

CONTRACT
ETD/2007/IM/H2/116

IMPLEMENTED BY



DEMOLIN, BRULARD, BARTHELEMY
- HOICHE -

FOR



COMMISSION EUROPEENNE
- DG FOR INTERNAL
MARKET AND SERVICES -

**COMPENSATION OF VICTIMS OF CROSS-BORDER ROAD
TRAFFIC ACCIDENTS IN THE EU: COMPARISON OF
NATIONAL PRACTICES, ANALYSIS OF PROBLEMS AND
EVALUATION OF OPTIONS FOR IMPROVING THE
POSITION OF CROSS-BORDER VICTIMS**

- REPORT -

Submitted by Jean Albert, Team Leader

TABLE OF CONTENTS

GLOSSARY	13
PRELIMINARY NOTE	20
PRESENTATION OF THE STUDY AND METHODOLOGY.....	23
REPORT	36
INTRODUCTION.....	37
EXECUTIVE SUMMARY.....	42
1 Background	42
1.1 The Motor Insurance Directives	42
1.2 Regulation (EC) N° 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II)	43
2 The main issues in terms of access to compensation (avoiding expiry of limitation period) for EU residents involved in road traffic accidents in a Member State other than the Member State of their habitual residence (“Visiting victims”).	44
2.1 Issues related to limitation periods.....	44
2.2 Distortions in levels of Compensation due to differences in limitation periods and procedures.....	45
2.3 Importance of the risk of distortion	45
2.4 Importance of the level of distortion	47
2.5 Difficulties encountered by Visiting Victims	47
2.6 Solutions to issues related to limitation periods.....	48
3 The main issues in terms of the level of compensation (risks of under-compensation or over-compensation) for EU residents involved in road traffic accidents in a Member State other than the Member State of their habitual residence.....	50
3.1 Distortions in levels of Compensation for damage to property	50
3.1.1 Claims amounts in the EU.....	50
3.1.2 Determination of compensation levels.....	51
3.1.3 Different types of losses taken into account.....	51
3.1.4 Risks of over or under compensation.....	52
3.2 Compensation for personal injury	52
3.3 General levels of compensation in the different EU countries.....	54
3.3.1 General differences in compensation practices	54
3.3.2 Some countries provide higher levels of compensation depending on the type of loss	56
3.3.3 Predictability and cross-border specificity	58
3.3.4 Increases in compensation levels over time.....	58

3.4	Solutions for issues relating to the level of compensation.....	58
4	Assessment of solutions.....	60
5	Road traffic accidents involving Visiting Victims.....	61
5.1	Gathering data on road traffic accidents.....	61
5.2	Narrowing down the numbers.....	66
5.3	The extent of the problem.....	67
6	Conclusions and recommendations.....	68
FINDINGS.....		71
1	Compensation Levels.....	71
1.1	Road traffic accidents involving Visiting Victims.....	71
1.1.1	Gathering data on road traffic accidents.....	71
1.1.2	Narrowing down the numbers.....	75
1.1.3	The extent of the problem.....	77
1.1.4	Avoiding under and over compensation or the expiry of limitation periods.....	78
1.2	The Green Card System.....	79
1.3	Levels of compensation in the different EU countries.....	80
1.3.1	General differences in compensation practices.....	80
1.3.2	Some countries provide higher levels of compensation depending on the type of loss.....	82
1.3.3	Predictability of compensation level.....	83
1.3.4	Cross-border specificity.....	85
1.3.5	Increases in compensation levels over time.....	86
2	Sources of distortions in compensation levels: compensation practice.....	86
2.1	Numerous Sources.....	86
2.2	The compensation system as a source of distortion.....	87
2.3	The courts' discretion: a source of distortion.....	88
2.3.1	The role of courts.....	88
2.3.2	The discretion exercised by judges and compensation levels.....	92
2.3.3	Marked differences in the level of discretion.....	92
2.3.4	The impact of courts on the recognition of losses.....	93
2.3.5	The impact of the recognition of losses on compensation levels.....	94
2.3.6	The difficulties that too great a discretion may create.....	94
2.3.7	The limitations on discretion and the resulting effect on differences between Member States.....	96
2.3.8	The solutions aimed at canalizing discretion.....	96
2.3.9	A solution that may create new problems.....	99

2.3.10	The difficulties that judges may experience when taking into account the victims' situation in their country of residence.....	99
2.4	The existence of different types of losses	100
2.4.1	Restitutio in integrum and losses	101
2.4.2	Restitutio in Integrum and lex loci	103
2.4.3	Types of damage taken into account.....	105
2.5	The existence of different types of methodologies to assess losses	107
2.5.1	Property damage	107
2.5.2	Personal injury Compensation calculation methods - capital v. periodic payments	109
2.6	The different parameters taken into account when calculating awards	116
2.7	The role of lawyers and academics.....	116
2.8	The role of medical expertise	117
2.8.1	Role of medical experts in evaluating and assessing non-economic losses .	118
2.9	The role of insurers	119
2.10	Insurers are one of the main sources of compensation.....	119
2.11	Taxation on compensation	120
2.12	Legal costs and practices	120
3	Compensation practices	120
3.1	Introduction.....	120
3.2	Multiple sources in all European countries	120
3.3	Multiple compensation systems	124
3.4	The “fault” systems	127
3.4.1	Common features in fault systems	127
3.4.2	Limitations of fault systems	128
3.4.3	Consequences of the limits of the fault system	129
3.5	The “no-fault” systems	130
3.5.1	The limits of no-fault systems.....	131
3.5.2	The social security and health care systems - sources of personal injury compensation.....	132
3.5.3	Guarantee Funds	133
3.5.4	Private insurance.....	134
3.5.5	Proceedings in Courts	138
3.6	Personal Injury	147
3.7	Economic losses for personal injury.....	147
3.7.1	Loss of income due to temporary/permanent incapacity to work	149

