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Actio Directa as an Element of the Polish and European System of Protection of Victims of Traffic Accidents

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Abstract: Liability insurance involves a direct claim by the injured party against the insurer (*actio directa*). In the case of compulsory motor insurance, it is guaranteed not only by the Polish Civil Code, but also by EU directives (currently 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). Doubtful issues related to the application of this power have repeatedly been the subject of rulings by Polish courts and statements by the doctrine. The purpose of the article is to present the nature of the *actio directa* and selected problems related to the application of this entitlement in practice, in particular by presenting the jurisprudence of Polish courts and the CJEU. At the same time, the article highlights the issues arising in the situation of the application of national civil liability provisions and harmonized provisions on compulsory motor vehicle insurance to this entitlement. One of the important problems is the difficulty in drawing clear boundaries between national, non-harmonized regulation, and European Union law. The research methodology used includes: analysis of the legal provisions, the caselaw of the Polish courts and CJEU as well as the views of the doctrine.

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1. *Actio Directa* in Polish Law and the Motor Insurance Directive (2009/103/EC)

Although the provisions concerning the insurance contract generally remain the subject of Polish national regulation and the contract is regulated in the Polish Civil Code,[1] in the case of motor vehicle liability insurance, the Polish legal regulation contained additionally in the special law on compulsory insurance[2] must also take into account Directive 2009/103/EC of the European Parliament and of the Council.[3]

Compulsory third-party motor vehicle liability insurance has been the subject of many court disputes over the years, as well as doubts regarding the correct interpretation and application of the provisions devoted to it, which have been resolved by the Supreme Court in many of its judgments. Polish courts have also repeatedly referred questions to the Court of Justice of the European Union for preliminary rulings in order to clarify doubts regarding the interpretation of EU motor insurance provisions. Among the controversial issues with which the Polish courts were confronted was the problem of adjusting the minimum guarantees (minimum amounts of cover) in order to achieve the appropriate level resulting from Directive 84/5[4] and the correctness of Poland's use of the transitional periods for achieving these minimum amounts.[5] Another issue requiring interpretation by the CJEU was the understanding of the concept of "use of the vehicle," which is crucial for compulsory motor vehicle owners' insurance.[6]

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1 Law of 23 April 1964 Civil Code (consolidated text: Journal of Laws of 2024, item 1061, as amended) – Civil Code.

2 Law of 22 May 2003 on compulsory insurance, the Insurance Guarantee Fund and the Polish Motor Insurers' Office (consolidated text: Journal of Laws of 2023, item 2500, as amended) – Law on Compulsory Insurance.

3 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 (codified version) (OJ L263, 7 October 2009), 11 – the Motor Vehicles Directive.

4 Second Council Directive of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (OJ L8, 11 January 1984), 17.

5 CJEU Judgment of 21 December 2021, A.K. v. Skarb Państwa, Case C-428/20, ECLI:EU:C:2021:1043.

6 CJEU Order of 29 October 2021, HG and TC v. Insurance Guarantee Fund, Case C-688/20, ECLI:EU:C:2021:897.

The case law of the Court of Justice issued as a result of the preliminary questions from the Polish courts also concerned the interpretation of Article 18 of Directive 2009/103, which regulates direct right of action, requiring Member States to ensure that the victim of an accident caused by an insured vehicle has a direct claim against the insurance company protecting the perpetrator of the accident with respect to civil liability.

This construction is known in Polish law as *actio directa* and is regulated both in the Civil Code (for all liability insurance) and in the Law on compulsory insurance (for compulsory liability insurance). The idea of a direct claim by the injured party against the insurer of the entity responsible for the damage is also widely known in Europe. In countries such as Sweden it was introduced as early as 1927 and in Norway in 1930. It is particularly common in the case of compulsory insurance.[7]

According to Article 822 § 4 of the Civil Code, a person entitled to compensation in connection with an event covered by a civil liability insurance contract may pursue a claim directly against the insurer. On the other hand, pursuant to Article 19(1) of the Law on Compulsory Insurance, an injured party in relation to an event covered by a compulsory liability insurance contract may pursue a claim directly against the insurance company; the insurance company shall immediately notify the insured of the claim. Further provisions of the Law provide for the possibility for the injured party to pursue a claim directly from the Insurance Guarantee Fund in certain cases (Article 19(2) of the Law on Compulsory Insurance) and from the Polish Motor Insurers' Office (Article 19(3) of the Law on Compulsory Insurance).

