E/1/99/48

REPORT FOR THE HEARING
in Case E-1/99

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Norges Høyesterett (Supreme Court of Norway) for an Advisory Opinion in the case pending before it between

Storebrand Skadeforsikring AS

and

Veronika Finanger

on the interpretation of the Agreement on the European Economic Area (hereinafter variously "EEA" and "EEA Agreement"), with particular reference to the following Acts referred to in Annex IX to the EEA Agreement:

– the Act referred to in point 8 of Annex IX (Council Directive 72/166/EEC of 24 April 1972, on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability, hereinafter the "First Motor Insurance Directive");

– the Act referred to in point 9 of Annex IX (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, hereinafter the "Second Motor Insurance Directive");

– the Act referred to in point 10 of Annex IX (Third Council Directive 90/232/EEC of 14 May 1990, on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, hereinafter the "Third Motor Insurance Directive");

(hereinafter collectively the "Directives" or the "Motor Insurance Directives").

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I. Introduction

1 By a reference dated 23 June 1999, registered at the Court on 28 June 1999, Norges Høyesterett (Supreme Court of Norway), made a Request for an Advisory Opinion in a case brought before it by Storebrand Skadeforsikring AS (hereinafter "appellant") against Veronika Finanger (hereinafter "respondent").

2 The case before the Høyesterett concerns the issue of whether the Motor Insurance Directives impose requirements as to the formulation of national law relating to compensation. This includes whether the Directives preclude a legal rule to the effect that injuries sustained by a passenger due to the driver's being under the influence of alcohol shall not trigger liability for compensation when the passenger knew or must have known that the driver was under the influence of alcohol.

II. Legal background

3 The question referred by the national court concerns the interpretation of various Articles of the First, Second and Third Motor Insurance Directives.

4 Article 3(1) of the First Motor Insurance Directive reads as follows:

> *"Each Member State shall (...) take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance. The extent of the liability covered and the terms and conditions of the cover shall be determined on the basis of these measures."*

5 Article 1(1) of the Second Motor Insurance Directive reads as follows:

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

6 Article 2 of the Second Motor Insurance Directive reads as follows:

> *"1. Each Member State shall take the necessary measures to ensure that any statutory provision or any contractual clause contained in an insurance policy issued in accordance with Article 3 (1) of Directive 72/166/EEC, which excludes from insurance the use or driving of vehicles by:*
> *- persons who do not have express or implied authorization thereto, or*
> *- persons who do not hold a licence permitting them to drive the vehicle concerned, or*
> *- persons who are in breach of the statutory technical requirements concerning the condition and safety of the vehicle concerned,*
> *shall, for the purposes of Article 3 (1) of Directive 72/166/EEC, be deemed to be void in respect of claims by third parties who have been victims of an accident.*
> *However the provision or clause referred to in the first indent may be invoked against persons who voluntarily entered the vehicle which caused the damage or injury, when the insurer can prove that they knew the vehicle was stolen.*

> *Member States shall have the option - in the case of accidents occurring on their territory - of not applying the provision in the first subparagraph if and in so far as the victim may obtain compensation for the damage suffered from a social security body.*
> *2. In the case of vehicles stolen or obtained by violence, Member States may lay down that the body specified in Article 1 (4) will pay compensation instead of the insurer under the conditions set out in paragraph 1 of this Article; where the vehicle is normally based in another Member State, that body can make no claim against any body in that Member State (....) .”*

7 Article 1(1) of the Third Motor Insurance Directive reads as follows:

> *“Without prejudice to the second subparagraph of Article 2 (1) of Directive 84/5/EEC, the insurance referred to in Article 3 (1) of Directive 72/166/EEC shall cover liability for personal injuries to all passengers, other than the driver, arising out of the use of a vehicle (...).”*

III. Facts and procedure

8 On 11 November 1995 in Nord Trøndelag, Veronika Finanger was injured in a traffic accident. She was a passenger in a car which drove off the road. The cause of the accident was the reduced driving ability of the driver, due to the influence of alcohol. As a result of the accident, Finanger was left 60 per cent medically disabled and 100 per cent disabled. The third-party motor vehicle liability insurance of the motor vehicle which caused the injury was with Storebrand.

9 Veronika Finanger has sued Storebrand, claiming compensation for the personal injuries she suffered in the accident. The basis for the claim is the Norwegian Act of 3 February 1961 relating to compensation for injury caused by a motor vehicle (the Automobile Liability Act - *bilansvarsloven*). According to section 15 of that Act, the owner of a motor vehicle subject to registration shall insure it “[f]or cover of insurance claims pursuant to chapter II.” Under section 4 in chapter II, the main rule is that, when a motor vehicle causes injury, the injured party is entitled to compensation from the insurance company with which the vehicle is insured, regardless of whether anyone is to blame for the injury.

10 Storebrand rejected Finanger’s claim. The legal basis for refusing to pay compensation to Finanger was section 7, third paragraph, litra b of the Automobile Liability Act.

11 Section 7 (Contributory action of the injured party) reads as follows.

> *“If the injured party has intentionally or negligently contributed to the injury, the court may reduce the compensation or set it aside entirely, except in cases when the injured party has exhibited only slight negligence. In the decision, regard shall be had to the conduct demonstrated by both sides and the circumstances generally.*

> *If a motor vehicle causes injury while immobile and the injury did not occur in connection with the stopping or starting of the vehicle, the court may reduce the compensation or set it aside entirely, even if the injured party has exhibited only slight negligence.*
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> *The injured party may not obtain compensation, unless there are special grounds for doing so, if he voluntarily drove or allowed himself to be driven in the motor vehicle which caused the injury even though he*
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> *a) knew that the vehicle had been taken from its lawful owner by a criminal act, or*
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> *b) knew or must have known that the driver of the vehicle was under the influence of alcohol or another intoxicant or narcotic (cf. section 22, first paragraph of the Road Traffic Act). The specific rule enunciated herein does not apply, however, if it must be assumed that the injury would have occurred even if the driver of the vehicle had not been under the influence as aforementioned.*
> *An injured driver of the motor vehicle which caused the injury may not obtain compensation, unless there are special grounds for doing so, if he knew or must have known that the vehicle was being used in connection with a criminal act."*

12 The Automobile Liability Act was enacted on 3 February 1961. The rule in section 7, third paragraph, litra b has been subsequently amended twice, by Act No. 81 of 21 June 1985 and Act No. 113 of 27 November 1992, respectively. The last legislative amendment was carried out in order to adapt the Act to the EEA Agreement.