3.7.2	The temporary incapacity to work generally compensated on the basis of the actual earnings	150
3.7.3	Different types of compensation regarding permanent incapacity to work	152
3.7.4	Funeral expenses.....	155
3.8	Member States non economic losses in personal injury	157
3.8.1	Basic principles.....	157
3.8.2	Heads of recoverable non-economic losses: compensation under one single head of non-economic damage and compensation based on different sub-categories of non-economic loss	158
3.8.3	General compensation for medical expenses incurred by the victim	159
3.8.4	Damages awarded to third parties because of the victim's pain and suffering	180
3.9	Type of property damage taken into account (by insurance companies/courts in case of third party insurance coverage/in case of supplemental insurance policies)	183
3.9.1	Compensation for damage caused to the car and related expenses.....	183
3.9.2	Loss of income for third parties.....	189
3.10	Compensation levels (general and per type of personal injury/damage to property and in case of multiple victims by insurance companies/courts in case of third party insurance coverage/in case of supplemental insurance policies).....	190
3.11	Number of claims for compensation per annum (from 2002 to 2006).....	190
3.12	In which countries does application of the law lead to under-compensation for victims who are residents of your country?	190
3.13	Compensation levels for personal injury evolve over time	192
3.14	Difficulties in evaluating compensation levels accurately	192
3.15	For victims resident of which Member States would the application of your country's laws lead to under-compensation?	193
3.16	A case study to highlight the differences between Member States	195
3.16.1	Farandelle and Tartarin Case Study	196
3.16.2	The resulting compensation levels	202
3.17	Conclusions and recommendations	206
3.17.1	Conclusions.....	206
3.17.2	Recommendations.....	207
4	Limitation periods	213
4.1	Introduction	213

4.2	The table below provides the different main features of limitation periods in the EU.....	216
4.3	Interruption of limitation period: when is LP interrupted?.....	232
4.4	Interruption of limitation period: is the content of the claim important?...	236
4.5	Effect of interruption of the limitation period	238
4.6	Rules that may shorten limitation periods or end the right to make a claim	240
4.7	Limitation Periods on the right of the victim to claim from their own insurance company in case of the need to obtain compensation for damages not covered or compensation by third party	249
4.7.1	Limitation periods	250
4.7.2	Interruption of limitation period: when is LP interrupted?	254
4.8	Effect of interruption of the limitation period	255
4.9	Limitation periods for contracts	256
4.10	The effect of limitation periods in criminal cases on limitation periods in civil liability cases	257
4.11	Conflict of laws rules in respect of limitation periods	258
4.12	Evaluation of the number of claims that fail because of the limitation periods	258
4.13	Conclusions and recommendations.....	259
5	Assessment of solutions.....	261
5.1	Introduction.....	261
5.2	Presentation of the proposed solutions	262
5.2.1	The General Solutions are as follows:.....	262
5.2.2	Solutions tailored to issues pertaining to limitation periods (“Limitation Periods Solutions”)	262
5.2.3	Solutions tailored to issues pertaining to levels of compensation (“Compensation Solutions”).....	263
5.3	The goals pursued by each solution	266
5.4	Proportionality of solutions	276
5.5	Assessment of Solution 1: S1 - Do nothing (at the EU level).....	276
5.5.1	Issues and objectives	276
5.5.2	Impact on Visiting Victims	277
5.5.3	Impact on defendants	278
5.5.4	Impact on insurers and their customers	278
5.5.5	Impact on public health services	278
5.5.6	Impact on the taxpayer	279

5.5.7	Impact on courts and lawyers	279
5.5.8	Impact on the Victim's country of residence	279
5.5.9	Impact on the country of the location of the accident or injury.....	280
5.5.10	Impact on compensation levels	280
5.5.11	Impact on limitation periods	280
5.5.12	Policy and implementation costs	281
5.5.13	Costs benefits analysis	281
5.6	Assessment of Solution 2: S2 - Law of habitual residence of the Victim (referred to here as lex damni).	282
5.6.1	Issues and objectives	282
5.6.2	Impact on Visiting Victims	282
5.6.3	Impact on defendants or faulty party	283
5.6.4	Impact on insurers and their customers	284
5.6.5	Impact on public health services	284
5.6.6	Impact on the taxpayer	284
5.6.7	Impact on courts and lawyers	285
5.6.8	Impact on the Victim's country of residence	285
5.6.9	Impact on the country of the location of the accident or injury.....	286
5.6.10	Impact on compensation levels	287
5.6.11	Impact on limitation periods	288
5.6.12	Policy and implementation costs	288
5.6.13	Costs-benefit analysis	289
5.7	Assessment of Solution 3: S3 - Better information.	291
5.7.1	Issues and objectives	291
5.7.2	Impact on Visiting Victims	291
5.7.3	Impact on defendants or faulty party	292
5.7.4	Impact on insurers and their customers	292
5.7.5	Impact on public health services	292
5.7.6	Impact on the taxpayer	293
5.7.7	Impact on courts and lawyers	293
5.7.8	Impact on the Victim's country of residence	293
5.7.9	Impact on the country of the location of the accident or injury.....	294
5.7.10	Impact on compensation levels	294
5.7.11	Impact on limitation periods	294
5.7.12	Policy and implementation costs	294
5.7.13	Cost-benefit analysis	295