While the introduction in the Law of a specific regulation concerning the assertion of claims to the Insurance Guarantee Fund and the Polish Motor Insurers' Office is justified, the repetition of a regulation allowing

7 Olavi-Juri Luik and Janno Lahe, "Granting Direct Claim Rights in Voluntary Liability Insurance to the Aggrieved Person in Estonian Insurance Practice: Via Insurance Contract Vs Claim Assignment" (Conference paper, The 9th International Scientific Conference of the Faculty of Law of the University of Latvia, 2024), 196–206, https://doi.org/10.22364/iscflul.9.2.17; Bernard Tettamanti, Hubert Bär, and Jean-Claude Werz, "Compulsory Liability Insurance in a Changing Legal Environment – An Insurance and Reinsurance Perspective," in *Compulsory Liability Insurance from a European Perspective*, eds. Attila Fenyves et al. (Berlin: De Gruyter, 2016), 347.

the assertion of a claim against an insurance company is an unnecessary statutory *superfluum*.[8]

As indicated earlier, the claim is also directly provided for in the Motor insurance Directive. In addition, the importance of this claim is highlighted in the recitals of the Directive. According to recital 30,

> [t]he right to invoke the insurance contract and to claim against the insurance undertaking directly is of great importance for the protection of victims of motor vehicle accidents. In order to facilitate an efficient and speedy settlement of claims and to avoid as far as possible costly legal proceedings, a right of direct action against the insurance undertaking covering the person responsible against civil liability should be provided for victims of any motor vehicle accident.

2. Legal Nature of *Actio Directa* in Polish Law

The nature of *actio directa* is variously defined. In Polish law, the position has been formed that it is a specific entitlement which cannot be regarded as either a tort claim or a contractual claim. Although both Polish laws use the term "claim," it is, strictly speaking, a subjective right consisting of the right to demand performance from which claims flow.[9]

This position is also shared by the Polish Supreme Court (Sąd Najwyższy), holding that it is an independent substantive subjective right to which the injured party is entitled vis-à-vis the creditor in the event of the occurrence of an event covered by the insurance contract, containing both elements of a claim against the perpetrator of the damage and a claim to which the policyholder is entitled under the concluded contract of civil liability insurance.[10] The injured party's entitlement to the insurer arises only if the insured is liable for damages under separate legislation, either

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8 Marcin Krajewski, *Ubezpieczenie odpowiedzialności cywilnej według kodeksu cywilnego* (Warsaw: Wolters Kluwer Polska, 2011), 365–9; Dorota Maśniak, *Komentarz do ustawy: Ubezpieczenia obowiązkowe, Ubezpieczeniowy Fundusz Gwarancyjny, Polskie Biuro Ubezpieczycieli Komunikacyjnych* (Warsaw: C.H. Beck, 2021), 1010, Legalis.

9 Aleksander Raczyński, *Sytuacja prawna poszkodowanego w ubezpieczeniu odpowiedzialności cywilnej* (Warsaw: C.H. Beck, 2010), 135–7; Eugeniusz Kowalewski, *Ubezpieczenie odpowiedzialności cywilnej: Funkcje i przemiany* (Toruń: Uniwersytet Mikołaja Kopernika, 1981), 128.

10 Judgment of the Supreme Court of 21 April 2023, II CSKP 1907/22, unreported.

contractual or tortious in nature, and the amount of damages depends on the amount of damages that the perpetrator of the damage is obliged to pay.

In the case of a compulsory motor insurance contract, the injured party may also claim compensation from the insurance company if the driver of the vehicle that caused the damage might not have been compensated himself. In accordance with Article 43 of the Law on Compulsory Insurance, the insurance company may seek reimbursement of compensation paid from the driver of a motor vehicle if the driver caused damage intentionally, while under the influence of alcohol or in the state of intoxication or after using narcotic drugs, psychotropic substances or substitute substances within the meaning of the provisions on counteracting drug addiction; took possession of a vehicle as a result of committing an offence; did not have the required authorization to drive a motor vehicle, with the exception of cases in which it was necessary to save human life or property or in the pursuit of a person immediately after committing an offence; fled from the scene of the event.

The introduction of the above-mentioned recourse (called "atypical recourse") against the wrongdoer constitutes a sanction against the driver of the vehicle and has a repressive and preventive function.[11] Above all, however, atypical recourse in compulsory insurance (including motor insurance) allows compensation to be paid to the injured party because of the need to protect his interest when the perpetrator of the damage does not deserve protection.[12]

Despite the fact that the direct claim is an own subjective right of the claimant, it is linked to two other legal relationships: to the legal relationship of insurance between the insurer and the policyholder and to the legal relationship of damages linking the injured party to the insured. In the case of the first link, the literature speaks of the accessory nature of the own

[11] Dorota Maśniak, "Komentarz do niektórych przepisów ustawy o ubezpieczeniach obowiązkowych, Ubezpieczeniowym Funduszu Gwarancyjnym i Polskim Biurze Ubezpieczycieli Komunikacyjnych," in *Kontrakty na rynku ubezpieczeń. Komentarz do przepisów i warunków ubezpieczenia*, eds. Jakub Nawracała and Dorota Maśniak (Warsaw: Wolters Kluwer Polska, 2020), art. 43, Nt I.2, LEX/el.

