries".[59] According to some practitioners, such a standardised *barème* would fail to take into consideration a person's unique circumstances, especially as regards pain and suffering and other non-pecuniary damages; accordingly, it was argued that a standardised *barème* would be biased towards compensating injuries that are "medically identifiable", and would be based "more

[59] Haque, M. (2005), *Harmonisation of personal injury law in the EU*, available at http://www.crownofficechambers.com/cvs.asp?id=69.

on the basis of costs rather than protecting the interests of injured victims".[60] However, these critiques do not amount to a complete rejection of the idea of standardising disability rating schemes: they only mean that the exclusive use of such a *barème* would fail to achieve *restitutio in integrum*, and would have to be integrated by additional awards by national judges based on heading of damages that can be compensated under national laws.

Option 2 shares the same limits of Option 1. In addition, it further standardises awards in terms of actual sums of money, adjusted for the standard of living of the victim in his/her own country of residence. This option would reproduce the flexibility of awards obtained under the French *Barème Rousseau* or the Italian tables for the *calcolo a punto*, in which identical disability ratings lead to widely diverging awards in different regions of the same country.[61] Also in this case, however, *restitutio in integrum* would not be achieved, as the full standardisation of awards for specific types of injuries would not solve the problem of cross-border litigation, nor would allow judges to take fully into account the peculiar interests of the victim.

Option 3 also has to be discarded, as it would not achieve the goal of *restitutio in integrum* if not "on average", contrary to any principle of corrective justice. As was observed by a commentator, such an option would "disregard the inherent diversity in each member state arising from different standards of living, taxation and social security systems" and "would achieve relative inequality rather than relative uniformity".[62]

In summary, none of the three options above would ensure decisive progress towards the full compensation of victims of road-traffic accidents, although the adoption of a non-binding *barème* may provide a useful reference for lawyers and judges wishing to attribute a disability rating to certain types of bodily injuries. Such an assessment would however not make up to the assessment of the full damage to be compensated.

4.4 Coverage through first-party insurance

In previous sections, we often hinted at the decisive role insurance can play in the compensation of damages for torts. The law and economics literature has extensively debated the relative merits of achieving compensation through third-party or first-party insurance as opposed to traditional tort law remedies.[63] A potential option for achieving full compensation of victims of cross-border road traffic accidents may rely on the role of first-party insurance in the victim's country of residence. Such option would be based on a thought experiment based on the following assumptions. First, cross-border road traffic accidents reportedly represent less than 1% of road traffic accident Europe-wide, and are estimated at 2% in countries with substantial outbound tourism (e.g. Germany). Secondly, such accidents have a greater likelihood of occurring in countries "most concerned": in at least three of these countries (Spain, Greece, Cyprus) the level of damage award is normally lower than in countries such as the UK, Germany, France, Belgium or the Netherlands; but greater than awards in most of the new member states.

Based on these assumptions, it can be assumed that the cost for a first-party insurer having to secure coverage of losses arising from cross-border road traffic accidents would not be substantial, and could be recovered either through a generalised small increase in premium levels (*pooling solution*), or through the setting of a higher premium for insured persons travelling abroad (*separating*

[60] See the comments by the Law Society of England and Wales (2004) and those of the Italian Association of Personal Injury Lawyers (2004), both available online at www.dannoallapersona.it.
[61] See, for Italy, Cass. 18/9/95, Sez. III, N°9828.
[62] Haque (2005), *cit.*
[63] See again, Skogh (2000), *cit.*

solution).[64] Such increase in premia would be needed as first-party insurance companies would anticipate the risk of not recovering indemnities paid through subrogation in the victim's rights against the claims representative of the (third-party) insurer of the tortfeasor.

Generally speaking, this option would deserve a more thorough economic impact assessment, aimed at quantifying the expected changes in premium levels in EU member states. Further impacts of this option would be:

a) the approximation of *restitutio in integrum* for victims of cross-border road traffic accidents;

b) the reduction of the costs of administering justice – as widely acknowledged in the law and economics literature, an insurance system is normally less costly to administer than a legal regime based on tort law; and

c) the avoidance of the need, for national judges, to get to grips with compensation criteria used in other jurisdictions.

