Case C-375/20

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

10 August 2020

Referring court:

Tribunal da Relação de Coimbra (Portugal)

Date of the decision to refer:

11 May 2020

Appellant:

Liberty Seguros S.A.

Respondent:

DR

Subject matter of the main proceedings

The Third Civil Chamber of the Tribunal da Relação de Coimbra (Court of Appeal, Coimbra, Portugal) seeks a ruling from the Court of Justice on the compatibility with EU law (Directive 2009/103/EC) of the possibility, provided for in national law, of relying on the invalidity of an insurance contract, resulting from the unlawful nature of its transactional content, as against injured third parties and the Fundo de Garantia Automóvel (Portuguese Motor Vehicle Insurance Guarantee Fund, 'the FGA').

Subject matter and legal basis of the request for a preliminary ruling

Second paragraph of Article 267 TFEU.

Questions referred

Does [EU] law, and in particular Directive 2009/103/EC of the European Parliament and of the Council, preclude national legislation which allows the

nullity of a contract of insurance taken out against civil liability in respect of the use of motor vehicles to be relied on as against injured third parties and the Fundo de Garantia Automóvel where that nullity results from the fact that the policyholder has used the insured vehicle for the clandestine and illegal transport of persons and goods for remuneration and has concealed its use for that purpose from the insurer? Would the answer be the same even if the passengers had known that the transport was clandestine and unlawful?

Provisions of EU law relied on

Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability, in particular Article 13(1).

Judgment of 20 July 2017, *Fidelidade-Companhia de Seguros*, C-287/16, EU:C:2017:575; judgment of 4 July 2006, *Adeneler and Others*, C-212/04, EU:C:2006:443; judgment of 16 December 1993, *Wagner Miret*, C-334/92, EU:C:1993:945; and judgment of 13 November 1990, *Marleasing*, C-106/89, EU:C:1990:395.

Provisions of national law relied on

Decreto-Lei n.º 291/2007, de 21 de agosto (aprova o regime do sistema do seguro obrigatório de responsabilidade civil automóvel e transpõe parcialmente para a ordem jurídica interna a Diretiva n.º 2005/14/CE, do Parlamento Europeu e do Conselho, de 11 de maio, que altera as Diretivas n.ºs 72/166/CEE, 84/5/CEE, 88/357/CEE e 90/232/CEE, do Conselho, e a Diretiva n.º 2000/26/CE, relativas ao seguro de responsabilidade civil resultante da circulação de veículos automóveis) (Decree-Law No 291 of 21 August 2007 adopting the rules governing the system of compulsory insurance against civil liability in respect of the use of motor vehicles and partially transposing 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) ('the CMVI [compulsory motor vehicle insurance] rules'), *Diário da República* No 160 Series I, of 21 August 2007: in particular Articles 22, 47(1), 49(1)(a) and (b) and 54(3).

Decreto-Lei n.º 72/2008, de 16 de abril (estabelece o regime jurídico do contrato de seguro) (Decree-Law No 72 of 16 April 2008 laying down the rules governing insurance contracts) ('the ICR [insurance contract rules]'), *Diário da República* No 75, Series I, of 16 April 2008: in particular Articles 14(1), 24(1), 25(3) and 43.

Articles 253, 254(1), 280 and 294 of the (Código Civil) Civil Code.

Brief presentation of the facts and the main proceedings

1 Liberty Seguros S.A., brought an action for declaratory relief against the defendant, DR, now respondent, seeking a 'declaration annulling the insurance contract concluded with the defendant on the ground of its substantive invalidity retroactively to the date on which it was concluded, without prejudice to the applicant's right to retain the premiums paid by the defendant, in accordance with the provisions of Article 25(5) of Decree-Law No 72/2008'.

2 The applicant, now appellant, claimed in essence that, on 27 August 2015, it had concluded with the defendant a contract of insurance against civil liability in respect of the use of motor vehicles in which the item insured was the vehicle (identified in greater detail in the documents in the main proceedings) bearing registration number 56-FB-46 ('FB'), and that, in the application to take out that insurance, the defendant had identified himself as the owner of the aforementioned vehicle and stated that that vehicle was for private use by him as the owner and usual driver.