[12] Marcin Orlicki, *Ubezpieczenia obowiązkowe* (Warsaw: Wolters Kluwer, 2011), 411; Jacek Pokrzywniak, "Kilka uwag o regresie nietypowym w ubezpieczeniu OC posiadaczy pojazdów mechanicznych," in *Aktualne problemy ubezpieczeń komunikacyjnych*, ed. Andrzej Koch (Warsaw: C.H. Beck, 2008), 56–7.

right, while in the context of the second link it speaks of the accessory nature of the insurer's liability. However, since the *actio directa* is self-contained and is its own subjective right – from its inception it exists and is exercised independently of the insured's claim against the insurer.[13]

It is recognized that, in the case of *actio directa*, for the determination of the relationship between the insurer and the injured party, the provisions of insurance and the provisions of civil law (the Polish Civil Code) on liability for damages must be taken into account. Despite the fact that the injured party has two claims, they cannot obtain two damages. Claims against the injury case and the insurer exist until one of them is completely satisfied. The injured party may, at his or her option, direct his or her claim against the insured, or the insurer, or both entities at the same time (liability *in solidum*).[14]

3. Person Entitled to a Direct Claim

The Law on Compulsory Insurance provides that the possibility of pursuing claims directly against the insurance company is available to "the injured party in connection with an event covered by the compulsory liability insurance contract" (Article 19(1) of the Law). The Civil Code, on the other hand, refers to "the person entitled to compensation in connection with an event covered by a civil liability insurance contract" (Article 822 § 4 of the Civil Code). The regulation of the direct claim in the Civil Code refers to an earlier paragraph of the same article, which explains the essence of liability insurance as insurance in which the insurer undertakes to pay compensation for damage caused to third parties for whom the insurer or the insured is liable.

Despite these differences in the wording of the above-cited regulations, it can be assumed that the terms used are equivalent.[15] The wording used

[13] Aleksander Raczyński, in *Kodeks cywilny. Tom III. Komentarz. Art. 627–1088*, ed. Maciej Gutowski (Warsaw: C.H. Beck, 2022), art. 822, Nb 5 and 7, Legalis.

[14] Judgment of the Supreme Court of 19 October 2011, II CSK 86/11, OSNC 2012, no. 4, item 55.

[15] Małgorzata Serwach, "Komentarz do ustawy o ubezpieczeniach obowiązkowych, Ubezpieczeniowym Funduszu Gwarancyjnym i Polskim Biurze Ubezpieczycieli Komunikacyjnych," in *Prawo ubezpieczeń gospodarczych. Komentarz*, vol. 1, *Komentarz do przepisów prawnych o funkcjonowaniu rynku ubezpieczeń*, eds. Zdzisław Brodecki et al. (Warsaw: Wolters Kluwer Polska, 2010), Article 19, Nt 3.

in the Law on Compulsory Insurance is closer to that of the Motor Vehicles Directive. Article 18 of the Directive instructs Member States to ensure that a direct claim against the insurance company is available to "the victim of an accident caused by a vehicle."

In relation to the Civil Code, it has also been considered whether a "third party" within the meaning of this provision is only a person outside the insurance relationship, or whether this should also be understood as a person who is jointly covered by the same insurance. In more recent literature, the second view prevails.[16] The interpretation of the concept of "third party" has also been the subject of a number of court decisions, most of which have concerned compulsory insurance against civil liability in respect of the use of motor vehicles. Initially, although the right to compensation for personal injury caused by the driver of the vehicle was sometimes granted to any passenger, including a close relative who was a co-owner of the vehicle,[17] the Supreme Court generally held that the injured co-owner of the vehicle (including in particular the spouse and the partner of a civil partnership) could not be considered a third party, since his/her liability was also covered by the civil liability insurance contract. Consequently, the insurer was not liable to such a person either for damage to property or for personal injury.[18]

It was not until the 2008 resolution of the Supreme Court that a different interpretation of the provisions was included, resolving the discrepancy appearing in the case law,[19] and was significantly influenced by the content of the motor vehicles directives. The Supreme Court accepted that the insurer bears the guarantee liability under the contract of compulsory motor

16 Raczyński, in *Kodeks cywilny*, Article 822, Nb 2 and the literature cited therein.

17 Judgment of the Supreme Court of 26 July 2001, II CKN 72/99, "Izba Cywilna" 2002, no. 1, p. 53; Judgment of the Supreme Court of 5 September 2003, II CKN 454/01, "Izba Cywilna" 2004, no. 6, p. 41; Resolution of the Supreme Court of 19 January 2007, III CZP 146/06, OSNC 2007, no. 11, item 161.

18 Judgment of the Supreme Court of 10 January 1963, 3 CR 111/62, OSPiKA 1964, no. 3, item 39; Resolution of the Supreme Court of 29 November 1996, III CZP 118/96, OSNC 1997, no. 3, item 26; Judgment of the Supreme Court of 14 September 2000, V CKN 113/00, OSNC 2001, no. 6, item 85; Judgment of the Supreme Court of 15 April 2004, IV CK 232/03; Decision of the Supreme Court(7) of 12 January 2006, III CZP 81/05.