13 In the preparatory works for the Automobile Liability Act,[1] the reasons for the provisions are stated as follows:

> *"As agreed during the Nordic ministerial meetings, the ministry has expanded the rule to also include an injured party who allowed himself to be driven in the vehicle, even though he knew or must have known that the driver of the vehicle was under the influence of intoxicants or narcotics. A rule of this nature was considered by the committee, but found to be superfluous (see committee recommendation pages 63-64). However, the ministries find it proper to include in the act an explicit provision that regulates clearly the relationship under the stricter, specific rule in the last paragraph and not under the more liberal main rule on contributory negligence by the injured party."*

14 In connection with the legislative amendment in 1985,[2] the provision was amended somewhat. From the preparatory works for the amending act, it appears that the legislator wished to keep the provision, which at that time was contained

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1 Proposition to the Odelsting No. 24 1959-60, page 29.

2 Proposition to the Odelsting No. 75 1983-1984, page 47.

in section 7, third paragraph, litra c, for preventive reasons.[3] The following is from the discussion in the Storting (Parliament) justice committee:

> *"2. Section 7, third paragraph, Automobile Liability Act.*
> *Section 7, third paragraph, litra c provides that passengers in a car who know or ought to know that the driver is under the influence of alcohol, etc., normally may not obtain compensation. The rule has been criticized because it puts injured parties in a weak position. In particular, it has been stated that it is unreasonable for the specific rule to be applied regardless of whether there is a causal link between the condition of the driver and whether or not the injury is sustained.*
>
> *In light of the criticism, the ministry is of the view that a certain softening-up of the provision is in order. The ministry proposes that the specific rule in section 7, third paragraph, litra c should not be applied when there is no causal link between the condition of the driver and the injury (…)."*[4]

15 When the Act was amended in 1992 in connection with the implementation of the EEA Agreement in Norwegian law, the legislator assumed that the Motor Insurance Directives imposed certain substantive requirements on the rules on compensation in the Automobile Liability Act. The legislator assumed, however, that the rule in section 7, third paragraph, litra b was not contrary to EEA law. The following is from the preparatory works:

> *"The current third paragraph, litra c concerns limitation on the entitlement of the driver and passengers to compensation when the driver was under the influence of alcohol or other substances. It follows from litra c, second sentence that the specific rule does not apply in so far as it must be assumed that the injury would have occurred even if the driver of the vehicle had not been under the influence. This means that there is a requirement of causal link between the injury and the driver's being under the influence. For compensation to be set aside, it is furthermore a condition that the injured party knew or must have known that the driver was under the influence. Thus, the rule in the third paragraph, litra c cannot be said to go further than being a rule on contributory negligence which, admittedly, is stricter than the general rule on contributory negligence in the first paragraph. The ministry assumes, therefore, that the EEA rules do not prevent the rule from being maintained, see the draft of the third paragraph, litra b."* [5]

16 In a judgment of 21 September 1998, Frostating lagmannsrett concluded that the accident occurred due to the driver's being under the influence of alcohol and that Finanger knew that the driver was under the influence of alcohol.

17 The appellate court noted that the main rule in section 7, third paragraph, litra b of the Automobile Liability Act is that the injured party is not entitled to

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3 Cf. Proposition to the Odelsting No. 75 1983-84, page 46.

4 Cf. Recommendation to the Odelsting No. 92 1984-85, page 8.

5 Proposition to the Odelsting 1991-92 No. 72, page 77.

compensation in those cases which fall within the scope of the provision. The court concluded, however, that section 7, third paragraph, litra b was contrary to EEA law. The provision was set aside pursuant to section 2 of the EEA Act.[6] Pursuant to section 7, first paragraph of the Automobile Liability Act, Frostating lagmannsrett reduced the compensation of the injured party by 30 per cent as a consequence of her having mentally contributed to the drive and her knowing that driving in a car under the prevailing conditions would entail a considerable safety risk. Storebrand appealed the judgment to the Høyesterett.

18 Against this background, the Høyesterett decided to submit a Request for an Advisory Opinion to the EFTA Court.

IV. Question

19 The following question was referred to the EFTA Court:

> **Is it incompatible with EEA law for a passenger who sustains injury by voluntarily driving in a motor vehicle not to be entitled to compensation unless there are special grounds for being so, if the passenger knew or must have known that the driver of the motor vehicle was under the influence of alcohol at the time of the accident and there was a causal link between the influence of alcohol and the injury?**

V. Written observations

20 Pursuant to Article 20 of the Statute of the EFTA Court and Article 97 of the Rules of Procedure, written observations have been received from:

- the appellant, Storebrand Skadeforsikring AS, represented by Counsel Emil Bryhn and Tron Gundersen;
- the respondent, Veronika Finanger, represented by Counsel Erik Johnsrud;
- the Government of Iceland, represented by Einar Gunnarsson, Legal Officer, External Trade Department, Ministry of Foreign Affairs, acting as Agent, assisted by Björn Friðfinnsson, Permanent Secretary, Ministry of Justice;
- the Government of the Principality of Liechtenstein, represented by Christoph Büchel, Director of the EEA Coordination Unit, and Beatrice Hilti, Officer of the EEA Coordination Unit, acting as Agents;

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[6] Act No. 109 of 27 November 1992 relating to Implementation in Norwegian Law of the Main Agreement on the European Economic Area (EEA) etc. (the EEA Act – *EØS-loven*).

– the Government of the Kingdom of Norway, represented by Stephan L. Jervell, Advocate, Office of the Attorney General (Civil Affairs), acting as Agent;
– the EFTA Surveillance Authority, represented by Peter Dyrberg, Director, Legal & Executive Affairs Department, and Helga Óttarsdóttir, Officer, Legal & Executive Affairs Department, acting as Agents;
– the Commission of the European Communities, represented by John Forman and Christina Tufvesson, both legal advisers of the European Commission, acting as Agents.