5.8	Assessment of Solution 4: S4 - Harmonizing regulation	295
5.8.1	Issues and objectives	295
5.8.2	Impact on Visiting Victims	295
5.8.3	Impact on defendants or faulty party	295
5.8.4	Impact on insurers and their customers	296
5.8.5	Impact on public health services	296
5.8.6	Impact on the taxpayer	296
5.8.7	Impact on courts and lawyers	296
5.8.8	Impact on the Victim's country of residence	296
5.8.9	Impact on the country of the location of the accident or injury.....	296
5.8.10	Impact on compensation levels	296
5.8.11	Impact on limitation periods	297
5.8.12	Policy and implementation costs	297
5.8.13	Cost-benefit analysis	297
5.9	Assessment of Solution 5: S5 - Principle of ubiquity.	298
5.9.1	Issues and objectives	298
5.9.2	Impact on Visiting Victims	298
5.9.3	Impact on defendants or faulty party	299
5.9.4	Impact on insurers and their customers	299
5.9.5	Impact on public health services	299
5.9.6	Impact on the taxpayer	299
5.9.7	Impact on courts and lawyers	299
5.9.8	Impact on the Victim's country of residence	299
5.9.9	Impact on the country of the location of the accident or injury.....	299
5.9.10	Impact on compensation levels	300
5.9.11	Impact on limitation periods	300
5.9.12	Policy and implementation costs	300
5.9.13	Costs benefits analysis	300
5.10	Assessment of Solution 6: S6 - Lex Conveniens.	300
5.10.1	Issues and objectives	300
5.10.2	Impact on Visiting Victims	301
5.10.3	Impact on defendants or faulty party	302
5.10.4	Impact on insurers and their customers	302
5.10.5	Impact on public health services	302
5.10.6	Impact on the taxpayer	302
5.10.7	Impact on courts and lawyers	302

5.10.8	Impact on the Victim’s country of residence	302
5.10.9	Impact on the country of the location of the accident or injury.....	303
5.10.10	Impact on compensation levels	303
5.10.11	Impact on limitation periods	303
5.10.12	Policy and implementation costs	303
5.10.13	Cost-benefit analysis	304
5.11	Assessment of Solution 7: S7 - First Party Insurance	304
5.11.1	Issues and objectives	304
5.11.2	Impact on Visiting Victims	304
5.11.3	Impact on defendants or faulty party.....	305
5.11.4	Impact on insurers and their customers	305
5.11.5	Impact on public health services	305
5.11.6	Impact on the taxpayer	305
5.11.7	Impact on courts and lawyers	305
5.11.8	Impact on the Victim’s country of residence	306
5.11.9	Impact on the country of the location of the accident or injury.....	306
5.11.10	Impact on compensation levels	306
5.11.11	Impact on limitation periods	306
5.11.12	Policy and implementation costs	306
5.11.13	Costs benefits analysis	306
5.12	Assessment of Solution 8: S8 - EU tribunal for cross-border issues	307
5.12.1	Issues and objectives	307
5.12.2	Impact on Visiting Victims	309
5.12.3	Impact on defendants or faulty party.....	309
5.12.4	Impact on insurers and their customers	309
5.12.5	Impact on public health services	310
5.12.6	Impact on the taxpayer	310
5.12.7	Impact on courts and lawyers	310
5.12.8	Impact on the Victim’s country of residence	310
5.12.9	Impact on the country of the location of the accident or injury.....	310
5.12.10	Impact on compensation levels	310
5.12.11	Impact on limitation periods	311
5.12.12	Policy and implementation costs	311
5.12.13	Costs benefits analysis	312
5.13	Assessment of solutions relating to limitation periods	312
5.14	Assessment of solutions relating levels of compensation	322

5.14.1	Compensation level solutions focusing on CFR and guidelines	322
5.14.2	Compensation level solutions focusing on information	327
5.14.3	Compensation level solutions focuses on insurance.....	330
5.14.4	Compensation level solutions focuses on the creation of EU bodies	338
5.14.5	Compensation level solutions focuses on harmonization, restitutio in integrum and lex damni.....	343
5.15	Conclusions.....	350

TABLE OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
Art.	Article
AT	Austria
BAAC	<i>Bulletin d'Analyse d'Accident Corporel</i>
BE	Belgium
BG	Bulgaria
CARE	Community database on Accidents on the Roads in Europe
CEA	Comité Européen des Assureurs (European insurance and reinsurance federation)
CETE	<i>Centre d'Études Techniques de L'Équipement</i>
CFR	Code of Federal Regulations
CJCE	Cour de Justice des Communautés Européennes (Court of Justice of the European Communities)
CY	Cyprus
CZ	Czech Republic
DE	Germany
DK	Denmark
e.g.	<i>exempli gratia</i> (for example)
EE	Estonia
EFTA	European Free Trade Association
EL	Greece
ES	Spain
ETSC	European Transport Safety Council
EU	European Union
FI	Finland
FR	France
HU	Hungary
i.e.	<i>id est</i> (that is)
IDA (Convention)	convention d'Indemnisation Directe des Assurés (Direct Compensation to Insured)
IE	Ireland
INAIL	Istituto Nazionale per l'Assicurazione contra gli Infortuni sul Lavoro (Workers Compensation Authority)
IPP	Invalidité Permanente Partielle (permanent partial disability)