19 Resolution of the Supreme Court (7) of 7 February 2008, III CZP 115/07, OSNC 2008, no. 9, item 96.

insurance for personal injury caused by the driver of a vehicle, including a passenger who is a co-owner of the vehicle together with the driver.

In its argumentation, the Supreme Court referred to the regulation of Article 822 of the Civil Code and – above all – to the provisions of the Law on Compulsory Insurance, constituting *lex specialis* in relation to the Code, including in particular the principle that insurance against civil liability in respect of the use of motor vehicles covers civil liability of any person who, while driving a motor vehicle during the period of insurance liability, caused damage in connection with the movement of that vehicle (Article 35 of the Law), regardless of whether that person was also the holder or co-holder of the vehicle. An exception, constituting a limitation of this liability, is found in Article 38(1) of the Law, where damage caused by the driver to the holder or co-holder of the motor vehicle is expressly excluded, but only to the extent of damage consisting of damage to, destruction of or loss of property. There are, therefore, no grounds to extend this exception to personal injury. The Supreme Court also referred explicitly to the Second Directive 84/5[20] and Third Directive 90/232[21] of the Council of the European Union, recalling that Article 1 of the Third Directive prescribes the coverage of liability insurance for personal injuries to all passengers other than the driver, while Article 3 of the Second Directive, provides that family members of any person who is liable for damage covered by liability insurance relating to the use of motor vehicles may not be excluded from the benefit of the insurance. The Court of First Instance also emphasized that, as one of the objectives of that Directive, it was stated that the family of the insured person, the driver or any other person liable for damage arising out of the use of vehicles should be afforded protection comparable to that of other third parties, at least as regards personal injuries.[22]

The Directive and the case law of the Court of Justice of the European Union were also referred to by the Insurance Ombudsman (Rzecznik

[20] Directive 84/5/EEC of 30 December 1983 (OJ L8, 11 January 1984), item 17, as amended.

[21] Directive 90/232/EEC of 14 May 1990 (OJ L129, 19 May 1990), item 33, as amended.

[22] Reasons for the Supreme Court (7) Resolution of 7 February 2008, III CZP 115/07, OSNC 2008, no. 9, item 96.

Ubezpieczonych)[23] when applying to the Supreme Court for the adoption of the resolution in the case discussed above.[24] The Insurance Ombudsman pointed in particular to the ruling in Case C-348/98,[25] which states that Article 3 of the Second Council Directive requires compulsory insurance against civil liability in respect of the use of motor vehicles to cover personal injuries to passengers who are members of the family of the insured person, of the driver of the vehicle or of any other person who incurs civil liability for an accident and whose liability is covered by compulsory motor-vehicle insurance, where those passengers are carried free of charge, whether or not there is any fault on the part of the driver of the vehicle which caused the accident, only if the domestic law of the Member State concerned requires such cover in respect of personal injuries caused in the same conditions to other third-party passengers.

The Supreme Court, in issuing its resolution, noted that the Second and Third Directive extend the insurer's liability to the general rules of civil liability for personal injury,[26] sharing the position in the Insurance Ombudsman's proposal.

How the notions of third party and injured party in civil liability insurance are understood clearly affects the scope of persons entitled to *actio directa*. The position finally adopted in the jurisprudence of Polish courts is in line with the decisions of the Court of Justice of the European Union concerning the issue of whether the injured party may be at the same time the policyholder. In its case law, the ECJ has confirmed on several occasions that

> the insurance against civil liability in respect of the use of motor vehicles referred to in Article 3(1) of First Directive 72/166 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles must cover all the victims other than the driver

[23] A Polish body tasked with supporting insurers' customers, replaced by the Financial Ombudsman (Rzecznik Finansowy) from 2015.

[24] Proposal available at: https://rf.gov.pl/dla-klientow/wnioski-o-uchwale-sadu-najwyzszego/, accessed March 29, 2025.

[25] CJEU Judgment of 14 September 2000, Vitor Manuel Mendes Ferreira and Maria Clara Delgado Correia Ferreira v. Companhia de Seguros Mundial Confianca SA, Case C-348/98, ECLI:EU:C:2000:442.

[26] Ibid.

of the vehicle that caused the damage or injury, unless one of the exceptions expressly provided for by the First, Second or Third Directives applies.[27]

These exceptions include, in particular, the possibility of refusing to pay compensation to persons who voluntarily occupy a seat in the vehicle that caused the damage if the insurance company proves that they knew that the vehicle was stolen.[28]

Thus, the reference to the regulations of the Directives and the ECJ case law allowed the resolution of an issue that had remained controversial in Polish jurisprudence for years.

4. The Manner of Redress and the Extent of Damages That Can Be Claimed from the Insurer under a Direct Claim

Another issue that has been causing doubts in the practice of the application of motor vehicle liability insurance regulations in Poland for years is the way in which the damage caused to the injured party is compensated, with the compensation usually being paid directly by the insurer under the *actio directa* construction.