The appellant

21 The appellant pleads following two lines of argument which depend on the nature of the national rule in question. Firstly, if the question from the Høyesterett concerns a rule on liability for compensation, the issue arises as to whether EEA law imposes positive requirements as to the formulation of national conditions for liability for compensation. If so, the appellant submits that the Directives do not impose requirements as to the content of national law governing compensation, but rather are to be construed as regulating insurance cover when conditions for compensation are present. Secondly, if the question from the Høyesterett concerns a rule on limitation on a passenger's claim for insurance cover – and/or that the EFTA Court concludes that the Directives impose requirements as to national conditions for compensation – the question arises as to whether such a rule is in conformity with EEA law.[7] If so, the appellant submits that the second subparagraph of Article 2(1) of the Second Motor Insurance Directive cannot be construed as precluding an injured passenger's being refused compensation, unless special grounds are present, when the person knew or must have known that the driver was under the influence of alcohol and that the injury was caused by the driver's being under the influence of alcohol.

22 Concerning the question whether the Motor Insurance Directives impose requirements on national conditions for liability for compensation, the appellant is of the view that a distinction must be drawn between conditions for liability for compensation and insurance cover of liability.

23 The Directives impose requirements for motor vehicle insurance in the Member States. However, the Directives do not impose requirements on national law with respect to which events trigger entitlement to compensation for the injured party.

24 Reference is made to the headings[8] and the wording of the Directives in several places[9] which show that it is insurance cover which is encompassed by the

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7 The issue of whether the national provision in question is a rule on a condition for liability and/or a limitation on insurance cover is viewed as an open question under Norwegian law.

8 Reference is made to the headings of the First, Second and Third Motor Insurance Directives.

Directives, not conditions for compensation. Furthermore, the preparatory work for the Second Motor Insurance Directive and the definition of a "claim" in an agreement[10] concluded between the national insurers' bureaux are mentioned.[11] Lastly, the Proposal for a Fourth Motor Insurance Directive confirms that the Directives deal with the issue of cover and not conditions for liability.[12]

25 In the view of the appellant, the Second Motor Insurance Directive does not entail any substantive change in the scope of application of the Directives. The Directives still impose requirements as to insurance cover, not national conditions for liability for compensation.

26 Concerning the first objective of the Directives, the "free movement of persons within the Community", the appellant argues that the fact that the conditions for liability for compensation may vary between Member States is not a hindrance to the free movement of persons. The appellant submits that only a very small proportion of the passengers who travel in the EEA become involved in driving under the influence of alcohol. Consequently, a national rule on lapse of entitlement to compensation for this marginal group of passengers will not come into conflict with the object of the Treaty establishing the European Community (the "EC Treaty") and the EEA Agreement's objective of free movement of persons.

27 On the contrary, it may be argued that a national rule on lapse of compensation for passengers who become involved in incidents of driving under the influence of alcohol can be favourable to the market because it leads to motor travel being safer.

28 The appellant emphasizes that the consideration of protection goes no further than to ensure that a person who has a claim against a person who has caused injury gets that claim satisfied. Accordingly, the Directives' object of protection does not go so far as to confer a claim on a victim of a motor vehicle accident against a person who has caused injury and/or his insurance company. In the view of the appellant, these arguments are supported by the case law of the Court of Justice of the European Communities ("ECJ")[13] and legal theory.[14]

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9 See in particular Articles 1, 3(1) and 3(2) of the First Motor Insurance Directive; Articles 1 and 2 of the Third Motor Insurance Directive; Article 2 of the Second Motor Insurance Directive and paragraph 13, second sentence of the preamble to the First Motor Insurance Directive.

10 The legal basis for this agreement is Article 2(2) of the First Motor Insurance Directive.

11 COM(88) 644.

12 OJ 1997 C 343, p. 11.

13 Case 129/94 *Criminal proceedings against Rafael Ruiz Bernáldez* [1996] ECR I-1829 (hereinafter "*Bernáldez*").

14 Legal opinion of Dr. juris Finn Arnesen (Annex 2 to the written observations of the appellant); L. Kramer, *EEC Consumer Law*, Brussels 1986; Robert Merkin and Angus Rodger, *EC Insurance Law*, London 1997; Walter van Gerven et al., *Tort Law*, *Scope of protection*, Oxford 1998; Christian von Bar, *The Common European Law of Torts*, Oxford 1998.

29 However, one statement in the *Bernáldez* judgment[15] may indicate that the ECJ is of the view that the Directives are significant not only for the issue of cover but also for the issue of liability. Concerning these issues, the appellant refers to the legal opinion of Finn Arnesen, who has assessed the significance of the above-mentioned statements in the *Bernáldez* case in relation to the scope of application of the Directives.

30 In addition, the appellant points out that the judgment in the *Bernáldez* case says nothing about whether the injured party was a passenger and/or negligently contributed to the occurrence of the injury. The injured party appears to have been an outside third party who had not negligently contributed to the occurrence of the injury. Consequently, the judgment should be accorded little weight. The Directives cannot have the same protection with respect to an injured party who has caused his own personal injury either intentionally or through gross negligence. Reference is made here to the opinion of Advocate General Lenz in the *Bernáldez* case.[16]

31 In its second line of argument, the appellant considers that it will become necessary for the EFTA Court to examine EEA law, if one assumes that the rule about which the Høyesterett is asking concerns a limitation or limitations on the passenger's insurance cover.

32 The relevant Directive provision is Article 2 of the Second Motor Insurance Directive which gives, in three indents, limitations on insurance cover which may not be invoked against third parties who are injured in an accident. The first indent, for example, prohibits statutory provisions or contract provisions which exempt from cover: "persons who do not have express or implied authorization …" for using or driving the vehicle. The provision is grounded in consideration for the injured party in that, as a rule, it does not matter, for the purposes of the injured party's claim against the insurance company of the motor vehicle, whether the person who used the vehicle was authorized to drive or not. This rule does not apply, however, if the injured party has voluntarily entered the vehicle which caused the injury and it can be proven that the injured party knew that the vehicle was stolen.[17]

33 The reason for the rule's not applying must be partly that the injured party, by being a passenger in a stolen car, has also accepted an increased risk of injury, partly preventive considerations, and partly considerations of reasonableness.

34 The appellant submits that the Second Motor Insurance Directive does not explicitly regulate the situation in which the driver is under the influence of alcohol. However, the provision cannot be interpreted exhaustively because the presentation of the rules in Article 2(1) is quite casuistic.

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15 The relevant passages are found in paragraphs 18 to 20 of the reasons.