3 In addition, it stated that, on 9 September 2015, the defendant had submitted an application to amend that contract in which he requested that the item insured be changed from vehicle 'FB' to another vehicle of the same make and model bearing registration number 80-PX-30 ('PX'), of which he also identified himself as being the owner and usual driver. He further stated that the vehicle was intended for his private use, that it had six seats and that he was the policyholder and usual driver, but made no mention of the existence of a trailer. The applicant relied on those statements by the defendant and agreed to amend the contract, all of the other stipulations contained in the original contract concluded on 27 August having remained in force.

4 The applicant also claimed that, as a result of an accident which had taken place on 24 March 2016 in France (the victims of which were twelve persons travelling inside the vehicle), it became aware of the following: the defendant, at the time when he had asked to change the insured vehicle, was not, then or subsequently, the owner of the vehicle in question; he was not its usual driver; he was not using it for the purpose or in the way indicated in his application [for insurance], that vehicle having been used for the unauthorised transport for remuneration of passengers migrating between Portugal and Switzerland; the vehicle was being used with a trailer weighing 1 300 kilograms gross, and had twelve seats (in addition to the driver's seat); and, moreover, the usual driver of the vehicle was FN, aged 19 and the holder of a type-B non-professional licence authorising him to drive vehicles carrying a maximum of 9 passengers and towing a trailer the gross weight of which must not exceed 750 kilograms.

5 Lastly, the applicant stated that the defendant had deliberately withheld those facts from it, in particular the use of the vehicle for the activity pursued, thus deceiving it as to the scope of the risk contracted, and added that, if it had been aware of those facts, it would have refused to conclude the contract.

6 By its conduct, the defendant intentionally and wilfully infringed his duty to declare at the outset the risk to be transferred, provided for in Article 24(1) of Decree-Law No 72/2008. On that ground, in accordance with Article 25(3) of that Decree-Law and Articles 253 and 254(1) of the Civil Code, the applicant is entitled to cancel the contract and seeks a court order declaring this to be the case.

7 The defendant, who was duly summoned, did not respond.

8 The Fundo de Garantia Automóvel, within the time available to the defendant to respond [to the action], lodged an application to join the proceedings as a principal party in which, citing its standing to participate in the proceedings (on the ground that it has an interest equal to that of the defendant, inasmuch as, if the applicant's claims are upheld, it will be liable for payment of the compensation), it challenged the facts alleged by the applicant and contended that the action should be dismissed; the FGA also filed a counterclaim and an application for the institution of third-party proceedings, and requested that VS (the registered owner of the insured vehicle), FN (the driver of the insured vehicle) and JT (the applicant's broker) be compelled to join the proceedings.

9 To that end, it argued that the insurance contract was concluded with the assistance of a broker from the place of residence of the defendant DR, the latter having been known to be professionally engaged in the activity of transporting persons between Switzerland and Portugal for remuneration. This was a fact known to the applicant's insurance broker, who, at the time when the contract was concluded/amended, inspected the vehicle and was aware that it had three rows of seats and a trailer hitch. It added that the applicant itself has extensive means at its disposal to establish the truthfulness of the information given to it by the insured person and has an obligation to check and verify the accuracy of the replies provided by the policyholder, which is why the act of claiming that the contract is voidable constitutes abusive behaviour in the form of *venire contra factum proprium*. It further argues that, if that defect is present, it follows from Article 22 of Decree-Law No 291/2007 that the voidability of the contract cannot be relied on as against the injured parties, and, on that ground, it has filed a counterclaim requesting that the applicant be ordered 'to recognise that the possible voidability or nullity of the insurance contract concluded with the defendant DR cannot be relied on as against the injured parties and the FGA'.

10 At the end of the adversarial proceedings between the original parties, the court granted the FGA leave to join the proceedings as a principal party and allowed the counterclaim which had been filed.