IRSA (Convention)	convention Inter sociétés de Règlements des Sinistres Automobiles (Inter-Company agreement on compensation payments)
IT	Italy
LP	Limitation Period
LT	Lithuania
LU	Luxembourg
LV	Latvia
MT	Malta
MTPL	Motor Third-Party Liability
n.a.	Not Applicable
NL	The Netherlands
No or n°	Number
p. or p	Page
PEOPIL	Pan European Organization of Personal Injury Lawyers
PIAB	Personal Injuries Accident Board
PL	Poland
PT	Portugal
RO	Romania
SE	Sweden
SI	Slovenia
SK	Slovakia
TFF	<i>Trafikförsäkringsföreningen</i> (Sweden's Green Card Bureau)
TSN	<i>Trafikskadenämnd</i> (the Swedish Road Traffic Injuries Commission)
UK	United Kingdom
US	United States (of America)

GLOSSARY

The definitions provided herein should be read in the context of the Study. They may not be correct or complete in other contexts.

A

Accident shall refer to a road traffic accident involving at least one vehicle in motion and that results in damage caused to at least one person.

Adjuster shall refer to an insurance company representative, whether independent or not, who assesses losses and settles claims.

Aggregate Limit shall mean the total amount of coverage for liability under an insurance contract for the term of the contract regardless of the number of accidents that may occur during such terms.

All-Risk coverage refers to a coverage provided for all risks except those excluded.

Appraisal shall refer to a process for determining the value of property or extent of damages and usually performed by an independent expert.

Automobile Liability Insurance shall refer to the insurance covering the insured party's legal liability for damages caused to other persons (personal injury and damage to property) and shall be equivalent to third party liability insurance for the purpose of this study.

B

Bodily Injury: See personal injury.

Burden of proof means the obligation imposed on one party to demonstrate the validity of a claim. In this context, the burden of proving the fault of the other party or the extent of loss suffered, for example.

C

Car legal protection shall mean the insurance policy that covers legal expenses related to a claim.

Casualty shall mean damage resulting from an accident.

Casualty Insurance shall refer to third party insurance in that it is concerned with personal and property damages caused to third parties and the legal liability bestowed on the insured party for such damages.

Civil Liability: See Third Party Liability.

Claim shall refer to the demand made by the victim of an accident as a result of the damages suffered. In the present context, claim does not only refer to the demand made by an insured party to their insurance company for payments of benefits provided under the insurance policy or the demand for a third party's damages caused by the insured party but is wider in scope to include all accident related claims.

Claimant shall refer to the person or party who initiates a claim.

Claims adjuster shall refer to a person who is responsible for investigating a claim.

Collision Insurance/Collision coverage shall mean the extra coverage on top of a comprehensive insurance for damage to the car as caused by its collision with another vehicle or object.

Comprehensive coverage shall refer to an optional insurance policy coverage that pays for damage to the car in respect to losses resulting from various events usually including fire, theft, vandalism and falling objects.

Compensation shall mean the total amount that the victim of a road accident

and collateral victims receive from an insurance company, a special fund or the party that caused the damage to help make reparations for the damages that result from the accident. Compensation on a **cumulative mode** means that insurance policies compensate regardless of other compensations already obtained and without deductions based on prior compensations. Compensation on an **alternative mode** means that only one insurance policy will be used to compensate. Compensation on a **complementary mode** means that compensation is offered by one policy up to that policy's compensation ceiling and then other policies take over until full compensation is reached.

Compensation ceiling shall refer to the maximum amount that the insurance company will pay under an insurance policy for the term of the policy. Compensation ceilings may be different for damage to property and personal injury. They may also be limited based on the number of events and/or the number of injured parties.

Compulsory Auto Insurance shall refer to the minimum insurance coverage that each vehicle owner or driver has to subscribe to, from an insurance company, for the vehicle that they intend to drive before they can drive or use such vehicle.

Conflict of law rule refers to a rule enabling the determination of the applicable law in cases in which more than one country's laws may apply to a dispute.

Cost/Benefit analysis shall refer to an identification of advantages and drawbacks of a specific measure to attain a defined goal.

Coverage shall refer to the scope of protection under an insurance policy.

D

Damage shall mean loss or harm due to an injury to a person or damage to property.

Damage arising after a first compensation has been granted shall refer to loss or harm incurred after compensation has been granted either as a result of a deterioration of the person's health, new knowledge of other injuries, advances in science.

Damages shall refer to the amount that a party A is liable for in respect to a party B as a result of loss or harm that party A caused party B in the context of a road traffic accident.

Date of knowledge shall mean the time at which a person becomes aware of a damage.

Deductible shall refer to the situation where benefits, pensions, social security are deducted from an award for damages.

Disability shall refer to a total or partial, permanent or temporary condition whereby a person is not capable of normal pursuits.

Disability Income or Benefit shall refer to the amount payable or paid in the event of disability resulting from an accident.

Disabled shall refer to a total permanent condition whereby a person is not capable of carrying on normal pursuits.