16 Case C-129/94 [1996] ECR I-1847 paragraph 46.

17 Cf. second subparagraph of Article 2(1) of the Second Motor Insurance Directive.

35 Another important argument against interpreting Article 2(1) of the Second Motor Insurance Directive exhaustively is to be found in the fourth subparagraph of Article 1(4) of the same Directive. That provision allows for a rule under which compensation/insurance cover will not be paid for injuries caused by an uninsured vehicle to a passenger who voluntarily entered the uninsured vehicle. This shows that the Community legislator could not have intended to give an exhaustive list of prohibitions on limitations on insurance cover. The background for the provision is also considered to be that the injured party, by being a passenger, has accepted the risk of loss if injury occurs.

36 The considerations which support limitations on the obligation to cover in the event of theft and driving in uninsured vehicles apply with equal force in the event of driving under the influence of alcohol. The point is the passenger's negligent contribution to his own injury when he knows or must understand that the driver is under the influence of alcohol. The appellant is of the view that, in most cases, it will be more dangerous to ride with a driver under the influence of alcohol than in a stolen car. Car theft and driving under the influence of alcohol are both criminal offences. Accordingly, there is no reason why the passengers of a person who drives under the influence of alcohol should be placed in a better position than those of a thief.

37 Injuries caused by driving under the influence of alcohol constitute a significant societal problem. To reduce driving under the influence of alcohol, violations are criminal offences in all EEA/EU countries.[18]

38 The appellant states that driving under the influence of alcohol occurs in many cases precisely because third parties ignore the increased risk of injury and voluntarily go along for the ride. In this way, the passenger will be a negligent, contributing factor to the driving's taking place.

39 Concerning the viewpoint on the "acceptance of risk", the appellant submits that the national welfare schemes and/or social schemes must compensate the injured party's need for money for daily living and/or medical treatment, on a par with other persons who are injured in situations other than car accidents. There is not much reason to let the insurance companies, and thereby in reality the premium payers, bear the economic risk.

40 In the view of the appellant, Article 2 of the Second Motor Insurance Directive aims at provisions which exclude claims for insurance cover under those conditions which are positively listed in the three indents. The provision in the case at hand is of another character because it is not absolute. On the contrary, it allows for compensation/insurance cover to nonetheless be awarded if "special grounds" are present. In real terms, the provision is not much different from normal legal rules existing in most countries on reduction of the injured party's claim due to negligent contribution to the injury/acceptance of risk. The rule in

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18 Although the legal limit for what constitutes driving under the influence may vary.

question is different from the national rule in the *Bernáldez* case, which was a rule on absolute exclusion from insurance cover in the case of property damage.

41 The appellant proposes that the question be answered as follows:

> *"It is compatible with EEA law for a passenger who sustains injury by voluntarily driving in a motor vehicle not to be entitled to compensation unless there are special grounds for being so, if the passenger knew or must have known that the driver of the motor vehicle was under the influence of alcohol at the time of the accident and there was a causal link between the influence of alcohol and the injury."*

The respondent

42 The respondent presents a principal and a subsidiary submission. Principally, the respondent submits that national rules which provide a basis for reduction of a claim for compensation for passengers who sustain injuries from motor vehicles are contrary to EEA law, except for rules which allow a reduction of the claim for compensation in cases where the motor vehicle has been stolen and the insurance company can prove that the injured party knew this.

43 If the EFTA Court comes to the conclusion that the Directives do not regulate compensation rules but only the insurance cover, the respondent submits subsidiarily that section 7, third paragraph, litra b of the Automobile Liability Act must be construed as a rule which makes an exception to the insurance cover. Since EEA law only contains one exception to the insurance cover - i.e. cases of theft - section 7, third paragraph, litra b is contrary to EEA law.

44 Concerning its principal submission, the respondent makes reference to the wording of Article 3(1) of the First Motor Insurance Directive and to Article 1(1) of the Third Motor Insurance Directive. From an ordinary linguistic understanding of these provisions, it follows that the Directives impose requirements for national legislation on insurance cover of liability for compensation. However, the formulation is unfortunate and the content of the provision is unclear. Therefore, what the Directives mean by rules on insurance cover of liability for compensation must be understood in the light of statements in the preparatory works for the Third Motor Insurance Directive[19] and object- and coherence-related considerations.

45 The respondent refers to the statements of the Commission[20] which must be understood in the sense that the Directives impose requirements for national rules

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[19] In Directive Proposal (see footnote 11) the Commission has stated the following of crucial interest: "The proposal states in its Article 1 that all passengers, other than the driver and passengers who have knowingly and willingly entered a stolen vehicle, must be afforded the protection of the third party insurance cover."

[20] See footnote 11.

on an insurance scheme under which the insurance company with which the motor vehicle is insured becomes directly liable towards injured parties other than the driver.

46 Furthermore, the respondent states that EEA law places considerable emphasis on ensuring citizens in an EEA State a high level of consumer protection.[21] The concept of consumer must be interpreted very broadly in EEA law, so that it also includes a high level of protection for third parties[22] who sustain injuries from motor vehicles.[23]

47 The case law of the ECJ is also in line with the guidance set out in the preambles to the Directives.[24] It is submitted that one of the most important objects of the Directives is to ensure injured passengers equal treatment regardless of in which Member State the accident occurs.

48 The respondent argues that, in the *Bernáldez* ruling, the ECJ wished to prevent an interpretation which would allow the Member States to limit compensation for people who sustain injury in traffic accidents to specified types of injury. The ECJ also attempted to prevent injured passengers from being treated differently depending on in which Member State the accident occurred.

49 Concerning the question of whether the Directives are to be interpreted exhaustively, the respondent submits that the wording in Article 1(1) of the Third Motor Insurance Directive provides explicit support for an exhaustive interpretation of the Directives. The provision states that the injured party is to be compensated by the insurance company under the motor vehicle insurance and that the Directive only accepts an exception set out in the second subparagraph of Article 2(1) of the Second Motor Insurance Directive. The reservation regarding Article 2(1) of the Second Motor Insurance Directive, read together with the word “shall” in the Article 1(1) of the Third Motor Insurance Directive, must be construed in the sense that the Directives only accept one exception to the rule on full compensation from the insurance company, i.e., in cases where the motor vehicle was stolen and the insurance company can prove that the injured party knew this.[25]

50 This is also in line with the *Bernáldez* ruling, in particular in the light of the questions asked by the national court in that case. Therefore, the *Bernáldez* ruling cannot be understood in any other way than that the Directives must be interpreted exhaustively.

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21 Twelfth recital of the preamble to the EEA Agreement.