4.5 Creation of a European compensation fund for victims of cross-border road traffic accidents

A final option to be considered is the creation of a EU-wide fund aimed at ensuring adequate redress for undercompensated victims of cross-border road traffic accidents, funded through contributions raised from insurance premia (the "EU Fund"). This option would appear viable under the following assumptions.[65] First, there are approximately 250 million vehicles in the EU27, which are all in principle subject to compulsory third-party insurance. As a result, we assume that there are 250 insurance policies, although at widely different conditions and cost. Assume that the average price for an insurance policy is €500. Then, applying a moderate percentage increase in insurance premia (e.g. 0.5%) would lead to an average increase of €2.5, but also to raising an annual €625 million to be devoted to (full) compensation of cross-border road traffic accidents. This proposal could be easily coupled with options 3 and 4 above: as a matter of fact, first-party insurance companies would be in a better position to claim compensation from the EU Fund than actual victims, as well as settle claims within the EU Fund. Such claims would then lead to compensation based on an established set of common principles (such as in option 3), as well as on calculations based on the average level of awards in the member states involved. Such a centralisation of claims would lead to the following impacts:

a) the approximation of *restitutio in integrum* for victims of cross-border road traffic accidents;

b) the reduction of the costs of administering justice – as widely acknowledged in the law and economics literature, an insurance-based system is normally less costly to administer than a legal regime based on tort law; and

c) the avoidance of the need, for national judges, to get to grips with compensation criteria used in other jurisdictions.

d) The gradual development of a common set of principles for compensating victims for the breach of a Human Right in the EU27;

e) The contribution of all insurance companies (and all EU citizens) to tackling the problem of cross-border road traffic accidents;

f) The need to set up a EU Fund, which may be costly to administer in an efficient way.

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[64] See, *i.a.*, Rothschild, M. and Stiglitz, J. (1976), *Equilibrium in Competitive Insurance Markets: An Essay on the Economics of Imperfect Information*, The Quarterly Journal of Economics, Vol. 90, No. 4, pp. 629-649

[65] For this example, see the comment by F. Lione, President of Assinfort Europe, available at http://www.aduc.it/dyn/dilatua/dila_mostra.php?id=82832&L1=10.

5 Conclusions

Cross-border road traffic accidents represent, according to recent estimates, approximately 1% of overall road traffic accidents in Europe. Most of these accidents potentially create a risk of undercompensation of the non-resident victim, due to difference in the standard of living as well as in the calculation of the *quantum* of damages in the EU27. The problem of victims' undercompensation in the event of a cross-border traffic accident has so far been approached mostly under the broader aegis of the need to achieve further harmonisation in European Civil Law. Most recently, the European Parliament has proposed to address this issue by mandating the application of *lex damni* when assessing the quantum of damage awards. Authoritative European groups of lawyers – such as PEOPIL – seem to favour the gradual convergence of principles of damage compensation through comparative law.

In this background note, we identified the countries most concerned as those countries where the problem of undercompensation has the greater likelihood of emerging with significant frequency. These countries are, according to our analysis, Spain, Greece, Cyprus and Austria. However, in one of these countries – i.e. Austria – judges already must take into account what the victim would have obtained as compensation in his/her own country of habitual residence. In other countries, the level of damage award may be significantly lower than in other jurisdictions, especially when the victim's country of habitual residence is located in Northern Europe.

After a description of the problem's main legal underpinnings, we identified five main options in addition to the "zero option" (or "do nothing" option). Option 1 – the application of *lex damni* – potentially pursues the objective of securing *restitutio in integrum* for victims of cross-border road traffic accidents, at the same time avoiding cases in which a victim is overcompensated as it was involved in an accident taking place in a country where damage awards are greater, also due to that country's higher standard of living. However, such option also creates significant problems in terms of adaptation of existing practices in national courts – with national judges having to get familiar with foreign legislation; and in terms of expected increase in insurance premia in countries with lower income and lower damage awards.

Compared with this option, we discarded option 2 ("principle of ubiquity") as strictly dominated by Option 1. Option 3 and its sub-options ("relying on common principles at EU level") would not reach the goal of achieving full compensation for the victims, and can increase administrative costs in the short term. A full harmonisation of damage awards seems neither likely nor desirable. In contrast, options 4 and 5 provide solutions based on insurance policies, which may be worth discussing as means to achieve *restitutio in integrum* for victims of cross-border road traffic accidents without imposing significant and burdensome adaptations in the way such claims are dealt with by national judges and medical experts.