E

Excess policy refers to the portion of a damage paid for by a person out of the pocket before the insurance or compensation organization makes any payment. For example the fifth EU Motor Insurance Directive provides under Article 6 that "Nevertheless, Member States may provide for an excess of not more than EUR 500 for which the victim of such damage to property may be responsible." Excess policy is also sometimes referred to as a "deductible".

F

Fault based refers to a legal system based on fault liability by opposition to non-fault liability. In a fault based

system, the driver is held responsible for the damage caused in the accident if he or she is found to be at fault. The compulsory third-party insurance functions on a fault based system whereby the insurance policy covers the damages caused by the faulty driver to other parties. In practice the insurance companies will pay proportionally to the degree of fault of each party.

First Party Claim shall mean a claim for damage made by the insured.

First party insurance shall mean insurance coverage for damages to the insured.

Foreign victims: See Visiting victim.

Full coverage refers to an insurance policy that provides payment for all losses caused by events insured and without applying any deductions or depreciation ratios.

Funeral expenses shall refer to the expenses directly related to the funeral of the deceased victim including the funeral services fees, the casket, grave plot, vault, and headstone.

G

Guarantee Fund shall refer to a fund referred to the compensation body set up

in each Member State as under Directive 84/5/EEC.

H

Hit and Run refers to a situation where the faulty party in a road traffic accident is not identified.

I

Indemnity shall refer to a situation where the insured pays for the services when received and is reimbursed by the compensation organization based on receipts for the paid services.

Independent Adjuster shall refer to an adjuster who adjusts claims for a number of insurance companies and works as an independent contractor.

Individual driver's cover shall refer to the insurance policy that covers the driver in respect to personal injury (excluding minimal injuries) or death as a result of a road traffic accident whether he or she is at fault or not.

Injury: See personal injury.

Insurance Policy shall refer to the type of insurance an insured subscribes to.

Insurance Premium shall refer to the price paid by the insured for an insurance policy.

Insurance solution shall refer to solutions that can be provided through insurance products.

Insured shall refer to the fact that a party is covered by an insurance policy whereby the insurance company agrees to indemnify such party for losses falling within the scope of the insurance policy.

Insured Party: See Policy owner.

L

Lex loci delicti commissi shall refer to a latin expression for a legal principle used in determining the appropriate law to resolve a dispute. In the present context it means that the applicable law in case of an accident will be that of the location of the accident.

Liability Insurance/Legal Liability shall mean the coverage of the insured party in case such party becomes legally liable to a third party for personal or property damage as a result of an accident.

Limitation period refers to the statute of limitation applicable and defining the timeframe in which a person may formulate a claim in case of an accident. Claims would not be receivable after the expiry of such limitation period unless it has been suspended or interrupted by operation of the law. Limitation periods also exist in insurance contracts.

Statutes of limitations are usually different in criminal, civil and procedural matters.

Loss of income refers to an interruption in economic activity that is measurable as a period of time and is caused by the accident or its consequences.

Loss of use (as a result of damage to property) refers to the inability to use property as a result of an accident.

M

Minor shall refer to a person who is a dependent and does not benefit from all the legal rights and obligations generally conferred to adults.

N

National Emergency Fund shall refer to the Guarantee Fund.

New value shall refer to the type of compensation provided under an insurance policy whereby the compensation level is the equivalent of what it costs to replace as new the lost or damaged property.

No-fault refers to a system in which each driver's insurance pays for his or her own damages regardless of the fault. The aim of such a system is to limit the compensation delays that would be due to the determination of a faulty party or

their degree of fault. In a no-fault system, the driver's insurance will pay for damages up to the compensation ceiling as provided in the insurance contract. This payment is guaranteed in exchange for a waiver on any rights to sue the faulty party or their insurance company.

P

Pain and suffering (pretium doloris) shall refer to a variety of ills that include the physical discomfort and emotional trauma, which, in addition to actual damages awarded, a person may claim for from the faulty party.

Personal injury protection refers to an insurance policy providing first-party coverage for damages such as medical and funeral expenses regardless of fault.

Personal injury refers to harm caused to the victim's body by opposition to damage to property.

Physical Damage refers to personal injury.

Policy owner, policyholder or insured party shall mean the person who owns the insurance policy.

Primary compensation refers to the insurance cover that responds first to an insured damage.

Principle of ubiquity shall refer in this context to the assertion of jurisdiction by a court based on the location of the accident or the location of effects of the accident for the victim. The traditional definition of the principle of ubiquity would include only the location of the damage and that of the cause of the damage. In the present context it is applied from a slightly different perspective that includes the location of the effects of the damage as in where the damage is repaired or dealt with by the victim and his or her family.

Property damage refers to harm to tangible property such as a car.

S

Social security shall refer to state sponsored health care systems. They may also include a number of benefits in cases of accidents including loss of income coverage or pensions and may provide such benefits as a lump sum or spread out payments.

Social status shall refer to the situation of a person in society from a wealth standpoint by comparison to other people in society. It may also refer to one's position in society but in this context mainly in reference to lifestyle. An accident may have an impact on one's social status in terms of the damages it can cause one. It may also have an

impact on one's social status if, absent an appropriate insurance coverage, one is at fault in causing the accident.

Statutory shall refer to regulations.

Subrogation shall refer to the right of the insurer to recover all amounts paid to the insured party from the faulty party or their insurer. Such right derives from the assignment that the insurance contract usually includes.

I

Third Party liability shall refer to the legal liability of the driver of a vehicle for damages caused to others.