11 In the meantime, the applicant submitted a document extending the application in which it maintained all the claims contained in its original application, but claimed that it follows from Article 43(1) of Decree-Law 72/2008 that the insurance contract in question, inasmuch as it was concluded with a person without any interest worthy of legal protection (the pursuit of an illegal/clandestine activity involving the transport of passengers) is a void contract

and, for that reason, it requested, in accordance with Article 265(2) and (3) of the Código de Processo Civil (Code of Civil Procedure), that the application be amended so as to henceforth contain the following claims:

'(a) — principally, that the insurance contract should be declared void, and that all of the legal consequences that this entails should be brought to bear;

(b) — in the alternative, in the event that that contract is not declared void, that it should be declared to be annulled in the precise terms and on the grounds set out in the original application duly added to the documents in the case file'.

12 The first-instance court found the facts set out below, in particular, to be proved.

13 On 27 August 2015, the defendant proposed to the applicant the conclusion of a contract of insurance against civil liability in respect of the use of motor vehicles.

14 By that proposal, the defendant, who identified himself as the owner of vehicle FB and stated that he was using that vehicle for private purposes, sought to obtain not only compulsory cover for the risk of civil liability for damage caused through the use of that vehicle as purported owner and usual driver, but also separate cover for windscreen damage repair by an approved repairer, cover for death or incapacity of the driver, driver's medical expenses, temporary full incapacity and hospitalisation of the driver and additional travel assistance.

15 The applicant, relying on the statements made by the driver at that time, which it assumed to be truthful and made in good faith, agreed to the cover proposed and issued the corresponding policy.

16 On 9 September 2015, the defendant, in connection with the insurance contract which had entered into force only a few days before, put to the applicant a further proposal whereby, without changing the cover and capital agreed, sought to insure, instead of the vehicle insured up to that point, another vehicle of the same make and model carrying the registration PX.

17 In the proposed amendment which he signed, the defendant stated in relation to that vehicle too that he was taking out the insurance as the owner and usual driver of the vehicle, that he would be using it for private purposes and that it had 6 (six) seats authorised for transporting passengers and the driver. He did not mention that he intended to insure a trailer.

18 The applicant, again relying on the declarations which the defendant had made in the proposed amendment signed by him on 9 September 2015, and which the applicant presumed to be truthful and made in good faith, agreed to change the insured vehicle, under the terms of risk provided for in that proposal, with effect from that date and issued the corresponding addendum to the insurance contract.

19 On 25 March 2016, the applicant became aware that the defendant had not, either at the time when he proposed the change of insured vehicle or subsequently, been

using the vehicle in question for the purpose or in the way stated in the insurance proposal, but had been using it for the international transport for remuneration of migrant passengers and goods between Switzerland and Portugal, and that that vehicle had been towing a trailer.

20 The insured vehicle had been in use with nine people on board (in three rows of three seats each), except on 24 March 2016, when it had twelve people on board (in four rows of three seats each, the back row being removable).

21 The defendant was pursuing that activity, which he had been advertising since at least April 2015, without authorisation from any authority.

22 The defendant deliberately omitted to mention that activity to the applicant in his insurance proposal.

23 The defendant and the joined party FN were the usual drivers of vehicle 'PX'.

24 The joined party FN was 19 years old on 23 March 2016 and held a type-B non-professional driving licence authorising him to drive vehicles transporting a maximum of 9 passengers and a towed trailer the gross weight of which must not exceed 750 kilograms.

25 In the period from August 2015 to 24 March 2016, FN, as the driver of vehicle 'PX' and another vehicle of the defendant, made at least twenty (outbound and return) trips between Switzerland and Portugal, most of them using vehicle 'PX'.

26 On at least some of those trips, the insured vehicle was towing a trailer weighing 1 300 kilograms gross.

27 Vehicle 'PX' had nine fixed seats and, on 24 March 2016, a further three removable sets were added as a fourth row. Those seats were installed on the first day of the trip on which the accident occurred and were not fitted with seat belts.