Table 1 – Legal regimes for road traffic accidents in the EU27

Country	Liability regime	Pecuniary damages (primary victim)	Non pec. damages (primary victim)	Pecuniary damages/death (close relatives)	Non pec. Damages/death (close relatives)	Living with an injured person
Austria	**Strict L. (relative)**	Treatment expenses Lost profits & loss future earnings Costs of medical treatment *Limits: NO*	Pain & suffering (Risk to life or health) *Limits: NO* *(case-law: €120-€400 daily)*	Loss of maintenance funeral and related costs *Limits: NO* Inherit claims of the deceased if death is not immediate	Pain and suffering (*case law: €7,250 - 18,200*) Inherit claims of the deceased if death is not immediate	Costs of care (must be claimed by primary victim)
Belgium	**Strict L. (relative)**	Medical & nursing Loss of profits *Limits: NO*	Pain & suffering Disfigurement Enjoyment of life Sexual function *Limits: NO, but tables*	Funeral expenses Loss of support *Limits: NO* Inherit claims for losses suffered before death by the victim	Loss of a relative Suffering from witnessing *Limits: NO, but tables* Inherit claims of the deceased if death non immediate	Costs of hospital visits Adaptation of home Lost income Pain & suffering (only for parents or children)
Bulgaria	**Fault-based**	Medical expenses Lost benefits (direct cause) Legal expenses *Limits: NO*	Pain & suffering *Limits: NO*	Medical expenses Lost benefits *Limits: NO*	Pain & suffering *Limits: NO*	
Cyprus	**Fault-based**	<u>General damages</u>(presumed) Loss of future earnings <u>Special damages</u> (strict proof) Medical expenses Treatment expenses *Limits: NO, scales*	<u>General damages</u> (presumed) Pain & suffering Loss of amenity of life *Limits: NO, scales*	<u>General damages</u> (presumed) Loss of future earnings <u>Special damages</u> (strict proof) Medical expenses Funeral expenses *Limits: NO, scales*		

Country	Liability regime	Pecuniary damages (primary victim)	Non pec. damages (primary victim)	Pecuniary damages/death (close relatives)	Non pec. Damages/death (close relatives)	Living with an injured person
Czech Rep.	**Strict L. (relative)**	Medical expenses Loss of earnings Loss of pension Court fee (winning party) Attorney fee (winning party) *Limits: NO* *For insurance compensation: CZK 35 m for health damages; CZK 18m for material damages*	Pain & suffering Social handicap *Limits: NO*			
Denmark	**Strict L. (relative)**	Medical expenses Temp. loss of earnings Permanent loss of earnings *Standard criteria*	Temp. pain & suffering (*€18/day in 2002*)	Burial expenses Loss of support (only if dependant) Inherit claims of the deceased	NO Inherit claims of the deceased	
Estonia	**Strict L. (relative)**	Medical expenses Loss of income *Limits: NO*	Moral damages *Limit approx. 320 €*	Medical expenses Loss of income	Moral damages *Limit: approx. 320 €*	
Finland	**Strict L. + comparative negligence**	Medical expenses Loss of earnings Care and support *Limits: NO, standard criteria*	Pain & suffering Temp. & perm. Disability Mental disturbance *Limits: NO, standard criteria*	Funeral expenses Loss of maintenance *Limits: NO, standard criteria* Inherit claims of the deceased for period between injury and death	NO Inherit claims of the deceased only if he/she started proceeding	

Country	Liability regime	Pecuniary damages (primary victim)	Non pec. damages (primary victim)	Pecuniary damages/death (close relatives)	Non pec. Damages/death (close relatives)	Living with an injured person
France	**Strict L. (almost absolute)**	Medical expenses Loss of income *Limits: NO*	Pretium doloris Aesthetic detriment Loss of amenity *Limits: NO*	Loss of support for dependants Funeral and related costs *Limits: NO* Inherit claims of the deceased for period between injury and death	Mental suffering *Limits: NO* Inherit claims of the deceased for period between injury and death	Non pecuniary damages (to be proven)
Germany	**Strict L. + comparative negligence**	Accident related expenses Medical costs Loss of earnings *Limits: NO*	Pain & suffering Loss of amenity Disfigurement *Limits: NO*	Funeral costs Loss of support for dependants *Limits: NO* Inherit claims of the deceased	Only for severe impairment of very close relatives *Limits: NO* Inherit claims of the deceased (depends on lengths and condition of survival)	Loss of support Caring costs
Greece	**Strict L. + comparative negligence**	Medical costs Past and future earnings *Limits: NO*	Only if bodily injury *Limits: NO*	Funeral expenses Loss of income *Limits: NO* Inherit claims of the deceased for period between injury and death	Shock (death) if considerable as a bodily injury, Moral damage for very close relatives *Limits: NO* Inherit claims of the deceased only if trial ongoing before death	

