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CONSULTATIVE DOCUMENT

CONSULTATION PAPER

on the Compensation of victims of Cross-Border Road Traffic Accidents
in the European Union

1. INTRODUCTION

According to the current rules contained in Regulation (EC) 864/2007, also known as 'Rome II', the law applicable to claims arising from cross-border road traffic accidents is the law of the country where the damage occurs (Art 4.1). However, in cases where the parties involved in the road traffic accident come from the same country, the law of that country shall apply (Art 4.2). Also if all circumstances of the case are more related with another country than the one where the accident took place, the law of the former shall apply (Art 4.3).

This means for people involved in a road traffic accident in a Member State other than the Member State of their habitual residence (the so-called visiting victims under the 4th Motor Insurance Directive 2000/26/EC) that they are, except for cases caught by the afore-mentioned exemptions, confronted with the application of foreign law both with regard to the award of compensation and to the limitation period relevant for the processing of the claim.

The aim of this consultation is to obtain the views of all interested parties on the effects of application of foreign law to claims arising from cross-border road traffic accidents. The main concerns expressed by some in this respect are the risk of unexpectedly low compensation awards as well as the risk of "early" expiry of the limitation period applicable under foreign law.

To that end a description of the main problem areas along with a series of policy options, both based on the "*ROME II study on compensation of cross-border victims in the EU*" conducted for the European Commission by DBB Law and published on 29 January 2009 on the web-site of DG Internal Market and Services (hereinafter the "Study"), are provided below in sections 2.1. and 2.2. of the present paper.

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Commission européenne, B-1049 Bruxelles / Europese Commissie, B-1049 Brussel - Belgium. Telephone: (32-2) 299 11 11.

Office: SPA 2 02/041. Telephone: direct line (32-2) 295 62 59. Fax: (32-2) 299 30 75.

http://ec.europa.eu/internal_market/

E-mail: Robert.MULAC@ec.europa.eu

In addressing these policy options, please be as specific as possible. Please send your response to the following email address: MARKT-H2@ec.europa.eu. The comments received will be used in accordance with the privacy statement. The deadline for submitting responses is 29 May 2009. Comments received after that deadline will be processed on a best effort basis.

2. ISSUES TO BE ADDRESSED

2.1. Compensation awards

The Study has confirmed that Member States apply different concepts as regards liability for damages and injuries in relation to road traffic accidents. Liability can be strict, fault based, or a mix between the two and it also very often depends on the category of the victim as to which of the liability forms applies, e.g. strict liability is applied for damages caused to pedestrians whilst fault based when two vehicles collide.

Similarly divergent are Member States' compensation rules governing both the type of damages eligible for compensation and the way these damages shall be quantified. For instance some injuries and damages such as whiplash, moral damage caused to relatives in the event of fatal accidents or spoiled holidays are not recognized in some Member States as losses that can be compensated. As regards the quantification of damages, the way compensation for pain and suffering and the loss of earnings is calculated and paid out - either lump sums with discount rates or annuities based on diverging mortality tables- is also very different from Member State to Member State. Not unimportant is the role national social security schemes play within the settlement of claims, especially when it comes to the question at what stage of the compensation procedure and to what extent they intervene.

The Study clearly illustrates that due to the above differences in national liability and compensation rules, visiting victims may very well enjoy different treatment in different Member States, always depending on the law of and practices in the country where the accident took place. However, to show precisely the general levels of compensation in each Member State is rather difficult according to the Study. It is suggested that one cannot say that in general any one country compensates at a higher level than another since for instance some countries award more compensation for "death" whilst others have higher levels of compensation for non death losses (leg amputation etc.). It also seems that in countries where no exact guidance or even binding rules on compensation awards exist, such as tables for the assessment of personal injuries, significant differences in compensation awards may exist even at national level. On the other hand in those countries where such guidance or rules are applied, this would seem to result in a rather rigid approach to compensation of victims since there is relatively little room for taking into account the circumstances of each individual case.

Since no reliable records of the number of victims relying on the application of foreign law exist, there are only estimates ranging from 1 to 7.5% of all road traffic accident victims. However, it is clear that not all accidents involving visiting parties belong to the above category. Indeed, a certain percentage of visiting victims will be cross-border workers or commuters. These categories of victims are very often protected under labour laws, special insurance schemes and/or their contract with their employer. Furthermore, many visiting parties travel with tour operators and are covered by additional insurance products where the issue of claims settlement is a contractual one and the law of the country of the accident does not necessarily apply. The study suggests that this must be

taken into account when considering the number of people running the risk of unexpectedly low compensation or early expiry of the limitation period.

In the light of the above, several potential policy options have been identified on which we would like to receive your opinion. Please identify your preferred option (s) and explain the reasons for your preference as well the advantages of your preferred option compared to others. Any other suggestions are of course welcome.

2.1.1. Policy options

Option 1

Await the results and impact of application of the ROME II Regulation (EC) 864/2007 which came into force on 11 January 2009 and which in recital 29a) calls upon the Member States to apply the "restitutio in integrum" principle:

"According to the current national rules on compensation awarded to victims of road traffic accidents, when quantifying damages for personal injury in cases in which the accident takes place in a State other than that of the habitual residence of the victim, the court seized should take into account all the relevant actual circumstances of the specific victim, including in particular the actual losses and costs of after-care and medical attention.