28 The defendant was fully aware that he could not advertise, let alone communicate to the applicant, the activity he was really and actually pursuing in using that vehicle (and trailer), from which he made a substantial profit through the price he charged the people using his services; that activity, it is worth noting, had not been authorised by the authorities competent to do so.

29 The defendant charged each passenger he carried at least EUR 100 per outbound or return trip between Portugal and Switzerland.

30 That price included 'door to door' carriage of the passenger and his or her luggage.

31 The trips were completed by a single driver who, on most occasions, did not have a suitable driving licence, given the number of people being carried and the characteristics of the vehicle and relevant trailers.

32 The defendant was fully aware that, if, at the time when he requested insurance, he had told the applicant about the activity he was pursuing and wished to continue pursuing using the insured vehicle, the applicant would never have agreed to conclude the contested insurance contract with him, let alone make the change of insured vehicle agreed later.

33 The applicant became aware of those facts (concerning the activity which the defendant had been pursuing and the use of the insured vehicle) after the serious accident in which vehicle PX was involved and the investigation which it ordered to be conducted.

34 That accident took place at 23:40 on 24 March 2016 on Route Nationale 79, at Moulins, municipality of Montbeugny, Lyon, France.

35 The accident occurred when the insured vehicle, being driven at that time by the joined party FN, while heading in the direction of Mâcon to Moulins, collided head-on with a heavy goods vehicle travelling in the opposite direction.

36 The collision took place in the right-hand lane, according to the direction of travel of the heavy goods vehicle (Moulins to Mâcon), when vehicle 'PX', travelling in the opposite direction, after performing various manoeuvres to overtake other vehicles, and proceeding at a speed in excess of the maximum permitted on that road (80 km/h), breached that lane.

37 The collision resulted in the death of the twelve migrant Portuguese citizens who were making their way from Switzerland back to their home country in order to spend the Easter holidays with their families.

38 Each of those passengers had paid or was about to pay the defendant DR at least EUR 100 for the trip they were making.

39 Had it not been tragically and definitively interrupted, the trip from Switzerland to Portugal would have had to be made non-stop in order for it to be capable of being concluded at its intended destination between 11:00 and 12:00 on 25 March 2016.

40 No provision had been made for a rest break, either for the driver, who was exclusively responsible for driving the vehicle for the full length of the journey, or for the passengers, who, together with much of their luggage, were 'crammed' into a space of approximately 4.5 m^2 and a volume of approximately 8.5 m^3; four of those passengers (the three on the back row of seats and a child in arms) were without seat belts (which the vehicle did not have).

41 The shortest available route for the trip from the city of Romont in Switzerland to the city of Guarda in Portugal was 1 643 kilometres, and would take 16 hours non-stop.

42 Vehicle 'PX' had no tachograph or system for recording the periods of continuous or intermittent driving by the relevant drivers.

43 At the time of the fatal accident, vehicle 'PX' was towing a trailer the gross weight of which (when empty) was 1 300 kilograms and which was carrying the remaining luggage and belongings of the passengers.

44 The weight of the people and items carried in that vehicle made it abnormally unstable and that instability was increased exponentially by the performance of manoeuvres such as overtaking and driving at speeds in excess of 90 km/h.

45 As a result of the violence of the collision with the HGV, the projection of the passengers travelling without seat belts towards those sitting in front increased the risk of death of the latter and inevitably contributed towards it.

46 The trailer was not covered by the insurance contract at issue in this case.

47 The defendant told the joined party JT that he was taking out insurance and would if necessary request an amendment to the policy in his capacity as owner of vehicle 'PX', and that he was/would be the usual driver of the vehicle.

48 The defendant stated that the answers given on the form were fully consistent with the truth and that he had not concealed any information that might influence the applicant's decision on the insurance proposal.

49 He also stated that he was aware of his obligation to provide an accurate account of all information which was known to him or which he considered reasonably important in order to enable the insurer to evaluate the risk, and further stated that he was aware of the obligation to communicate any change in the circumstances or in the risk covered by the contract during its period of validity.

