

Case C-428/20

Request for a preliminary ruling

Date lodged:

11 September 2020

Referring court:

Sąd Apelacyjny w Warszawie (Poland)

Date of the decision to refer:

28 August 2020

Appellant:

A.K.

Respondent:

Skarb Państwa

[...]

ORDER

28 August 2020

Sąd Apelacyjny w Warszawie I Wydział Cywilny (Court of Appeal, Warsaw, First Civil Chamber) [...]:

[...]

further to the hearing on 28 August 2020 in Warsaw

[...]

in the action brought by A. K.

against the Skarb Państwa (State Treasury) represented by the Minister ...

concerning payment

arising from an appeal lodged by brought by the appellant against the judgment of the Sąd Okręgowy w Warszawie (Regional Court, Warsaw)

[order]

makes the following order:

1. The following question shall be referred to the Court of Justice of the European Union for a preliminary ruling:

Under Article 2 of Directive 2005/14/EC 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, is a Member State, which has established a transitional period within which to adapt minimum guarantees, under an obligation to increase guarantees to at least a half of the amounts provided for in Article 1(2) of Directive 84/5/EEC, as amended, within 30 months of the expiry of the time limit for implementing that directive:

- in respect of all motor insurance contracts in force after the expiry of those 30 months, including contracts concluded before 11 December 2009 but still in force after that date – in cases of damage occurring after 11 December 2009,

- or only in respect of new motor insurance contracts concluded after 11 December 2009?

2. The appeal proceedings are stayed pursuant to Article 177(1)(3)¹ of the Code of Civil Procedure.

[...]

GROUND S [Or.2]

Subject matter and legal basis for the reference for a preliminary ruling

Article 2 of 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 2005 L 149/14; ‘Directive 2005/14’), in conjunction with Article 29 of 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 (OJ 2009 L 233/11; ‘Directive 2009/103’).

Article 267 of the Treaty on the Functioning of the European Union.

Subject matter of the dispute

1. The subject matter of the dispute is a claim against the State Treasury for damages as a result of the incorrect and incomplete implementation of Directive 2005/14.

Facts of the case

2. On 12 October 2010 [...] a road accident occurred in Poland [...] which resulted in the death of 16 people, including G. M. and the person responsible for the accident – the driver V. ..., who had motor vehicle liability insurance under an insurance contract concluded for the period from 8 December 2010 to 7 December 2011 with ... S.A. (a public limited company) established in Ł. [...].

3. In connection with the death of G. M., her daughter, the appellant A. K., reported the damage on 2 March 2011 to ..., claiming non-material and material damages. In the course of the settlement proceedings, the appellant finally received from ... the amount of PLN 47 000 as compensation for non-material damage pursuant to Article 446(4) of the kodeks cywilny (the Civil Code) and PLN 5 000 as damages as a result of the significant deterioration in her circumstances under Article 446(4) of the Civil Code.

4. A. K. was finally notified by ... that the amount of cover under liability insurance policy No ... had been exhausted.

Form of order sought in the application and the position of the parties

5. The appellant is seeking damages from the State Treasury in the amount of PLN 78 000, plus default interest, as compensation for the damage caused by the incomplete implementation of Directive 2005/14. She argues that if it had been implemented properly she would have received an additional PLN 78 000 by way of compensation for the non-material harm sustained as a result of her mother's death. The defective implementation had deprived her of the possibility of obtaining that service from ..., which means that the respondent caused material damage to the appellant's property in that amount.

6. The appellant considers that the Polish State was obliged to transpose the provisions of Directive 2005/14 in such a way that, as from 11 December 2009, the guarantee in all compulsory motor vehicle liability insurance contracts amounted, in the case of personal injury, to EUR 2 500 000 per claim. However, the Ustawa z dnia 24 maja 2007 r. o zmianie ustawy o ubezpieczeniach obowiązkowych, Ubezpieczeniowym Funduszu Gwarancyjnym i Polskim Biurze Ubezpieczycieli Komunikacyjnych (Law of 24 May 2007 amending the Law on compulsory insurance, the Insurance Guarantee Fund and the Polish Motor Vehicle Insurance Office) had differentiated the scope of protection in such way that the level of protection afforded to victims following damage which occurred between 1 December 2009 and December 2010 depended on the date on which the insurance contract was concluded. Both contracts concluded from 11 [Or.3] December 2009 providing for a guarantee of EUR 2 500 000 and contracts

concluded before 11 December 2009, in which the guarantee amounted to only EUR 1 500 000, were in operation during this period.