Country	Liability regime	Pecuniary damages (primary victim)	Non pec. damages (primary victim)	Pecuniary damages/death (close relatives)	Non pec. Damages/death (close relatives)	Living with an injured person
Hungary	**Strict L. (relative)**	Medical expenses Loss of earnings *Limits: NO*	Moral damages *Limits: NO*			
Ireland	**Fault-based**	Special damages: Medical treatment Material losses Loss of earnings *Limits: NO*	General damages: Physical and mental pain *Limits: NO*	Funeral Other damages & expenses Loss of benefits *Limits: NO* Inherit pecuniary claims of the deceased only if different cause of death	Grief (*fixed and automatic*)	Loss of consortium
Italy	**Strict L. (relative)**	Medical expenses Loss of income *Limits: NO*	Loss of physical/mental integrity (*danno biologico*) Loss of quality of life (*danno esistenziale*) Pain & suffering (*danno morale*) *Limits: NO, tables for danno biologico and danno esistenziale for minor injuries*	Burial and funeral costs Loss of income Personal loss of income if death had consequences on health or work of relatives *Limits: NO* Inherit claims of the deceased for period between injury and death	Danno biologico-psichico Pain and suffering Negative changes of life (danno esistenziale) *Limits: NO, tables* Losses sustained by the deceased only if he survived for a certain time (*100€-4000€/day of life*)	Pecuniary losses Danno biologico Danno morale Danno esistenziale

Country	Liability regime	Pecuniary damages (primary victim)	Non pec. damages (primary victim)	Pecuniary damages/death (close relatives)	Non pec. Damages/death (close relatives)	Living with an injured person
Latvia	**Strict L. (relative)**	Insurance law: Medical expenses Loss of ability to work Temporary loss of income *Limit: approx. 356,000 € per injured person, approx. 100,000 € for property losses* Civil law: Medical expenses Lost income Future income losses (only if permanent disability) *Limits: NO*	Insurance law: Pain and suffering (*depending on the type of injury : 20 LVL to 400 LVL*) Civil law: Moral injury (to be proven by the victim) *Limits: NO*	Insurance law: Loss of pecuniary support Civil law: Medical treatment Burial expenses Support for dependants Loss of property *Limits: NO*	Insurance law: Pain and suffering : *100 LVL for each dependant*	
Lithuania	**Fault-based**	Bodily damage Property damage Penalty damages *Limits: NO*	Pain & suffering Deterioration of social life *Limits: NO*			
Luxembourg	**Strict L. (relative)**	Incurred expenses Present & future losses *Limits: NO*	Pain & suffering Breach of human right Physical integrity *Limits: NO*	Loss of earnings Funeral expenses *Limits: NO* Inherit losses suffered by the deceased after accident	Yes *Limit: €15,000 -20,000* Inherit losses suffered by the deceased	Loss for extra work Emotional loss
Malta	**Fault-based**	Expenses incurred Loss of past & future earnings *Limits: NO*				

Country	Liability regime	Pecuniary damages (primary victim)	Non pec. damages (primary victim)	Pecuniary damages/death (close relatives)	Non pec. Damages/death (close relatives)	Living with an injured person
Netherlands	**Strict L. (relative)**	Medical expenses Loss of earnings Other pecuniary losses Harm to goods *Limits: NO*	Only harm directly caused *Ceilings by case law*	Loss of support Funeral expenses Incurred costs *Limits: NO* Inherit right to claim losses	<u>No *restitutio in integrum*</u> Only for recognized mental injury *Practically non awarded* Inherit right only if deceased started proceedings	Costs that the primary victim could claim + physical & mental injury of the relative
Poland	**Strict L. (relative)**	Medical treatment Loss of present & future income Training for new occupation *Limits: NO*	Pain & suffering *Limits: NO*	Loss of support for dependents *Limits: NO*	Suffering *Limits: case law*	
Portugal	**Fault-based**	Medical expenses Loss of earnings Loss due to permanent disability *Limits: NO*	Only in case of serious losses deserving legal protection *Limits: NO*	Inherit claims of the deceased (*case-law: between € 7,500- 30,000*)	Loss of the right to life (*case law: c.ca €50,000*) *Limits: NO* Inherit claims of the deceased	
Romania	**Fault-based**	Losses that can be monetized *Limits: NO*	Moral damages *Limited in case-law*			
Slovakia	**Fault-based**	Medical expenses Loss of past & future income Lost property *Limits: NO*	NO			