22 Passengers, pedestrians, etc.

23 Twelfth and thirteenth recitals in the preamble to the Third Motor Insurance Directive. The Directives’ object of a high level of consumer protection is further evidenced by the third to fifth recitals in the preamble to the Third Motor Insurance Directive.

24 See footnote 13, paragraph 13.

25 See also footnote 13.

51 Lastly, the respondent submits that it is common in EEA law for directives with a social object to be accorded considerable weight in questions of whether the Directives are to be interpreted exhaustively in favour of consumers.[26]

52 Concerning its subsidiary submission, the respondent argues that it must be determined where the line is to be drawn between, on the one hand, compensation rules which are not regulated by the Directives and, on the other hand, rules on insurance cover which are regulated by the Directives. A common feature of these rules is that they both affect the final liability for compensation the insurance company must bear under motor vehicle insurance.

53 The respondent is of the view that there is guidance to be found in the words "[civil] liability for compensation". It must be considered that the Directives, with the words "[civil] liability for compensation", presumably also attempt to set out parameters for a concept of contributory negligence within the meaning contemplated by the Directives.

54 The respondent is of the view that the object of having equal treatment of passengers and a high level of protection will only be implemented in the manner contemplated by the Directives if the line between the contributory negligence rules and rules which make an exception to the area of cover of the insurance is determined by a common, EEA law concept of contributory negligence.

55 Thus, the question becomes what the Directives presumably mean by contributory negligence. This issue has been canvassed by the ECJ.[27] The respondent is of the view that, in determining the more specific content of the contributory negligence concept, one can seek guidance in the Member States' compensation law on settlement of claims following traffic accidents.[28]

56 The respondent argues that the following three characterizing criteria may be set up for a rule on contributory negligence: (1) The injured party has, as a starting proposition, a claim against the person causing the injury for unreduced cover of his injury (full compensation). (2) For there to be a basis for reduction, the injured party must have negligently contributed to the injury, i.e., the injured party should have acted differently, thereby preventing the injury from occurring or being as extensive as it was. Requirements are imposed for a qualified causal link between the injured party's conduct and the injury. More or less passive behaviour on the part of the injured party in relation to the event causing the injury is not sufficient. (3) If the injured party has negligently contributed to the injury, a concrete, rough assessment may be used for the purposes of a reduction, i.e. the compensation amount may possibly be reduced or, in the case of more gross forms of contributory negligence, be set aside. Key elements in this

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26 See ruling in Case E-9/97 *Sveinbjörnsdóttir* v *Government of Iceland* [1998] EFTA Court Report 95.

27 Case 283/81 *CILFIT* v *Ministry of Health* [1982] ECR 3415.

28 Reference is made to Norwegian legal literature.

reduction assessment are a comparison between the influence or the concrete causal factors on the part of, on the one hand, the person causing the injury and, on the other, of the injured party, in relation to the injury.

57 Statutory rules which do not contain these criteria must, in the view of the respondent, be considered as rules which make exceptions to the area of cover of the insurance and thus "insurance cover of [civil] liability for compensation", as the expression is used in the Directives.

58 Firstly, such legal rules lack a reduction function. The reason for this is that the general rule is one of exclusion. Exceptions may only be made if special grounds to do so are present. This exception has been interpreted and applied very strictly by the Høyesterett and is of little practical interest. Consequently, the respondent is of the view that the exception can in no way lead to the rule's being characterized as a reduction rule.

59 Secondly, the respondent submits that the rule applies to a situation in which the injured party's conduct does not bear a direct causal link to the event causing the injury. The contributory negligence criterion in general provisions on contributory negligence must relate solely to the event causing the injury. This means that if the car, for example, drives off the road because the driver is under the influence of alcohol, the passenger has not negligently contributed to the actual act of driving off the road, unless he has actively taken hold of the wheel or the like. It cannot be sufficient that the passenger has voluntarily allowed himself to be driven by a driver under the influence of alcohol.

60 Lastly, the respondent submits that the rule means that there is nothing to reduce. Furthermore, the object of the rule is not to regulate the apportionment of fault between the injured party and the person causing the injury, but to express society's disapproval of driving under the influence of alcohol.[29]

61 The Høyesterett has concluded that a reduction can be made in a claim for compensation of the surviving relatives under section 7, third paragraph, litra b of the Automobile Liability Act because the rule is not an ordinary compensation rule, but must be seen as a rule on loss of insurance cover.[30]

62 Against this background, the respondent is of the view that national rules such as the one in question must be characterized as an exception to the area of cover of the insurance.

63 In any event, the respondent submits that the line between insurance rules and compensation rules is determined by whether a reduction or exclusionary rule under national law can also be invoked by the person causing the injury. This is

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29 The above is followed up by the Supreme Court of Norway in its judgment in Rt. 1997, page 149.

30 See footnote 29.

supported by an ordinary linguistic understanding of what is meant by "[civil] liability for compensation". According to an ordinary linguistic understanding, rules which regulate only the insurance company's liability and not the personal liability of the person causing the injury are considered to be compensation rules.

64 The above is illustrated with a reference to the two-track system in Norwegian law. In Norwegian law, it is clear that the person causing the injury cannot invoke section 7, third paragraph, litra b of the Automobile Liability Act to exclude the injured party's claim for compensation against him. It is the general contributory negligence provision in section 5-1 of Act No. 26 of 13 June 1969 relating to compensation in certain circumstances (the Compensation Act – *skadeserstatningsloven*) which regulates the contributory negligence of the injured party. Consequently, there can be a divergence between the insurance company's liability and the liability of the person causing the injury. This may lead to both practical and economic disadvantages for the injured party, particularly when the person causing the injury is not capable of being sued.

65 Reference is also made in this connection to the ECJ's interpretation in the *Bernáldez* judgment. In that case, it was clear that the person causing the injury was liable for compensation to the injured party under national compensation rules, but under Spanish statutory rules the motor vehicle insurance did not apply when the driver had caused the injury while under the influence of alcohol. The ECJ held that rules like the Spanish one in question were contrary to the Directives.