The main issue is the question of whether it is permissible to determine the compensation as equivalent to the hypothetical costs of restoring the vehicle to its previous condition in those situations where, even before the amount of compensation was determined, the vehicle was sold without being repaired, as well as when the victim made such repairs himself. This method of settling damages is referred to as monetary restitution. In this context, we refer to the cost method of determining the amount of damage.

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27 Vadim Mantrov, "Clarifying the Concept of Victim in the Motor Vehicle Drivers' Liability Insurance: the ECJ's Judgement in Case C-442/10," *European Journal of Risk Regulation* 3, no. 2 (2012): 257–60, http://www.jstor.org/stable/24323225; CJEU Judgement of 1 December 2011, Churchill Insurance Company Limited v. Benjamin Wilkinson and Tracy Evans v. Equity Claims Limited, Case C-442/10, ECLI:EU:C:2011:799; CJEU Judgment of 30 June 2005, Katja Candolin, Jari-Antero Viljaniemi and Veli-Matti Paananen v. Vahinkovakuutusosakeyhtiö Pohjola and Jarno Ruokoranta, Case C-537/03, ECLI:EU:C:2005:417; CJEU Judgment of 19 April 2007, Elaine Farrell v. Alan Whitty and Others, Case C-356/05, ECLI:EU:C:2007:229.

28 Article 2(1) of the Second Directive and Article 13(1) of Directive 2009/103/EC.

As a matter of principle, in the case of insurance against civil liability – including compulsory insurance for motor vehicle owners – the general provisions on liability for damages contained in the Polish Civil Code apply. These are, firstly, Article 361 of the Civil Code, indicating that a person obliged to pay damages shall only be liable for ordinary effects of an action or omission which the damage resulted from. Within the above-mentioned limits, in the absence of a different statutory or contractual provision, the redress of damage shall involve losses which the injured party has suffered as well as profits which it could have obtained, if no damage were inflicted. The regulation of the method of redress of damage is contained in Article 363 of the Civil Code, according to which the redress of damage shall come into being according to the injured party's choice either by the restoration of the former state or by the payment of an adequate sum of money. However, if the restoration of the former state was proved impossible or if it entailed excessive difficulties or expenses to the obliged party, a claim of the injured party shall be limited to pecuniary performance.

The latter provision is central to the issue under consideration. It should be noted that it does not provide for such a way of repairing the damage, which consists in paying an amount corresponding to the costs of restoring the previous state of affairs. However, Polish courts have for many years allowed such a method of repairing damage in the case of motor liability insurance. The line of jurisprudence allowing the cost method of determining damage and monetary restitution dates back to the 1960s and 1970s.[29] It was consolidated later in a number of Supreme Court decisions.[30] It is mainly based on the assumption that the damage arises at the moment of the traffic accident and also the obligation to compensate the damage by paying an appropriate monetary sum arises at the moment of the damage and does not depend on whether the injured party has repaired the vehicle

[29] Judgment of the Supreme Court of 1 September 1970, II CR 371/70, OSNC 1971, no. 5, item 93; Judgment of the Supreme Court of 27 June 1988, I CR 151/88.

[30] Judgment of the Supreme Court of 11 June 2001, V CKN 266/00; Resolution of the Supreme Court of 15 November 2001, III CZP 68/01, OSNC 2002, no. 6, item 74; Judgment of the Supreme Court of 8 March 2018, II CNP 32/17; Decision of the Supreme Court of 7 December 2018, III CZP 51/18, OSNC 2019, no. 9, item 94; Judgment of the Supreme Court of 3 April 2019, II CSK 100/18; Judgment of the Supreme Court of 20 October 2021, I NSNc 150/20; Judgment of the Supreme Court of 16 December 2021, I NSNc 451/21; Judgment of the Supreme Court of 30 March 2022, I NSNc 184/21.

and whether he intends to repair it at all. This is because the purpose of compensation is to make up for the pecuniary loss caused by the event causing the damage, existing from the moment the damage is caused until the time when the obligor pays the injured party a sum of money corresponding to the damage as established by law. With this understanding of the damage and the duty to compensate, it is irrelevant at what cost the injured party has actually repaired the item and whether he/she has done so at all or intends to do so.[31]

In recent years, however, a second line of jurisprudence has emerged in the jurisprudence of the Supreme Court, which has questioned the legality of determining compensation on the basis of hypothetical repair costs.[32] Doubts were also expressed about this point in the doctrine. The circumstances in which the Supreme Court's judgment of 2 June 1988 was given were pointed out – due to the economic crisis at the time, there was a serious shortage of supplies in Poland and spare parts were difficult to obtain. Therefore, the injured party could not always be expected to repair their vehicle. It was also pointed out that the Polish Civil Code does not provide for monetary restitution and that there are no grounds for compensation for damages of a hypothetical nature. An important argument put forward repeatedly by the opponents of monetary restitution is that setting compensation at the level of repair costs not incurred often leads to making money out of the damage, as the amount calculated in this way turns out to be higher than the compensation determined by the differential method.[33]

The existence of two conflicting lines of jurisprudence prompted the Financial Ombudsman ("Rzecznik Finansowy") to ask the Supreme Court to resolve this legal issue. In a Resolution of 11 September 2024, the Supreme Court stated that if it has become impossible for the injured party to repair the vehicle, in particular if the vehicle is sold or repaired, it is

31 Cf. Justification of the Resolution of the Supreme Court of 15 November 2001, III CZP 68/01, OSNC 2002, no. 6, item 74.