Third Party claim shall mean a claim for damage to a third party that has been caused by the insured.

Total Loss shall refer to the condition of property that has suffered a damage that is so extensive that the cost of repairing the property exceeds its value. Total loss also refers to the maximum amount a

policy pays for a specific property in case of its destruction at a point in time.

U

Uninsured vehicle shall refer to the situation where the lack of the faulty driver's insurance for him or herself or the vehicle means that a Guarantee Fund will have to ensure third party liability coverage in lieu of an insurance company.

V

Visiting EU citizen shall refer to a citizen of one Member State of the European Union that is visiting another Member State of which he or she is not a citizen or resident.

Visiting victim shall refer to injured parties entitled to compensation in respect of any loss or injury resulting from accidents occurring in a Member State other than the Member State of residence of the injured party which are caused by the use of vehicles insured and normally based in a Member State.

PRELIMINARY NOTE

The contractor (hereafter the “Contractor”) is DBB Law (Demolin - Brulard - Barthelemy), a law firm with offices in Brussels¹, Mons, and Soignies, Belgium and Paris, France.

This report (the “Report”) is based on contributions made in the form of specific reports from all members of the team described below (the “Team”)².

As Team Leader, I wish to thank the members of the Team, researchers, contact points and other contributors for their dedication to this project and the quality of their input.

Members of the Team are listed below.

Team Leader

Jean Albert (jeanalbert@accidentscompensation.org)

Legal and economical aspects

Professor Frédéric Leplat (fredericleplat@accidentscompensation.org)

Legal Experts who have done the Country Report and the Case Study

Austria: Benedikt Spiegelfeld (benedikt.spiegelfeld@accidentscompensation.org)

Belgium: Yves Brulard (yves.brulard@accidentscompensation.org)

Bulgaria: Emilyia Atanasova (emilyia.atanasova@accidentscompensation.org)

Cyprus: Yiannos Georgiades (yiannos.georgiades@accidentscompensation.org)

Czech Republic: JUDr. Ondrej Dostal (ondrej.dostal@accidentscompensation.org)

Estonia: Ants Mailend (ants.mailend@accidentscompensation.org)

Finland: Professor Juha Karhu (juha.karhu@accidentscompensation.org)

¹ DBB, 46 avenue des Arts, 1000 Brussels, Tel +32 (0)2 213.14.50, Fax +32 (0)2 213.14.60, Email info@dbblaw.eu

² The contents of this Report are the sole responsibility of the Team Leader and can in no way be taken to reflect the views of the European Commission or of those who collaborated or participated in this Report since their participation, limited to specific portions of the Report, was reviewed and re-written to form the Report. The European Commission does not guarantee the accuracy of the data included in this report, nor does it accept responsibility for any use made thereof.

France: Isabelle Tinel (isabelle.tinel@accidentscompensation.org)
Germany: Norbert Häger (norbert.haeger@accidentscompensation.org)
Greece: Panagiotidou Vassiliki (v.panagiotidou@accidentscompensation.org)
Hungary: Csaba Pataky and Tibor Pataky (pataky@accidentscompensation.org)
Italy: Enrico Adriano Raffaelli (e.a.raffaelli@accidentscompensation.org)
Latvia: Valters Gencs (valters.gencs@accidentscompensation.org)
Lithuania: Valentinas MIKELINAS (valentinas.mikelenas@accidentscompensation.org)
Luxembourg: Patrick GOERGEN (patrick.goergen@accidentscompensation.org)
Malta: Marse-Ann Farrugia (mars-ann.farrugia@accidentscompensation.org)
The Netherlands: Mrs S.C.Banga (s.banga@accidentscompensation.org)
Poland: Piotr Sadownik (piotr.sadownik@accidentscompensation.org)
Portugal: Dr. Ronald Charles Wolf (ronald-charles.wolf@accidentscompensation.org)
Romania: Melnic Virgil (virgil.melnic@accidentscompensation.org)
Slovenia: Pipan Nahtigal Nataša (natasa.pipan@accidentscompensation.org)
Slovakia: Peter Bartosik (peter.bartosik@accidentscompensation.org)
Spain: Emilie Pavageau (emilie.pavageau@accidentscompensation.org)
Sweden: Jur. Dr. Roland Dahlman (roland.dahlman@accidentscompensation.org)
United Kingdom: Hugh James (mark.harvey@accidentscompensation.org)

Legal Experts who have done the Country Report solely

Denmark: Christian Riewe (christian.riewe@accidentscompensation.org)
Ireland: John Sweetman B.L. (john.sweetman@accidentscompensation.org)
and Neil Long B.L. (neil.long@accidentscompensation.org)

Legal Expert who have done the Case Study solely

Denmark: Jørgen Rasch (jorgen.rasch@accidentscompensation.org)
Ireland: Damian Doyle (damian.doyle@accidentscompensation.org)
The Netherlands: W.A. (Wim) Luiten (wim.luiten@accidentscompensation.org)
Sweden: Åke Fransson (ake.fransson@accidentscompensation.org)

Participants

Emilie Dessens (project management) emiliedessens@accidentscompensation.org
Jacqueline Duband (coordination/translation/edition) j.duband@accidentscompensation.org
Cécile Fargier (legal aspects) fargiercecile@accidentscompensation.org
Isabelle Tinel (legal aspects) isabelletinel@accidentscompensation.org
CETE (Sud-Ouest), Gilles Duchamp