Country	Liability regime	Pecuniary damages (primary victim)	Non pec. damages (primary victim)	Pecuniary damages/death (close relatives)	Non pec. Damages/death (close relatives)	Living with an injured person
Slovenia	**Strict L. (relative)**	Health expenses Damage to health Trial expenses Loss of alimonies (*max: € 20,000*) Damage to property (*max: €500*)	Mental suffering (*max: € 10,000*) Decreased life activities *(case-law*)	Funeral expenses (only if not covered by health insurance)		Mental suffering only in case of extreme invalidism RARE!
Spain	**Strict L. + contributory negligence**	Bodily injury Lost income *Tables*	Immaterial damage *Depends on level of injury: tables*	Loss of earnings (*very low!*) Funeral expenses Inherit claims of deceased only if he/she survived for at least one month	Grief *Limits: NO*	Costs of serious injury Costs for alteration of family/ social life *Limits*
Sweden	**Strict L. + full insurance coverage**	<u>During recovery</u>: Medical expenses (unless covered by national insurance) Lost income <u>After recovery</u>: Loss of income *Limits: NO, tables*	<u>During recovery</u>: Pain & suffering <u>After recovery</u>: Disadvantage & incapacity Specific inconvenience *Limits: NO, tables*	Funeral & burial costs Loss of pecuniary support Inherit claims of deceased after injury	Grief (*case law*) Inherit claims of deceased after injury only if he/she started proceedings	Some cases: hospital visits Costs included in the primary victim's claim
UK	**Fault-based**	Medical expenses Loss of income *Case by case*	Pain & suffering Loss of amenity *Informal tables: max £200,000*	Loss of future support Expenses incurred Inherit claims of deceased	Bereavement losses (*fixed £ 10,000 after 1/4/2002*) Inherit claims of deceased (only if survived for some time)	Costs of caring and other expenses must be included in the primary victim's claim

Table 2 – Minimum insurance coverage in selected EU member states

1. Sums insured *Minimum sums insured stipulated by law for:*	Austria	Belgium	Bulgaria	Czech Republik	Denmark	Estonia	Finland	France	Germany	Greece
- Bodily injury	€ 1,090,093	Unlimited	€15,380/person; €25,633/event	€ 582,006	€ 10,896,117	€ 351,492/person	Unlimited	Unlimited	€ 2.5m/person € 7.5m/event	€ 500,000
- Material damage			€ 10,253	€ 161,668	€ 2,152,331	€102, 252	€ 3,300,00	€ 460,000	€ 500,000	€ 100,000
Sums commonly applied	€ 3m € 6m € 10m		As above	€ 582,006/€ 161,668 (50%) € 1.6 m/€1.6m (50%)	As above		Unlimited	Unlimited (bodily) varies for material	Unlimited; € 8m/person	As above
2. Obligatory insurance	**Yes**	**Yes**	**Yes**	**Yes**	**Yes**	**Yes**	**Yes**	**Yes**	**Ys**	**Yes**
% of uninsured vehicles	0.50%	1%	40%		less than 1%		0.01%	Less than 0.5%	0.50%	3%
3. Claims handling										
Direct claims	**Yes**	**Yes**	**Yes**	**Yes**	**Yes**	**Yes**	**Yes**	**Yes**	**Yes**	**Yes**
Direct claims settlement	**No**	**Yes**	**No**	**No**	**No**	**No**	**Yes**	**Yes**	**No**	**Yes**
- for bodily injury claims up to		n.a.					Unlimited	n.a.		n.a.
- for material damage claims up to		€ 7,500					Unlimited	€ 6,100		€ 6,000
Share of participating insurers		98%						99%		90%

1. Sums insured *Minimum sums insured stipulated by law for:*	Hungary	Ireland	Italy	Netherlands	Poland	Slovakia	Slovenia	Spain	Sweden	UK
- Bodily injury	€ 1,233,203	Unlimited	€ 774,685	€ 907,560	€ 600,000	€ 454,350/person	€ 153,663	€ 350,000/person	€ 33,198,694	Unlimited
- Material damage	€ 2,055,338	€ 114,276				€ 119,566	€ 102,293	€ 100,000		€ 408,030
Sums commonly applied	As above	BI: unlimited PD:Unlimted (private) € 114,276 (commercial)		€ 2,268,901	As above			Unlimited		As above
2. Obligatory insurance	**Yes**	**Yes**	**Yes**	**Yes**	**Yes**	**Yes**	**Yes**	**Yes**	**Yes**	**Yes**
% of uninsured vehicles	3.00%	10-13%	1%	0.018	0.015			0.045	1.00%	5%
3. Claims handling										
Direct claims	**Yes**	**No**	**Yes**	**Yes**	**No**	**Yes**	**Yes**	**Yes**	**No**	**No**
Direct claims settlement	**No**	**No**	**Yes**	**No**	**No**	**No**	**No**	**Yes**	**Yes**	**No**
- for bodily injury claims up to			n.a.					n.a.		
- for material damage claims up to			Unlimited					€ 96,000		
Share of participating insurers			0.95					95%	100%	

Source: Munich Re (2003)