32 Cf. Decision of the Supreme Court of 17 July 2020, V CNP 43/19; Decision of the Supreme Court of 11 September 2020, IV CNP 26/19; Judgment of the Supreme Court of 10 June 2021, IV CNPP 1/21, OSNC 2022, no. 3, item 33; Judgment of the Supreme Court of 8 December 2022, II CSKP 726/22, OSNC 2023, no. 6, item 62; Judgment of the Supreme Court of 15 December 2022, II CNPP 7/22.

33 Sandra Hadrowicz and Piotr Ratusznik, "O tak zwanej restytucji pieniężnej – przyczynek do rozważań na temat zakresu ochrony poszkodowanego," *Przegląd Sądowy*, no. 7–8 (2022): 78–99.

not justified to determine the amount of compensation under motor vehicle liability insurance as the equivalent of the hypothetical repair costs.[34] In justifying its resolution, the Supreme Court referred to previous case law, which took into account the concept of the dynamic nature of damage, according to which from the moment the damage occurs until the moment it is repaired, the form and size of the damage suffered may change. Above all, however, the Court emphasized that the use of the cost method could lead to the unjust enrichment of the injured party, *inter alia*, if he or she were to receive compensation in an amount exceeding the value of the funds actually spent on repairing the vehicle. In its reasoning, the Court further referred to the case law of the Court of Justice of the European Union, which has ordered national courts to ensure that the protection of rights guaranteed by the legal order of the European Union does not lead to the unjust enrichment of entitled persons: judgment of the CJEU of 25 March 2021, C-501/18, *Bt v. Balgarska Narodna Banka*, and judgment of the CJEU of 21 March 2023, C-100/21, *Qb v. Mercedes-Benz Group Ag, Anciennement Daimler Ag*.[35]

The above-mentioned resolution of the Supreme Court met with the approval of some doctrine representatives. It was pointed out that the amount needed to repair the vehicle is compensation, i.e. a way of repairing damage. Damage, on the other hand, is the deterioration or destruction of the vehicle. The extent of the insurer's liability changes, as does the extent of the offender's obligation to repair the damage. In other words, the same damage can be compensated in different ways. If the injured party has repaired the vehicle, the compensation should correspond to the cost of the repair; if, on the other hand, he has sold the vehicle, his loss will correspond to the difference in the price obtained. In both cases, the amount of compensation may differ from compensation calculated either as the hypothetical cost of repairing the thing or as the difference between the thing's actual value and its hypothetical value if the damage had not occurred. It was submitted that the latter two methods should be applied until the damage is repaired.[36]

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34 Resolution of the Supreme Court of 11 September 2024, III CZP 65/23.

35 Cf. the grounds for Resolution III CZP 65/23.

36 Jędrzej M. Kondek, "Odszkodowanie za szkodę w pojeździe mechanicznym w przypadku uprzedniego naprawienia tego pojazdu lub jego zbycia w stanie uszkodzonym. Glosa do

However, it is difficult to consider that the resolution in question actually resolved the doubts concerning the admissibility of the cost method of determining damages, since in a later judgment the Supreme Court still considered that no provision explicitly resolved the question of the admissibility of damages calculated by the cost method, and there are two well-argued possible interpretative options in current case law.[37]

Moreover, the question of the permissibility of calculating compensation on the basis of hypothetical repair costs for a vehicle, irrespective of whether the owner has repaired or intends to repair that vehicle, was one of the elements of the question referred by the Polish District Court for the City of Warsaw (*Sąd Rejonowy dla miasta stołecznego Warszawy*). In asking its question, the court expressly pointed out that compensation which takes into account such hypothetical repair costs, which far exceed the amount of the damage suffered determined on the basis of the differential method, is granted even to injured parties who have already sold their damaged vehicle and who, therefore, do not use that compensation to have the vehicle repaired. According to the referring court, that practice results in the unjustified enrichment of those persons, to the detriment of all other policyholders, to whom insurance undertakings pass on the cost of that excessive compensation, by requiring them to pay ever higher premiums.[38]

In its judgment, the Court of Justice ruled that Article 3 and Article 18 of Directive 2009/103/EC must be interpreted as not precluding national legislation which, in the event of a direct action, by the person whose vehicle has suffered damage as a result of a road traffic accident, against the insurer of the person responsible for that accident, provides that the sole means of obtaining redress from that insurer is by way of monetary compensation. At the same time, the Court of Justice held that those provisions must be regarded as precluding rules for the calculation of that compensation and conditions relating to its payment, in so far as they would have the effect, in the context of a direct action brought under Article 18,

uchwały siedmiu sędziów Sądu Najwyższego z 11 września 2024 r., III CZP 65/23," *Prawo Asekuracyjne* 4, no. 121 (2024): 90–100.