66 The respondent proposes that the question be answered as follows:

> *"It is incompatible with EEA law for a passenger who sustains injury by voluntarily driving in a motor vehicle not to be entitled to compensation unless there are special grounds for being so, if the passenger knew or must have known that the driver of the motor vehicle was under the influence of alcohol at the time of the accident and there was a causal link between the influence of alcohol and the injury."*

The Government of Iceland

67 The Government of Iceland states that, in Iceland, the rules on compensation for damages and injuries related to car accidents are based on the general principles of the law of torts. It is well established in Icelandic judicial practice that a passenger who knows, or should know, that a driver is under the influence of alcohol has accepted the risk related thereto. This rule is classified as a principle on assumption of risk, and most often leads to the passenger's being excluded from compensation. With the Traffic Act of 1987, the rules on the reduction of compensation were narrowed in scope. It is now provided that compensation for bodily injury will only be reduced in a case where the injured party has contributed to the injury intentionally or through gross negligence. Despite these changes, however, the Supreme Court of Iceland has continued to apply the assumption of risk principle in cases where the passengers of an intoxicated driver have been injured.[31]

68 In substance, the Government of Iceland argues that it does not fall within the ambit of the Motor Insurance Directives to regulate liability for compensation of injuries related to the use of motor vehicles. This view is supported by the placement of the Directives in Annex IX to the EEA Agreement. Regulating the national law of torts would have required a different anchoring in the EEA Agreement.

69 Furthermore, this approach is underlined by the structure and wording of the Motor Insurance Directives. Reference is made to Article 3(1) of the First Motor Insurance Directive, to the preamble to the Second Motor Insurance Directive and to Article 1(1) of the same Directive, which shows that the aim of the Directives is to regulate only the insurance cover and nothing more.

70 Referring to case law of the ECJ,[32] the Government of Iceland argues that there is a distinction in the Directives between the rules governing compensation for civil liability and the insurance thereof.

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31 Judgment of the Supreme Court of Iceland, Hrd. 1996:3120.

32 Case 116/83 *Asbl Bureau Belge des Assureurs Automobiles* v *Adriano Fantozzi and SA Les Assurances Populaires* [1984] ECR 2481.

71 Furthermore, Article 2(1) of the Second Motor Insurance Directive must be interpreted only as precluding statutory and/or contractual provisions excluding the categories of persons specified therein from insurance coverage. Paragraph 2 of Article 2(1) must not be interpreted exhaustively. Rather, it is an example of the cases where national authorities could, despite the rules in paragraph 1, limit the insurance coverage. It must be clear in any event, however, that insurance coverage, here as elsewhere, only comes into question once civil liability has been established. The bottom line is that it is impossible to let insurance cover civil liability that does not exist.

72 The Government of Iceland is of the opinion that the *Bernáldez*[33] ruling deals with insurance cover and is of little, if any, significance for the case at hand.

73 The reference in point 1 in the preamble to the First Motor Insurance Directive to the safeguarding of the interests of persons who may be the victims of accidents caused by motor vehicles can be interpreted as implicitly referring to the non-contribution of the person concerned to an accident. Those who have contributed to their own injuries do not have the same need for the same adequate insurance coverage. The Norwegian provision seems to be partly based on this principle, as well as on the desire of the public authorities to motivate people not to accept a ride with an intoxicated driver.

74 In the opinion of the Government of Iceland, it could even be argued that, in this respect in relation to the accident, the term "third party" is misleading.

75 The Government of Iceland proposes that question be answered as follows:

> *"It is not incompatible with EEA law for national law to preclude a passenger, who sustains injury by voluntarily driving in a motor vehicle, from being entitled to compensation, as long as the preclusion pertains to the basis for liability, but not merely to the insurance."*

The Government of the Principality of Liechtenstein

76 The Government of the Principality of Liechtenstein submits that a distinction must be made between the relation between the insurance and the insured and the relation between the insurance and the victim. The relation between the insurance and the insured is to be understood as the internal relation, which is regulated by law and by an insurance contract. The insurance contract can, in this case, also provide that there will not be any cover in specified cases, meaning an exclusion of cover or an exclusion from the insurance, respectively.

77 This relation clearly distinguishes itself from the relation between insurance and the victim. Except for a certain case listed in the Second Motor Insurance Directive, the victim is always entitled to compensation. This means that the

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33 See footnote 13.

insurance contract cannot provide for an exclusion of liability. This would deprive the victim of any compensation and would therefore be contrary to the aims of the Directives.

78 In the light of the *Bernáldez*[34] judgment of the ECJ, the opinion of Advocate General Lenz[35] in that case and the objectives of the Motor Insurance Directives, the Government of the Principality of Liechtenstein is of the view that the reasons for the exclusion of liability of the Directives are to be understood as having an exhaustive character. The protection of the victim is one of the central objectives of the Directives and, therefore, there will be liability of the insurance towards the victim in any case.[36]

79 The first subparagraph of Article 2(1) of the Second Motor Insurance Directive is to be considered as a minimum requirement, as a prohibition to enforce any exclusions from the insurance upon injured victims, because protection of the victim is to be given priority.

80 The Government of the Principality of Liechtenstein states that if the Norwegian provision was compatible with EEA law, it would allow a transfer of the risk from the level between the insurance and the insured to the level of the victim. In the view of the Government of the Principality of Liechtenstein, the issue of whether the risk is to be assigned to the insurance or to the insured is a political decision. Thus, it is clear that the risk must be assigned to the insurance if the protection of the victim is to be given priority. This interpretation also finds ground in the aim of the Directives as affirmed by the ECJ in the *Bernáldez* case.

81 However, the question of whether or not the compensation may be limited due to the passenger's failure to demonstrate diligence must be answered by the national law or judge. Although the liability of the insurance is given in any case, this does not mean that the insurance has to pay the full amount of compensation[37] to the victim in any case. In the opinion of the Government of the Principality of Liechtenstein, the compensation may, for example, be limited or reduced if the victim has shown gross negligence.

82 It lies within the discretion of the EEA States to apply the national principles of liability. The Directives do not designate any harmonization in this field so that it is possible to apply the national principles of liability[38] and to reduce the compensation.

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34 See footnote 13.

35 See footnote 16.

36 With the exception of the case of the stolen vehicle, which is mentioned in the second subparagraph of Article 2(1) of the Second Motor Insurance Directive.

37 For example, loss of earnings, satisfaction etc.

38 For example, the principle of fault.

83 Consequently, there is a possibility of reducing the compensation in a case where the passenger has shown contributory negligence or violated his duty of diligence. At the same time, however, it is not possible to exclude the claim *a priori* and leave it to the injured party to prove that there were special circumstances that would nevertheless allow for a claim.