Research, Translation and Administrative

Julie Béral
Simon Elliott
Saoussen Farhat
Barbara Hatzimichail
Maud Leroyer
Jenny Maidment
Jean-Baptiste Merlin
Anais Nizon
Cécile Pinel
Julien Saintpierre
Virginie Touzet
Sylvain Traversa

Main Outside Contributors

PEOPIL, Dr Wolfgang Resch

Other contributors

Interviewees
Participants in the questionnaires
National Statistics Agencies
Ministries of Justice/Transport
Insurance companies

Jean Albert
Team Leader
2009

PRESENTATION OF THE STUDY AND METHODOLOGY

Context

This study (the “Study”) concerns *“Compensation of victims of cross-border road traffic accidents in the EU: comparison of national practices, analysis of problems and evaluation of options for improving the position of cross-border victims”*.

The context of the Study is the ongoing effort conducted by the European Union to achieve, at one end of the spectrum, a significant reduction in the number of car accidents and curtail the high incidence and costs of injuries and, at the other to ensure that road traffic accident victims are provided with adequate compensation. In particular, EU citizens must feel confident to move freely within the EU if affirmation of freedom of movement principles is not to have limited effects. However, if safety standards and levels of compensation were to vary too much from one Member State to another, the effect could be de facto obstacles to the enjoyment of such principles.

Since 1972, the European Union has adopted several directives in order to improve the protection of cross-border road accident victims and thus to ensure the full application of the free circulation of people and goods.

Several directives concerning insurance have been adopted. They establish the following.

- Guaranteeing of claims settlement via national insurance offices;
- The compulsory character of insurance;
- Minimum standards of protection for road traffic accident victims;
- The obligation for insurance companies to appoint a representative in each Member State; and
- The creation of national compensation bodies.

Where litigation is a factor, the rules governing the process in each jurisdiction have been harmonized by Council Regulation (EC) 44/2001 of 22 December 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Nevertheless, rules relating to civil liability, limitation periods and compensation have not been harmonized at the EU level, and the diversity of legislations in the Member States may entail a risk of legal insecurity for EU citizens who are victims of an accident in a Member State other than their own (“Visiting Victims”). The reason for such risk of legal

insecurity is that currently, according to international private law, the law applicable to a road traffic accident is that of the country in which the accident occurred -*lex loci delicti commissi*. The determination of the party liable for the damage due to a road traffic accident (and under what circumstances the accident occurred) and the level of compensation that the victim will be entitled to are based on the “law of the accident” (“Accident Law”). Similarly, the procedure that will regulate the timing for a claim will be based on Accident Law. As a result, the Visiting Victim may not know or fully understand the law applicable to his or her situation because it is not the law of his/her own country of residence.

The application of the Accident Law may lead to concerns regarding the proper level of compensation awarded to Victims. Some of the concern voiced by different stakeholders including the European Parliament stems from differences in living standards, medical and after-care cost expectations, and the compensation culture prevailing within each Member State of the EU. The issue is whether or not under Accident Law compensation awarded to a Visiting Victim would be the same or similar to that if the accident had occurred in the Victim’s country of residence. In order to address this issue, it seems important to determine to what extent the environment and background of the Victim in his or her country of residence are taken into account when damage is quantified and compensation determined.

Should differences in compensation between countries be significant, and should compensation practices show that the Visiting Victim’s specific circumstances are not taken into account, the risk of under or over-compensation is brought into play. This is one of the potential negative effects of a strict application of the Accident Law. Under or over-compensation may have negative effects in particular for insurers, policyholders, social security and healthcare systems, and other State-sponsored services involved in the settlement of road traffic accident claims.

Further, from a procedural standpoint the Victim may run a risk of no compensation at all because of the differences in limitation periods from one Member State to another. Victims could find themselves caught out by very short limitation periods or lack of knowledge regarding the commencement of a running time, its duration or the possibility of suspending such periods.

The potential negative effects outlined above may be exacerbated by persistent differences in third party liability insurance cover across the EU, regardless of the existence of minimum amounts of insurance cover provided by the 5th Motor Insurance Directive 2005/14/EC.

Finally, the greater the number of Visiting Victims, the more evaluation of risk of over or under compensation will be necessary.

Objectives

The purpose of this Study is to examine the different practices followed in EU Member States regarding the level of compensation awarded to victims of road traffic accidents.

The Study analyses those specific problems resulting for EU residents involved in road traffic accidents in a Member State other than that in which they are habitually resident (the “visiting victims” under the 4th Motor Insurance Directive 2000/26/EC), especially with respect to potential under -compensation. The Study also examines the effects of differing limitation periods on visiting victims when they rely upon the application of foreign law - *lex loci delicti commissi* during the settlement of their claim. Finally, the Study identifies and examines the feasibility of all options and solutions to issues raised, including insurance issues, for improving the position of cross-border victims. The Study examines in particular internal market characteristics by:

- examining compensation and insurance cover provided to “visiting victims”,
- examining, comparing and evaluating the application of the *lex loci delicti commissi* to cross border road traffic accidents with regard to both levels of compensation and, and limitation periods.

Thus, the Study’s objective (“Objective”) is to identify the levels of compensation awarded to victims of road accidents in each Member State of the EU, and more specifically what occurs when the accident takes place in a Member State other than the victim’s Member State of residence.