37 Cf. Justification of the Judgment of the Supreme Court of 12 September 2024, II CNPP 26/22.

38 CJEU Judgment of 30 March 2023, AR and Others v. PK SA and Others, Case C-618/21, ECLI:EU:C:2023:278, para. 13.

of excluding or limiting the insurer's obligation, under Article 3, to cover all the compensation which the person responsible for the damage must provide to the injured party in respect of the damage suffered by that party.

In its reasoning, the Court of Justice also emphasized – for the first time so clearly – the importance of the direct claim described in Article 18 of the Directive. The Court noted that, in so far as, by exercising his or her direct right of action against the insurer of the civil liability of the person responsible for the damage, the injured party requires the provision, to him or her, of the insurer's benefit provided for in the insurance contract, the payment of that benefit could be made subject only to the conditions expressly laid down in that contract.[39] In addition, the Court emphasized that in order to avoid undermining the effectiveness of the direct right of action provided for in Article 18 of Directive 2009/103, the conditions for the calculation of such monetary compensation cannot have the effect of excluding or limiting the insurer's obligation, under Article 3 of that directive, to cover in full the compensation which the person responsible for the damage must provide to the injured party in respect of the damage suffered by the latter.[40]

The above-mentioned judgment in *AR and Others* is read as an important ruling confirming that the direct right of action against an insurer is of fundamental concern to the protective and correct application of the Directive 2009/103.[41] Although the Court of Justice did not indicate in its ruling that the cost method is admissible,[42] the judgment in case C 618/21 is interpreted as confirming the correctness of the line of case law of the courts that allow the recovery of damages determined by the cost method. The injured party is not obliged to repair the vehicle and subsequent

39 Ibid., para. 46.

40 Ibid., para. 47.

41 James Marson and Katy Ferris, "Extra-Contractual Rules and Third-Party Rights of Direct Action: The Court of Justice Defines Claimants' Rights and Insurers' Obligations in Motor Vehicle Agreements," *European Law Review* 48, no. 4 (2023): 480–9.

42 Bartosz Kucharski, "Gloss to a Judgement of CJEU of 30th of March 2023, C-618/21 AR and Others Versus PK S.A. and Others," *Wiadomości Ubezpieczeniowe*, no. 1 (2024): 67; Marcin Orlicki, "Glosa do wyroku Trybunału Sprawiedliwości Unii Europejskiej (piąta izba) z dnia 30 marca 2023 r. (C-618/21) dotyczącego zakresu kompetencji ustawodawców krajowych w zakresie zasad prawa odszkodowawczego oraz ubezpieczenia odpowiedzialności cywilnej posiadaczy pojazdów mechanicznych," *Prawo Asekuracyjne* 1, no. 114 (2023): 87–8.

events, after the partial damage, are irrelevant. For this reason, it is possible to claim compensation within the *actio directa* in the amount corresponding to the necessary and economically justified costs of restoring the vehicle to its previous state, also in the event that the vehicle is sold in its damaged state or is previously repaired.[43]

5. Relationship between National and EU Rules in Motor Vehicle Insurance

The possibility for persons entitled to compensation to claim directly from the insurance company is one of the elements of the insurance system emphasizing the protection of victims of damage caused by the driver of a motor vehicle (in addition to, *inter alia*, the compulsory nature of this civil liability insurance, and the coverage of damage caused by any person driving a vehicle).[44]

As elements of insurance law and civil law converge in *actio directa* in the case of motor vehicle liability insurance, the necessity of applying a strictly national regulation (principles of liability for damages) together with the regulation covered by the Directive and interpreted by the Court of Justice of the European Union (principles of compulsory motor vehicle liability insurance) becomes apparent with this institution.

The relationship between national civil liability rules and the motor vehicle directives has, of course, been the subject of numerous rulings by the Court of Justice of the European Union. The Court pointed out that the Member States remain free to determine the civil liability regime applicable to damages resulting from the use of motor vehicles, as the directives do not aim to harmonize civil liability regimes. Nonetheless, the Member States have obligations under the Directives to ensure that civil liability under their national law is covered by insurance which complies with the provisions of the Motor Vehicle Directives, and national rules governing

43 The Financial Ombudsman's Request of 12 December 2023 for a Resolution by the Supreme Court, p. 32, accessed March 29, 2025, https://rf.gov.pl/wp-content/uploads/2024/04/Wniosek-RF-do-Sadu-Najwyzszego-grudzien-2023.pdf; Aleksandra Partyk, "Niemożność żądania od ubezpieczalni naprawienia auta zgodna z prawem UE. Omówienie wyroku TS z dnia 30 marca 2023 r., C-618/21 (AR i in.)," LEX/el. (2023).