50 The judgment given at the conclusion of the proceedings granted the application in part, upheld in full the counterclaim made by the FGA and declared void, with *inter partes* effects and the legal consequences arising therefrom, the insurance contract concluded between the applicant and the defendant. It dismissed all further claims against the defendant and held that the invalidity of the contract could not be relied on as against the injured third parties or the FGA.

51 The applicant Liberty Seguros S. A. brought an appeal against that judgment before the referring court.

Essential arguments of the parties in the main proceedings

52 Liberty S.A. submits in its appeal that, in so far as the judgment under appeal recognises and declares the nullity of the insurance contract at issue, it should also have held that nullity to be capable of being relied on as against the joined party Fundo de Garantia Automóvel and, consequently, as against the parties injured by the accident at issue in the main dispute, since it is that Fund which is obliged to pay the corresponding compensation.

53 The foregoing follows from an interpretation of Article 291 of the Civil Code in conjunction with Articles 2, 25(1) and (3) and 147(1) and (2) of Decree-Law No 72/2008 and Articles 22, 27 (by converse inference), 47(1), 49(1) and 54(4) of Decree-Law No 291/2007.

54 The application of the aforementioned provisions of national law is not contrary to the EU directives on the system of compulsory insurance against civil liability in respect of the use of motor vehicles.

55 This is because EU directives have vertical direct effect in relations between individuals and the Member State or the public authorities (the FGA in this case), meaning that individuals may rely on provisions of a directive which are sufficiently clear, precise and unconditional in the context of public-law relations.

56 Horizontal direct effect occurs in relations between individuals (private-law relations) and, although the Court of Justice recognises the direct applicability of regulations (that is to say, vertical and horizontal direct effect), in the case of directives it envisages only the possibility of vertical direct effect in relations between individuals and the State or the public authorities.

57 Thus, national courts have no discretion when it comes to the direct application or, put another way, the recognition of the horizontal direct effect of a directive in judicial proceedings between individuals, and, for that reason, they are not in a position to recognise that effect.

58 In this case, Liberty Seguros is, under national law, exempt from civil liability as a consequence of the nullity of the insurance contract.

59 The interpretation of national law in accordance with EU law is excluded where this gives rise to a *contra legem* interpretation of national law.

60 It therefore submits that the judgment under appeal should be replaced with another judgment which, upholding the appeal, recognises and finds that the declared and recognised nullity of the contract of insurance against civil liability in respect of the use of motor vehicles concluded between the applicant and the defendant DR can be relied upon as against the joined party Fundo de Garantia Automóvel and as against the parties injured in the accident that took place in France on 24 March 2016, and that the obligation to compensate the injured parties for the harm they have sustained falls to the FGA (and not to the applicant Liberty Seguros).

61 In its response, the Fundo de Garantia Automóvel requested that the subject matter of the appeal be extended, and submitted the following arguments in connection with the extension sought.

62 The FGA considers that the referring court should have found it to be proved that the broker was fully aware of the unlawful activity being pursued by the defendant

DR, that is to say, the transport for remuneration of persons between Switzerland and Portugal.

63 As a result, the insurer's reliance on contractual exceptions constitutes without the slightest doubt abusive conduct in the sense of *venire contra factum proprium*, inasmuch as it seeks to adopt a legal position manifestly contrary to the conduct in which it itself engaged previously, in accordance with Article 334 of the Civil Code.

64 Even on a different construction, in the context of a contract of insurance against civil liability in respect of the use of motor vehicles, the interest worthy of legal protection is that of the victim of the road traffic accident, the provisions of Article 43 of the CMVI rules being inapplicable.

65 Consequently, even if it is accepted that the insurance contract does not reflect an interest worthy of legal protection, the special compulsory insurance scheme requires that the nullity referred to in Article 43 of the CMVI rules must be interpreted as a mere ground of voidability — that must be based on false statements — and cannot, therefore, be relied on as against injured parties.