7. The respondent State Treasury in the person of the Minister ... contends that the action should be dismissed. It maintains that the directive was implemented correctly. It refers to the principle of non-retroactivity, and also points out that proceedings brought by the European Commission against Poland concerning infringement of [...] ..., as regards deficiencies in the implementation of Directive 2005/14 were under way, but the Commission decided to discontinue them on 28 April 2016. The respondent takes the view the Commission thereby acknowledged that there had been no infringement of EU law.

Relevant provisions of EU law

8. Directive 2005/14

Article 2

Amendments to Directive 84/5/EEC

Article 1 of Directive 84/5/EEC is replaced by the following:

‘Article 1

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

2. Without prejudice to any higher guarantees which Member States may lay down, each Member State shall require insurance to be compulsory at least in respect of the following amounts:

(a) in the case of personal injury, a minimum amount of cover of EUR 1 000 000 per victim or EUR 5 000 000 per claim, whatever the number of victims;

(b) in the case of damage to property, EUR 1 000 000 per claim, whatever the number of victims.

If necessary, Member States may establish a transitional period of up to five years from the date of implementation of 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, within which to adapt their minimum amounts of cover to the amounts provided for in this paragraph.

Member States establishing such a transitional period shall inform the Commission thereof and indicate the duration of the transitional period.

Within 30 months of the date of implementation of Directive 2005/14/EC Member States shall increase guarantees to at least a half of the levels provided for in this paragraph.’

9. Directive 2009/103

Article 29 Repeal

Directives 72/166/EEC, 84/5/EEC, 90/232/EEC, 2000/26/EC and 2005/14/EC, as amended by the Directives listed in Annex I, Part A, are hereby repealed, without prejudice to the obligations of the Member States relating to the time limits for transposition into national law and application of the Directives set out in Annex I, Part B. ... [Or. 4]

Relevant provisions of national law

10. Ustawa z dnia 24 maja 2007 r. o zmianie ustawy o ubezpieczeniach obowiązkowych, Ubezpieczeniowym Funduszu Gwarancyjnym i Polskim Biurze Ubezpieczycieli Komunikacyjnych oraz ustawy o działalności ubezpieczeniowej (Law of 24 May 2007 amending the Law on compulsory insurance, the Insurance Guarantee Fund and the Polish Motor Vehicle Insurance Office and the Law on the insurance business) (*Dziennik Ustaw* No 102, item 691; ‘Law of 24 May 2007’)

Article 1

The Law on compulsory insurance, the Insurance Guarantee Fund and the Polish Motor Vehicle Insurance Office (*Dziennik Ustaw* No 124, item 1152, as subsequently amended) is amended as follows:

1. ...

2. Article 36(1) is replaced by the following: 1. The compensation shall be determined and paid within the limits of the civil liability of the holder or driver of the motor vehicle, but up to the maximum guarantee laid down in the insurance contract. The guarantee may not be lower than the equivalent in zlotys:

(1) in the case of personal injury – of EUR 5 000 000 in relation to each event, the effects of which are covered by the insurance, whatever the number of victims,

(2) in the case of damage to property – of EUR 1 000 000 in relation to each event, the effects of which are covered by the insurance, whatever the number of victims

- determined by applying the average exchange rate announced by the National Bank of Poland on the day on which the injury or damage was caused.

...

Article 3

The previous provisions shall apply to insurance contracts concluded before the date on which this Law enters into force.

Article 5

In the case of contracts for motor vehicle liability insurance and farmers liability insurance the amount of the minimum guarantee shall be the equivalent in zlotys:

- (1) in respect of contracts concluded in the period up to 10 December 2009:
 - (a) in the case of personal injury – of EUR 1 500 000 in relation to each event, the effects of which are covered by the insurance, whatever the number of victims,
 - (b) in the case of damage to property – of EUR 300 000 in relation to each event, the effects of which are covered by the insurance, whatever the number of victims- determined by applying the average exchange rate announced by the National Bank of Poland on the day on which the injury or damage was caused;
- (2) in respect of contracts concluded between 11 December 2009 and 10 June 2012:
 - (a) in the case of personal injury – of EUR 2 500 000 in relation to each event, the effects of which are covered by the insurance, whatever the number of victims,
 - (b) in the case of damage to property – of EUR 500 000 in relation to each event, the effects of which are covered by the insurance, whatever the number of victims**[Or.5]**
- determined by applying the average exchange rate announced by the National Bank of Poland on the day on which the injury or damage was caused.

11. Civil Code

Article 446(1) If the victim died as a result of physical injury or health disorder, the person required to pay compensation for the injury or damage shall reimburse the costs of the treatment and the funeral to the person who sustained it. ...