44 The Justification of the Supreme Court (7) Resolution of 7 February 2008, III CZP 115/07, OSNC 2008, no. 9, item 96.

the conditions of compensation for damage arising from the use of motor vehicles may not deprive the Directives of their effectiveness (*effet utile*).[45]

However, as countries have separate civil liability regimes, there are still differences in the practice of applying the liability regulations, which may affect the achievement of the fundamental objective of the EU Motor Insurance Directive,[46] which is that motor vehicle accident victims should be guaranteed comparable treatment irrespective of where in the Community accidents occur (recital 20 in the preamble) and ensure the free movement of vehicles normally based on EU territory and of persons travelling in those vehicles.[47] Another, separate, issue that may affect the achievement of the objectives of the Directive is also the problem of the implementation of the insurance obligation for motor insurance. No country manages to achieve full implementation of this obligation. Different European countries use different methods to deal with these problems.[48] At the same time, another objective of the directives is to protect that particularly vulnerable category of potential victims who are motor vehicle passengers by filling the gaps in the compulsory insurance cover of those passengers in certain Member States.[49]

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45 CJEU Judgment of 14 September 2000, Vitor Manuel Mendes Ferreira and Maria Clara Delgado Correia Ferreira v. Companhia de Seguros Mundial Confianca SA, Case C-348/98, ECLI:EU:C:2000:442; CJEU Judgment of 19 April 2007, Elaine Farrell v. Alan Whitty, Minister for the Environment, Ireland, Attorney General and Motor Insurers Bureau of Ireland (MIBI), Case C-356/05, ECLI:EU:C:2007:229; CJEU Judgment of 30 June 2005, Katja Candolin, Jari-Antero Viljaniemi and Veli-Matti Paananen v. Vahinkovakuutusosakeyhtiö Pohjola and Jarno Ruokoranta, Case C-537/03, ECLI:EU:C:2005:417.

46 Vadim Mantrov, "Is 142 Euro Equal to 350,000 Euro? The CJEU Interpretation of 'Personal Injury' and 'Injured Party' in EU Motor Insurance Law," *European Journal of Risk Regulation* 5, no. 3 (2014): 405–6, http://www.jstor.org/stable/24323470.

47 CJEU Judgment of 28 March 1996, Criminal proceedings against Rafael Ruiz Bernáldez, Case C-129/94, ECLI:EU:C:1996:143, para. 13; CJEU Judgment of 30 June 2005, Katja Candolin, Jari-Antero Viljaniemi and Veli-Matti Paananen v. Vahinkovakuutusosakeyhtiö Pohjola and Jarno Ruokoranta, Case C-537/03, ECLI:EU:C:2005:417, para. 17.

48 Jeff De Mot and Michael G. Faure, "Special Insurance Systems for Motor Vehicle Liability," *The Geneva Papers on Risk and Insurance – Issues and Practice* 39 (2014): 569–84, https://doi.org/10.1057/gpp.2014.23.

49 CJEU Judgment of 1 December 2011, Churchill Insurance Company Limited v. Benjamin Wilkinson and Tracy Evans v. Equity Claims Limited, Case C-442/10, ECLI:EU:C:2011:799; CJEU Judgment of 19 April 2007, Elaine Farrell v. Alan Whitty and Others, Case C-356/05, ECLI:EU:C:2007:229.

Sometimes the boundary between the provisions of a Directive and the interpretation of European Union law and the strictly national provisions and interpretation of national law governing liability for damages may be difficult to draw, as the example of the judgment in Case C-618/21 shows. Following the submission of the reference for a preliminary ruling, one of the parties, in its submissions, sought a refusal to give a preliminary ruling on the ground that the questions referred for a preliminary ruling in its view, in fact, concerned the undermining of the rules laid down in Polish law governing compensation for damage arising from the use of motor vehicles under civil liability insurance.[50]

The need for the simultaneous application of EU motor vehicle directives and national liability for damages rules may lead to special treatment for victims of motor vehicle accidents, different from victims who have been injured in other circumstances. In Poland, this is visible in the case of co-insured victims, who under the general regulation of the Civil Code would be unlikely to be recognized as third parties who can claim compensation for damage caused by another co-insured. Another example is the authorization of the use of the cost method of determining compensation and monetary restitution in motor insurance, which often leads to the determination of a higher compensation than the actual damage suffered. This constitutes a violation of the basic principles of civil law on liability for damages, from which it follows that compensation must not lead to the enrichment of the injured party. This different treatment was, however, already practiced before Poland's membership of the European Union, on the basis of specific national rules on compulsory insurance and the practice developed by the courts. Particularly in the latter case, it is indeed a matter of national law and not of European Union law.

[50] CJEU Judgment of 30 March 2023, AR and Others v. PK SA and Others, Case C-618/21, ECLI:EU:C:2023:278, para. 21.

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