66 What is more, even if nullity is present — *quod non* — this could be relied on as against injured parties and, therefore, the FGA, only if it had been declared prior to the accident.

67 In conclusion, the FGA contends that the appeal brought by Liberty Seguros should be dismissed as unfounded, that the judgment under appeal should be maintained and, in the alternative, that the extension of the subject matter of the appeal should be granted.

Brief presentation of the grounds for the request for a preliminary ruling

68 In order to dispose of the appeal pending before it, the referring court must assess whether, contrary to the conclusion reached at first instance, the nullity of the insurance contract for lack of interest worthy of legal protection must be regarded as being capable of being relied on as against third parties and the FGA.

69 The first-instance court considered that the insurance contract at issue in this case is not only voidable but also void, in accordance with Article 43(1) of the CMVI rules, in so far as the insured person's interest in the risk covered is not worthy of legal protection.

70 Next, the judgment under appeal found that the defects which it identified in the insurance contract — as mentioned previously, nullity for lack of an interest (on the part of the insured person) worthy of legal protection in the risk covered, and voidability for wilful breach of the duty of initial disclosure and the consequent risk inherent in driving the vehicle — in accordance with the applicable national law, in particular Article 22 (which expressly provides that the nullity of a

contract may be relied on as against injured parties), and Articles 54(3) and (4) of Decree-Law 291/2007, in conjunction with the CMVI rules, may be relied on as against injured parties and the FGA.

71 Nonetheless, the first-instance court concluded in the judgment under appeal that that outcome — that is to say, reliance on the invalidity of a contract — is not compatible with EU law. It stated that, 'thus, since, in accordance with the provisions of Article 3(1) of the First Directive and Article 2(1) of the Second Directive, on an interpretation consistent with EU law and in accordance with the settled case-law of the Court of Justice of the European Union, Member States may not undermine the effectiveness of such directives, the Portuguese State could not provide in Article 22 of the CMVI rules for the insurer to be able to rely as against injured parties and the FGA on the exceptions arising from the invalidity of the contract, even if these existed at the time when the contract was concluded'.

72 On the basis of that reasoning, it concluded finally that, 'as a result of the foregoing, it is appropriate to take the view that the insurance contract, *inter partes*, is invalid (void for lack of an interest worthy of legal protection and voidable as a result of the false statements and wilful omissions of the policyholder), although the insurer cannot rely on that invalidity as against injured third parties and the FGA'.

73 According to the referring court, the first-instance court appears to have started from the premiss that the situation at issue in the dispute in the main proceedings and that which gave rise to the case culminating in the judgment of the Court of Justice of the European Union of 20 July 2017, C-287/16, were equivalent. It inferred from this that the relevant national law is contrary to EU law in so far as it relates to reliance/non-reliance on the invalidity of a contract and gave priority to the solution advocated by EU law — in accordance with the principle of the primacy of EU law over national law — and thus concluded that the insurer could not rely as against the injured parties and the FGA on the invalidity of the insurance contract as resulting from its nullity for lack of an interest worthy of legal protection or its voidability in consequence of the false declarations or wilful omissions of the policyholder.

74 That, in essence, is the conclusion which the insurer seeks to have reversed on appeal. It argues that, in adopting Decree-Law 291 of 21 August 2007, the legislature sought only to transpose in part into national law Directive 2005/14/EC on insurance against civil liability in respect of the use of motor vehicles, since it states as much in the preamble to that Decree-Law, and that directives do not produce horizontal direct effect, an interpretation which, as it endeavoured to demonstrate, is maintained largely intact in the case-law of the Court of Justice.

75 The insurer also argues that that no point is served in relying on the principle that national law is to be interpreted in line with an EU directive — which is an alternative to the lack of horizontal direct effect of directives — given that, in the

situation at issue in this case, an interpretation of the national legislation in conformity with EU law would entail a *contra legem* interpretation of national law; as is manifestly apparent from the judgment under appeal, national law, if properly interpreted, does not permit any outcome other than the ability to rely on the invalidity of a contract, and the Court of Justice, in establishing the above-mentioned principle, made it clear that it cannot form the basis of a *contra legem* interpretation of the law.