4. The court may also grant the closest members of the deceased's family an appropriate sum by way of pecuniary compensation for non-material damage.

Article 417(1) The State Treasury or local government unit or another legal person exercising public authority under the law shall be liable for damage caused by an unlawful act or omission in the exercise of public authority.

Article 417^l(4). If the damage was caused by a failure to issue a legislative act, the obligation to issue thereof being provided for in an applicable provision of law,

the unlawfulness of the failure to issue such an act shall be determined by the court seised of the case for compensation for injury or damage.

12. Ustawa z dnia 22 maja 2003 r. o ubezpieczeniach obowiązkowych, Ubezpieczeniowym Funduszu Gwarancyjnym i Polskim Biurze Ubezpieczycieli Komunikacyjnych (Law of 22 May 2003 on compulsory insurance, the Insurance Guarantee Fund and the Polish Motor Vehicle Insurance Office) (*Dziennik Ustaw* No 124, item 1152, as subsequently amended; ‘Law on compulsory insurance’):

Article 19(1). The victim may, in connection with an event covered by a compulsory liability insurance contract, pursue claims directly with the insurance company. ...

Article 26(1). A motor vehicle liability insurance contract shall be concluded for a period of 12 months, subject to Article 27.

Civil proceedings to date

13. By judgment of 30 May 2016, the Sąd Okręgowy w Warszawie (Regional Court, Warsaw) dismissed the action. The Regional Court held that the guarantee under policy No ... had not been exhausted, and therefore the appellant had not sustained any injury or damage. The Court of Appeal [...] set aside that judgment and referred the case back. The Court of Appeal found that the guarantee had been definitively exhausted and therefore the court of first instance should consider the plea alleging incorrect implementation of Directive 2005/14 and establish whether the appellant had sustained harm.

14. By judgment of 20 March 2019, the Regional Court again dismissed the action.

15. Referring to Article 4171(4) of the Civil Code, the Regional Court ruled that the provisions do not give a citizen the right to compensation for non-material damage sustained in the case of legislative omission. In the view of the Regional Court, the appellant is seeking compensation for non-material damage and not material damage.

16. The Regional Court also held that Directive 2005/14 was implemented correctly, applying the permissible transitional periods for increasing the guarantees to half the target amount and to the final amount thereof. The Regional Court considers that the obligation to increase the guarantees, as laid down in the directive, applied only to contracts concluded after the expiry of the transitional periods and did not cover the requirement to increase the guarantee in contracts which were established before the expiry of the transitional period, even if those contracts formed the basis for insurance **[Or.6]** cover also for a certain period after the expiry of the transitional time limit. The Regional Court referred to the principles of legal certainty, non-retroactivity and freedom of contract.

17. The Polish legislature, which incorporated the terms of the directive into the Polish legal order by the Law of 24 May 2007 that entered into force on 11 June 2007, made use of its powers in relation to transitional periods by providing for a gradual increase in the guarantee in Article 5 thereof, which stipulates inter alia that in the case of motor vehicle liability insurance contracts the amount of the guarantee is to be the equivalent in zlotys:

- in respect of contracts concluded in the period up to 10 December 2009, in the case of personal injury – of EUR 1 500 000 in relation to each event, the effects of which are covered by the insurance, whatever the number of victims,

- in respect of contracts concluded between 11 December 2009 and 10 June 2012, in the case of personal injury – of EUR 2 500 000 in relation to each event, the effects of which are covered by the insurance, whatever the number of victims.

18. Thus, the legislature increased the guarantee to half the target amount in respect of contracts concluded between 11 December 2009 and 10 June 2012. The motor vehicle liability insurance contract of the person responsible for the accident, in which the appellant's mother died, was concluded on 8 December 2009. Article 5(1) of the Law of 24 May 2007, under which the minimum guarantee in the event of personal injury is to be EUR 1 500 00 in relation to each event, the effects of which are covered by the insurance, whatever the number of victims, will be applicable to it.

19. In the view of the Regional Court, that implementation of Directive 2005/14 was complete and not defective.

20. The appellant appealed against the decision of the Regional Court of 20 March 2019, alleging inter alia infringement of Article 417¹(4) of the Civil Code by the unfounded assumption that the respondent had correctly implemented Directive 2005/14 in the national legal order.

Reasons for referring the questions for a preliminary ruling

21. The Court of Appeal notes that since the judgment of the Court of Justice of 24 October 2013 in Case C-22/12 there has been no doubt that compulsory motor vehicle liability insurance must cover compensation for non-material damage sustained by close relatives of victims who have died in a road traffic accident in so far as such compensation is provided for by way of the civil liability of the insured person under the applicable national law. The protection in this regard covers any person entitled under national civil liability law for compensation for damage caused by motor vehicles.