84 The Government of the Principality of Liechtenstein proposes that the question be answered as follows:

> *"The reasons for the exclusion of liability of the motor vehicle directives, i.e. Council Directive 72/166/EEC of 24 April 1982 on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability, 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 and the Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles are to be interpreted as being exhaustive.*
> *Therefore it is incompatible with EEA law for national law to provide for a passenger who sustains injury by voluntarily driving in a motor vehicle not to be entitled to compensation unless there are special grounds for being so, if the passenger knew or must have known that the driver of the motor vehicle was under the influence of alcohol at the time of the accident and there was a causal link between the influence of alcohol and the injury.*
> *However, it remains an issue of national law to apply the national principles of liability as regards the question whether or not the compensation can be limited because of the violation of the duty for diligence of the passenger."*

The Government of Norway

85 Referring to the national system set out in the Norwegian Automobile Liability Act, the Government of Norway argues that the provision in question is based on the view that every consideration should clearly be given to all aspects of prevention in the formulation of provisions on liability for compensation in connection with drunken driving. Furthermore, it would be unreasonable to impose additional costs on the owner of the vehicle in regard to insuring persons who choose to ride in a vehicle whose driver is under the influence of alcohol or some other intoxicant.

86 The Government of Norway argues that the placing of the Directives in the EEA Agreement, together with their purpose, indicate that they are not meant to harmonize the substantive liability for road traffic accidents throughout the Community and the EEA. This view was confirmed by the ECJ in the *Bernáldez* ruling in which the ECJ referred to the preambles to the Directives. Therefore, it is not the aim of the Directives that injured parties shall have a comparable position under the law of torts in all Member States.

87 The view that the Directives relate only to insurance cover and not to the substantive regulation of the national laws of torts has been accepted by legal theorists.[39]

88 Furthermore, the wording of the Directives show that the way in which Member States regulate liability for compensation is not affected by the Directives. It follows from Article 3(1) of the First Motor Insurance Directive that it imposes requirements as regards insurance cover, but it does not affect the substance of national law relating to torts and compensation.

89 The wording "any person entitled to compensation in respect of any loss or injury caused by vehicles" in Article 1(2) of the First Motor Insurance Directive entails that, until liability for compensation has been incurred, there is no injured party within the meaning of the Directive. The Directives concern only situations in which the right to compensation is already established. The question in these cases is only whether the liability for compensation is covered by the insurance.

90 Concerning injured third parties, Article 2(1) of the Second Motor Insurance Directive imposes requirements only as to the insurance cover, whereas it is up to the national law to regulate their position under the law of torts.

91 It also follows from the wording of Article 1 of the Third Motor Insurance Directive that it is the insurance cover that is being covered and not the liability for compensation. In this context, reference is also made to the Commission Proposal for a Fourth Motor Insurance Directive.

92 In the opinion of the Government of Norway, the distinction drawn between liability for compensation and insurance cover is also supported by the case law of the ECJ.[40]

93 However, the case at hand must be distinguished from the *Bernáldez* case because that case concerned the exclusion of injuries caused by drunken driving in general from the cover provided by the compulsory liability insurance in cases where the driver had incurred personal liability. The national provision in the case at hand deals with the question of whether the passenger's complicity or acceptance of risk is to preclude him from compensation. Whilst the national provision in the *Bernáldez* case presupposed that there was liability for compensation, it is precisely such liability that is governed by the provision of the Norwegian Automobile Liability Act.

94 The Government of Norway is of the opinion that Art 3(1) in particular of the First Motor Insurance Directive makes it clear that the Member States have broad

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39 See Robert Merking and Angus Rodger, *EC Insurance Law*, London 1997, p. 56*;* Christian von Bar, *The Common European Law of Torts*, Oxford 1998, p. 401; Walter van Gerven et al., *Tort Law, Scope of protection*, Oxford 1998, p. 386.

40 See footnote 13.

discretion as regards specific terms and conditions of the statutory insurance scheme.

95 The national provision in question falls within the limits of this discretion because its scope is very limited and several conditions must be fulfilled. The injured party must have voluntarily chosen to ride in the vehicle that caused the injury despite the fact that he knew or must have known that the driver of the vehicle was under the influence of alcohol or some other intoxicant. There must also be a causal link between the injury and the fact that the driver was intoxicated. The provision must be viewed in connection with the general Norwegian rules on denial or reduction of compensation on the basis of acceptance of risk, complicity and contributory actions.

96 In relation to the aim of the Directives of facilitating the free movement of persons in the Community, the Norwegian rules are of marginal significance. In the case of injuries suffered by passengers who knew or must have known that the driver was intoxicated, the protective aim of the Directive is not immediately manifest.

97 The phrase "[civil] liability in respect of the use of vehicles" in Article 3(1) of the First Motor Insurance Directive cannot be understood as referring to national provisions on compensation which were not drawn up with traffic insurance in mind. The national provisions referred to are the ones concerning strict liability.

98 Concerning Article 2(1) of the Second Motor Insurance Directive, the Government of Norway is of the view that this provision does not fully govern all cases where liability for compensation or insurance cover may be limited. If the Directives allow exclusion from compensation of passengers in stolen and uninsured vehicles, then *a fortiori* is there reason to also exclude passengers who ride voluntarily in a vehicle driven by a drunken driver, since the consumption of alcohol affects the driver's ability to drive. There is no such direct link between the criminal act and the risk of injury in the case of riding in a stolen or uninsured vehicle.

99 The Government of Norway argues that a national exception clause such as the one in question that adopts the aim of the Directives to a lesser degree than the Directives' own exception clauses must, at any rate, be compatible with the Directives. The legal position would be untenable if forms of limitation of liability for compensation or insurance cover other than what is stated in the Directives were not allowed.

100 The Government of Norway proposes that the question be answered as follows:

> *"It is not incompatible with EEA law for a passenger who sustains injury by driving (riding) voluntarily in a motor vehicle not be entitled to compensation unless there are special grounds for being so (entitled), if the passenger knew or must have known that the driver of the vehicle was under the influence of*

alcohol at the time of the accident and there was a causal link between the influence of alcohol and the injury."

The EFTA Surveillance Authority

101 With respect to the argument that the national rule in question concerns only liability and therefore falls outside the scope of the Directives, the EFTA Surveillance Authority is of the opinion that the qualification of the rule in question cannot preclude an examination as to whether the rule is compatible with the Directives. Referring to the case law of the ECJ,[41] the EFTA Surveillance Authority states that the applicability of the Directives cannot vary in function from the qualification of the rules made in the different national legal orders.