76 Nonetheless, although the interpretation to the effect that directives do not have horizontal direct effect is largely maintained — notwithstanding contributions to the contrary from the 'principle of direct effect' — alternative approaches to the lack of horizontal direct effect have evolved and include by way of example the adoption of a broad definition of State, the use of the mechanism of interpretation of national law in line with an EU directive and the assertion of the principle of State liability for infringements of EU law.

77 Use can also be made, ultimately, of the reference for a preliminary ruling mechanism as a means of avoiding the non-recognition of the horizontal direct effect of directives, since the decisions of the Court of Justice are of general application and the national courts are, therefore, obliged to respect the meaning and scope which such decisions confer on EU law.

78 The legitimacy of turning to alternatives to the lack of horizontal direct effect in order to enforce as between individuals certain elements of a directive derives primarily from the principle of the primacy of EU law, which forms the basis for relying on the principle of effective judicial protection as a means of ensuring that the State cannot be held liable for infringements of EU law.

79 Material among the alternative mechanisms to the lack of horizontal direct effect, in this case, is the mechanism of interpretation of national law in line with an EU directive, also known as the principle of indirect effect or the principle of fair interpretation, which consists in essence in the obligation incumbent on national courts to interpret national legislation transposing a directive in the light of its wording and its purpose.

80 That principle was clearly recognised in the judgment of 13 November 1990, *Marleasing* (C-106/89), from which it is apparent that the mechanism of interpretation of national law in line with an EU directive must also be applied to relations between individuals, and not only to vertical relations, and that it is incumbent on all Member State authorities and is directed at all national legislation in its entirety, both prior and subsequent to the directive, not only to national legislation specifically adopted to transpose the directive.

81 Nonetheless, in the judgment of 4 July 2006, *Adeneler* (C-212/04), the Court of Justice makes reference to the limits attaching to that interpretation: 'the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of national law is limited by general

principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law *contra legem*' (paragraph 110).

82 The national court further reasons that it is appropriate to note that, even if it is assumed with sufficient certainty that it would be contrary to EU law to rely as against injured third parties and the FGA on the nullity of an insurance contract in the specific circumstances of the contract at issue in the main proceedings, this does not mean that the principle that national law must be interpreted in line with an EU directive will support the opposite conclusion to that reached at first instance; for as is clear from the analysis of national law carried out in that context, such an interpretation would probably give rise to a *contra legem* interpretation of national law, which, as has already been noted, is not permitted by that principle.

83 The referring court is uncertain whether it is contrary to EU law to rely as against injured third parties and the FGA on the nullity of an insurance contract in the specific circumstances of the contract at issue in the dispute in the main proceedings.

84 This, according to that court, is because neither in the successive directives on compulsory insurance against civil liability nor in the case-law of the Court of Justice in that sphere is reference made to the nullity of an insurance contract as resulting from the unlawful nature of its transactional content. At most, that case-law, in the form of the aforementioned preliminary ruling of 20 July 2017 (C-287/16), supports the inference of the non-reliance as against injured parties of the invalidity of insurance contracts voidable for the defect of consent as arising from the wilful making of false statements relating to the ownership of the vehicle and the identity of the usual driver, or of insurance contracts void because the insured person does not have an interest worthy of legal protection in the risk covered. That case-law does not address the (non-)reliance on nullity arising from an insurance contract which has as its subject matter an activity which is not only unauthorised, and therefore clandestine, but also cannot be authorised because it is illicit and unlawful; accordingly, the users of that activity, the injured third parties, might even be regarded – in the applicant's view, which is unsubstantiated by the facts — as having acted 'in bad faith' inasmuch as they could not have been unaware of the clandestine and illegal nature of that activity.