22. Polish law provides for such compensation in Article 446(4) of the Civil Code. The compensation provided for in that provision is covered by compulsory motor vehicle liability insurance.

23. In the view of the Court of Appeal, if the appellant did not obtain the pecuniary compensation for non-material damage due to her from ... because the guarantee had been exhausted, there was thus damage to her property corresponding to the difference between benefit paid by ... and the benefit due. If the plea alleging defective implementation of the directive turns out to be correct, the State Treasury will be liable for the injury or damage caused under Article 417¹(4) of the Civil Code.

24. The Court of Appeal notes that according to recital 10 of Directive 2005/14, its purpose is to protect victims. The Court of Appeal is unable to find anything in Directive 2005/14 to suggest increased protection could cover only some victims for a period of one year from the expiry of the 30-month transitional period (and, similarly, one year from the expiry of the 5-year transitional period). In particular, the directive contains no provisions which would directly restrict the obligation to increase the guarantee only to contracts concluded as from 11 December 2009, completely overlooking insurance contracts which were concluded previously but still in force for a certain period after 11 December 2009.

25. The Court of Appeal can see no reasons that could justify differentiation in level of legal protection afforded to victims at the same time in different traffic accidents, particularly since such differentiation would depend on chance, that is to say on the date [Or.7] on which the insurance contract covering the vehicle of the person responsible for the damage was concluded. The Court of Appeal is unable to find any arguments to support a legal interpretation of the directive that allows contracts in which the guarantee under the compulsory liability insurance amounts to EUR 2 500 000 and contracts in which it amounts to considerably less, namely EUR 1 500 000, to operate in parallel.

26. The Court of Appeal finds unconvincing the reference by the respondent and the Regional Court to the principle of non-retroactivity. That principle does not preclude change to existing contractual obligations with future effect.

27. The reference to the principle of legal certainty is also doubtful in this case. The long period for implementing the directive and the right to make use of the transitional periods allowed the legislative process to be carried out in a timely manner so that the parties to insurance contracts concluded in December 2008 and during 2009 were aware that the level of protection afforded would increase in respect of cases of damage occurring from 11 December 2009. This would have allowed insurers to adjust the level of insurance premiums to the amount of the new guarantee. Therefore, the introduction of a new guarantee in all insurance contracts with effect from 11 December 2009 could be effected in accordance with the principle of legal certainty.

28. In the light of the foregoing considerations, the Court of Appeal is inclined to interpret Article 2 of Directive 2005/14 as proposed by the appellant.

29. The Court of Appeal has no doubt that the result intended by Article 2 of Directive 2005/14 included conferring certain rights on individuals. The purpose of this provision was to increase the level of protection for victims, inter alia by increasing the guarantees in insurance contracts. Therefore, if it transpired that the Polish State implemented the directive in an incomplete and thus defective manner, the first precondition for liability in damages would certainly be met (in this respect the Court of Appeal refers to the judgment of the Court of Justice of 19 November 1991 in Joined Cases C-6/90 and C-9/90, highlighting in particular the arguments contained in paragraphs 33 to 41 thereof). Only then does determination of that precondition make it necessary to consider in the main proceedings whether and to what extent the appellant has sustained damage with a causal link to the respondent State's failure to fulfil its obligation.

30. At the same time the Court of Appeal notes that it considers that the other legal arguments of the Regional Court are defective. There is no doubt that in this case the appellant is claiming damages from the State Treasury for damage to property. The appellant claims that as a result of the incomplete implementation of the directive she was unable to obtain from the insurer further compensation for the harm sustained as a result of her mother's death in the amount of PLN 78 000. In actual fact, as the court of first instance stated, the compensation due to the appellant from the insurer was intended to compensate her for non-material harm. It does not alter the fact that pecuniary compensation is a form a compensation for non-material damage provided for under Polish law. Therefore, it must be concluded that defective implementation is capable of causing material damage to the appellant's property in the form of failure to obtain a pecuniary benefit from the insurer. The classification of the appellant's claim against the State Treasury as a claim for material damage does not preclude the fact that the non-material damage resulting from the death of the appellant's mother was the source of her unmet pecuniary claims against the insurer.

31. Since the issue set out has not formed the subject matter of a judgment of the Court of Justice, the Court of Appeal considered it necessary in the above circumstances to stay proceedings and to make a reference to the Court of Justice for a preliminary ruling on the interpretation of Article 2 of Directive 2005/14.

[...]