Option 2

Provide better information to people in cross-border situations such as a standardized brochure explaining the main reasons for differences in compensation awards between the Member States and the possibilities or options that exist to reduce or eliminate the risk of unexpectedly low compensation. This brochure would be distributed via national channels such as motor insurers' bureaux, automobile clubs and victims' associations.

Option 3

Create European guidelines on the types of recognized compensation items and the way these should be calculated. These guidelines could be used, especially in jurisdictions with a great deal of judicial discretion in relation to assessment of damages, to assist judges in assessing damages and to move towards a more harmonized system in the long term.

Option 4

Set minimum EU standards for the types of recognized compensation items and the way these should be quantified. This solution would not prevent Member States from continued use of headings not caught by the minimum standards and therefore differences between compensation levels would remain.

Option 5

Create a table at the EU level detailing minimum awards per type of injury (compensation for pain and suffering). Compared to option 4, only one of the many damage award elements would be standardized.

Option 6

Apply the law of the country of the victim's residence "*lex damni*" to claims of visiting victims. This solution would provide the victim with compensation that is based on the practice in the victim's country of residence. However, in cases where several victims with different nationalities are involved in the same accident and the claim is settled collectively in the country of the accident, several foreign laws would have to be applied.

Option 7

Introduce a compulsory driver's insurance (the so-called first-party insurance) covering also passengers travelling in the vehicle. Drivers' policies appear to exist in most Member States and are sometimes even automatically included in third party liability insurance policies. The idea is to make this type of insurance compulsory. In order not to only address victims who are drivers, the scope of cover should be extended to all passengers travelling in the vehicle of the driver.

Option 8

Introduce a system EU wide whereby visiting victims would settle their claims with their own third-party liability motor insurer and, by applying the presumption that the accident took place in the victim's country of residence, receive compensation in accordance with the law of the country of their residence.

Such a system would require an agreement between insurers in order to determine apportionment of costs, and to allow effective settling of accounts. Systems for so-called direct settlement of claims already exist in many countries.

2.2. Limitation periods

The study shows that there are as many limitation period systems in the EU as there are Member States, mostly very complex ones, relying on many exceptions to the basic rules. The main differences between Member States relate to

- the event triggering the run of the limitation period,
- the events and circumstances that may suspend or interrupt the limitation period
- the length of the limitation period, very often depending on the type of damage and the category of the victim (special regimes applicable to disabled persons and minors)
- the existence of different limitation periods for actions in tort and in contract
- the discretion granted to the courts to extend the limitation period

The Study suggests that given the complexities of limitation periods in each Member State, it would not appear that visiting victims are more disadvantaged than resident victims when it comes to understanding how limitation periods apply. Both types of victims would seem to be depending on a professional advice to ensure that the limitation period in the specific case does not expire.

Even though the number of cross-border claims settled in court is rather low, the visiting victim's limited understanding of limitation periods in the Member State where the accident occurred may lead to the foreclosure of a right to claim. Visiting victims would

possibly lack the knowledge of the standard procedures and the authorities with whom they have to deal. The study claims that accident victims usually heavily rely in this respect on insurers, a fact that certainly raises the issue of conflict of interest.

Several policy options are listed below. Please identify your preferred option (s) and explain the reasons for your preference as well the advantages of your preferred option compared to others. It is evident that some of the options may be either applied simultaneously or combined with those relating to compensation awards. Therefore, please explain the interplay of your preferred options and their impact on the overall position of visiting victims. Any other suggestions are of course welcome.

2.2.1. Policy options

Option 1

Do nothing since the negative impact of the current system on visiting victims is not significant.

Option 2 (see Option 2 with regard to compensation awards)

Provide better information for people in cross-border situations such as a standardized brochure explaining the differences between limitation periods. This brochure would be distributed via national channels such as motor insurers' bureaux, automobile clubs and victims' associations.

Option 3

Make it compulsory for third party liability insurers and their claims representative appointed in accordance with Directive 2000/26/EC to inform claimants in cross-border cases about the applicable limitation period as well as related procedures, failing which responsibility might be established on the side of the insurer where the expiry of the limitation period leads to the foreclosure of the right to claim.

Option 4

Create a rule setting the time frame within which the claim must be presented by the visiting victim to the foreign liability insurer or its claims representative. This obligation would be complementary to the reasoned offer procedure stated in Directive 2000/26/EC.

Option 5

Increase the limitation period for visiting victims, by granting them additional time in order to reflect the fact that they have to organize their legal action from their country of residence. This option presumes partial harmonization of national civil laws.

Option 6

Create a rule according to which the limitation period is suspended as soon as the victim has sent a claim either to the liable party, to the insurance company of the liable party or to the national compensation body in cases where the vehicle was uninsured or unidentified. This option presumes partial harmonization of national civil laws.

Option 7

Introduce a general European regulation on limitation periods that would provide for a harmonized legal framework and which would deal with all important elements of limitation periods (starting date, suspension and interruption, length, rules for disabled and minors).

Option 8 (see Option 6 with regard to compensation awards)

Apply the limitation period according to the law of the country of the visiting victim's place of residence.

Option 9 (see Option 8 with regard to compensation awards)

Introduce a system EU wide whereby visiting victims would settle their claims with their own third-party liability motor insurer and, by applying the presumption that the accident took place in the victim's country of residence, the limitation period set by the law of the country of the victim's residence would apply.