85 Consequently, it is apparent that the insurance contract at issue in the dispute in the main proceedings is not only voidable but also void, as the decision under appeal found, because it cannot in any way be argued that the risk associated with an illegal activity is capable of constituting an 'interest worthy of legal protection'. It may be that the provision applicable here is not Article 43 of CMVI rules but, most probably, Article 14 of those rules which (i) refers to 'prohibited insurance' and prohibits in paragraph 1(a) the conclusion of insurance contracts that cover risks arising from criminal liability for the commission of illegal or disciplinary acts and (ii) goes on to guarantee the applicability of 'the general

rules on the legality of transactional content', thus referring, of course, to the provisions of Articles 280 and 294 of the Civil Code.

86 Furthermore, such nullity cannot under any circumstances be treated in the same way as voidability for wilful failure to make an initial or subsequent declaration of risk, in accordance with the provisions of Articles 24(1), 25 and 91 of the CMVI rules. The defendant, as policyholder, did not accidentally fail to mention the use he had in mind for the vehicle he wished to have insured. That being the case, such an omission is prejudicial not only to the insurer, in that it interferes with the synallagmatic balance sought between the premium payable and the risk, but also to society in general, in that it creates a significantly increased risk to road traffic, as is clear from the accident that took place in this case.

87 It was decided at first instance, and this decision appears in principle to have become final, that the insurance contract at issue in the dispute in the main proceedings is void as a consequence of the unlawfulness of its subject matter, meaning that nullity on that ground cannot be converted into voidability, and it must, therefore, be concluded that the situation at issue in this dispute raises a false question in asking about the (non-) reliance on heads of voidability as against injured third parties and the FGA.

88 What falls to be decided on appeal is, ultimately, whether or not it is possible to rely as against injured third parties and the FGA, in consequence of the use of a vehicle in respect of which civil liability has been the subject of an insurance contract, on the nullity of that contract resulting from the illegality of its subject matter, even in the case where the third parties could not have been unaware of that illegality.

89 According to the referring court, that question is not answered by the aforementioned judgment of the Court of Justice of 20 July 2017, in the operative part of which the Court held:

'Article 3(1) of Council Directive 72/166/EEC […] and Article 2(1) of [Second Council Directive 85/5 EEC] must be interpreted as precluding national legislation which would have the effect of making it possible to invoke against third-party victims, in circumstances such as those at issue in the main proceedings, the nullity of a contract for motor vehicle insurance against civil liability arising as a result of the policyholder initially making false statements concerning the identity of the owner and of the usual driver of the vehicle concerned or from the fact that the person for whom or on whose behalf that insurance contract was concluded had no economic interest in the conclusion of that contract'.

90 Making express reference to the report of Professor Menezes Cordeiro, which was added to the case file in the main proceedings, the referring court notes that 'the defect considered by the Court of Justice in the judgment [C-287/16] under examination is very limited. The contract at issue in that case was 'tainted' only by an inaccurate statement as to the identity of the usual driver of the vehicle, that

inaccuracy not having given rise to a substantially increased risk. In the specific case of the fatal accident that took place in France, on the other hand, the contract was not 'tainted' in the same manner: here, the situation in practice is totally different from that envisaged in the contract, carrying an exponentially higher risk and entailing elements of serious illegality'.

91 Accordingly, the Court of Appeal of Coimbra takes the view that the question forming the subject of this appeal is not answered by that judgment of the Court of Justice or in other judgments handed down in the area of road-traffic accidents, and the substance of EU law in relation to the question at issue in the dispute in the main proceedings is, therefore, unknown.

92 For situations such as this, Article 267 TFEU provides for the possibility of making a reference for a preliminary ruling, a mechanism, it is appropriate to note, under which the Court of Justice has jurisdiction to interpret EU law alone, not national law.

93 The second paragraph of Article 267 TFEU thus confers on all national courts the power to refer questions to the Court of Justice for a preliminary ruling in cases pending before them, the only condition for doing so being that they raise a question on the interpretation or validity of EU law which is relevant to the decision in question.

94 The Third Civil Chamber of the Court of Appeal of Coimbra hereby decides to stay the proceedings in order to refer to the Court of Justice for a preliminary ruling the questions set out at the head of this order.