102 Concerning the interpretation of Article 2(1) of the Second Motor Insurance Directive, which permits exclusion provisions for passengers in stolen cars, the EFTA Surveillance Authority doubts whether an exhaustive interpretation of this provision is proper. The rule concerning insurance cover of all passengers was introduced with the Third Motor Insurance Directive in 1990. Thus, passenger exclusion clauses could be assumed to have been lawful before and thus not barred by any exhaustive enumeration of exclusion clauses made by the Second Motor Insurance Directive, which was adopted just prior to 1984.

103 However, it follows from the *Bernáldez* judgment[42] of the ECJ that the Directive must be interpreted in the light of the aim of ensuring protection for the victims and that this aim leads to a wide interpretation of the provisions of the Directives. Such a wide interpretation may result in the setting-aside of national provisions, even though they are not explicitly envisaged by the Directives, when they run counter to the aim of the Directives. The judgment shows that the victim should not bear the risk for matters which lay with the driver.

104 Therefore, Article 3(1) of the First Motor Insurance Directive, seen in the light of Article 1 of the Third Motor Insurance Directive and Article 2(1) of the Second Motor Insurance Directive, must be interpreted so as to preclude a national rule such as the one in question.

105 However, the *Bernáldez* ruling does not exclude other types of limitations, such as a rule on contributory negligence.

106 The national rule in question goes clearly beyond being a normal rule on contributory negligence and includes other policy considerations. This is confirmed in a ruling of the Høyesterett, in which it is said that the national rule

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41 Case C-20/92 *Anthony Hubbard* v *Peter Hamburger* [1993] I-3777 and Case 82/71 *Pubblico Ministero della Repubblica Italiana* v *Società Agricola Industria Latte* (SAIL) [1972] ECR 119.

42 See footnote 13.

is "first and foremost anchored in considerations of criminal and alcohol policy".[43] Therefore, it will have the effect of hindering the free movement of vehicles in the European Economic Area and the protection of victims of road traffic accidents, by limiting payment of compensation to third-party victims of road traffic accidents to certain types of damage.

107 The EFTA Surveillance Authority proposes that question be answered as follows:

> *"The Motor Insurance Directives and in particular Article 3(1) of Directive 72/166/EEC, seen in the light of Article 1(1) of Directive 90/232/EEC and Article 2(1)of Directive 84/5/EEC, must be interpreted so as to preclude a national rule according to which there is no obligation for the insurer to pay compensation to the passenger who sustains injury, unless there are special grounds for doing so, if the passenger knew or must have known that the driver of the motor vehicle was under the influence of alcohol at the time of the accident and there was a causal link between the influence of alcohol and the injury."*

The Commission of the European Communities

108 The Commission of the European Communities, referring to the Motor Insurance Directives and their preambles, notes that the Directives established the principle of compulsory cover in return for a single premium in the field of insurance against civil liability resulting from the movement of automotive vehicles. The First Motor Insurance Directive introduces a system of compulsory third-party liability insurance throughout the Community. The basic protection provided for was extended and strengthened by the Second and Third Motor Insurance Directives.

109 Nevertheless, the Motor Insurance Directives do not contain any total harmonization measures concerning the level of compensation granted to victims and they do not abolish all differences between national requirements, except insofar as those differences impede the free movement of persons and vehicles within the Community.

110 Neither the wording of Article 2(1) of the Second Motor Insurance Directive nor the wording of Article 1 of the Third Motor Insurance Directive deals with clauses or provisions concerning the barring of a victim from compensation from the insurance company if the victim knew or should have known that the driver of the motor vehicle that caused the damage was under the influence of alcohol at the time of the accident and there was a causal link between the influence of alcohol and the injury.

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43 *Retstidende*, 1997, p. 149.

111 In the opinion of the Commission, Article 3(1) of the First Motor Insurance Directive, as developed and supplemented by the Second and Third Motor Insurance Directives, should be interpreted as meaning that compulsory motor insurance must enable third-party victims of accidents caused by vehicles to be compensated for all the damage to property and personal injuries sustained by them, to at least the amounts fixed in Article 1(2) of the Second Motor Insurance Directive. Any other interpretation would deprive Article 3 (1) of the First Motor Insurance Directive of its effectiveness and would also be contrary to the purpose of the Directives, which is to ensure comparable treatment of victims irrespective of where the accident occurred.

112 It follows from the whole rationale of the Motor Insurance Directives, which intend to ensure maximum protection to victims of car accidents, that compensation to the victim to the extent of the real and effective damages incurred should be guaranteed in all cases of accidents. It follows from Article 1 of the Third Motor Insurance Directive that these principles apply to all passengers other than the driver.

113 However, Article 3(1) of the First Motor Insurance Directive does not preclude statutory provisions or contractual clauses which allow the insurer to claim against the insured with a view to recovering the sums paid to the victim of a road traffic accident caused by an intoxicated driver.

114 Reference is also made to the seventh recital of the Second Motor Insurance Directive, which states that "it is in the interest of victims that the effects of certain exclusion clauses be limited to the relationship between the insurer and the person responsible for the accident". Also in the case of a stolen vehicle, even if compensation is not payable by the insurer, compensation must be provided by the guarantee fund provided for in Article 1(4) of the Second Motor Insurance Directive.

115 Therefore, the Commission is of the opinion that the possibility of application of exclusion clauses provided for in Article 2 of the Second Motor Insurance Directive must be interpreted restrictively and must be allowed only in the few and specific circumstances provided for in that Article. The Norwegian legislation falls outside the scope of that derogation and should therefore be considered contrary to the Motor Insurance Directives. In the opinion of the Commission, the ECJ has already confirmed this approach in the *Bernáldez* judgment.

116 The Commission proposes that the question be answered as follows:

> *"The Motor Insurance Directives and in particular Article 1 of Directive 90/232/EEC and Article 2(1) of Directive 84/5/EEC, must be interpreted as precluding a national statutory provision according to which, unless there are special grounds for doing so, there is no obligation for the insurer to pay compensation to a passenger who sustains injuries, if the passenger knew or*

should have known that the driver of the vehicle was under the influence of alcohol at the time of the accident."

Carl Baudenbacher
Judge-Rapporteur