This Objective involves answering the following questions:

- ✓ What is the result of application of *lex loci delicti commissi* to cross border road traffic accidents?

- ✓ Does such application of this measure create legal insecurity?
- ✓ Does such application lead to over or under-compensation of Victims?
- ✓ Does such application lead to cases of no compensation being paid at all due to the lack of understanding or knowledge of Victims of applicable limitation periods?

The Objective additionally invites the following comparative and analytical work:

- ✓ Comparing the civil liability rules in different Member States as they relate to compensation of road accident Victims,
- ✓ Observing the state of the common law and of national legislations,
- ✓ Highlighting factors that create discrepancies in compensation levels between Member States, including those related to procedure rather than substantive levels of compensation as permitted by the law,
- ✓ Comparing insurance rules and policies in different Member States as they relate to compensation of road accident Victims,
- ✓ Comparing the compensation amounts among Member States as they relate to road accident Victims,
- ✓ Comparing limitation periods for insurance claims in different Member States,
- ✓ Comparing the limitation periods for civil liability in different Member States,
- ✓ Evaluating the impact of other limitation periods (including criminal cases) on the possibility of the victim of a road accident obtaining compensation, and
- ✓ Making recommendations for possible actions at the EU level, possibly through the establishment of legal standards, the harmonisation of limitation periods, the availability of compensation schemes that would meet Victims' expectations, reform of compensation funds and/or determination of new insurance schemes.

Methodology

The methodology (the “Methodology”) to implement the Study involved legal and empirical research and analysis implemented through a number of assignments (“Assignments”).

The legal and empirical research and analysis

- (i) identifies and analyzes compensation practices and in particular:
 - national practices with respect to the level of compensation awarded to Visiting Victims of road traffic accidents,
 - the effect on compensation levels of the application of *lex loci delicti commissi*,

- the determination of expectations of compensation and the definition of under and over compensation,
 - the effects of inadequate compensation, either over or under compensation,
 - the status of indirect victims,
 - the number of claims in the last five years,
 - the identification of specificities in multi-victim accidents,
 - the determination of the type of prejudices included in claims under national laws,
 - the structure of compensation practices - important components of claims,
 - the statutory compensation amounts in each Member State,
 - the amounts covered by insurance companies,
 - the determination of relevant insurance products, and
 - solutions to issues highlighted.
- (ii) identifies and determines a taxonomy of limitation periods and in particular:
- determines different types of limitation periods based on the legal situation,
 - defines the commencement date of a limitation period,
 - evaluates the effect of the “date of knowledge” on the limitation period,
 - evaluates the power of the court to extend, shorten or suspend the limitation period,
 - determines special circumstances that impact the limitation periods (disabled persons or minors),
 - determines the effect of the burden of proof and evidence on limitation periods, and
 - determines different types of limitation periods whether procedural or substantive, and the effect of each type on the claim.

The legal and empirical research and analysis was completed through the performance of the following specific Assignments.

Three teams were assigned to the different Assignments and tasks to be implemented for this Study. A general team (the “Management Team”) coordinated efforts to implement all three Assignments.

Assignment 1/ Collection of public and private data on levels of compensation for visiting victims of road traffic accidents and related topics in the Member States

This Assignment focused on researching documents, communications, provisions, studies, articles and all other written documents related to the Study that could be found in public and private sources to determine:

- Effectiveness of the legislation on limitations and compensation statutory amounts,
- Ineffectiveness of the legislation on limitations and compensation statutory amounts,
- The disparities between EU Member States' legislation on limitations and compensation statutory amounts,
- Insurance coverage amounts,
- Different practices in determining compensation,
- Cross-border compensation issues,
- Legislative solutions adopted and
- Proposals for changes.

The following types of information on the limitation periods and compensation systems and regulations were also researched:

- Relevant regulations,
- Doctrinal papers,
- Some examples of jurisprudence,
- Articles, reports, essays, studies focused on the issue.
- Articles, reports, essays, studies on wider questions related to recent changes,
- Indications on actual trends,
- Examples of cross-border issues, and
- Indications of what constitutes good practice in the field of compensation.

A number of evaluations that implied taking into consideration the social and economic aspects of accident compensation were conducted. In particular the Study invited:

- An evaluation of levels of compensation;
- A determination of disparities in compensation levels;
- A determination of the existence of under-compensation and over-compensation issues.

To conduct these evaluations, studies from Member States on the economic and social perspective of road traffic accidents compensation were researched, focusing on the following topics:

- Insurance premiums and insurance compensation amounts;
- Numbers of cross-border car accident related claims;
- Court cases and complaint submissions;
- Levels of compensation;
- Studies of the economic and social cost of disparities in limitation periods in cross-border accidents;
- Studies of the economic and social cost of under-compensation;
- Studies on the economic implications of the lack of transparency in compensation levels throughout the EU;
- The question of "under-compensation" or "over-compensation" in cross-border accidents;
- Studies on the problems faced by citizens when travelling and the uncertainty of adequate compensation;
- Studies on fraud;
- Studies on compensation expectations and the differences between a Europe where all citizens are equal and equally compensated and a Europe of varying rights, and the extent of intervention of European regulations in fostering double standards.

Official resources on national legislations and European regulations were used. All relevant regulations were analyzed for their relevance in terms of road traffic accidents and in particular limitation periods, minimum statutory amounts, civil liability issues and insurance obligations, and how each piece of legislation contributed to identifying compensation levels.

Research was conducted involving different ministries of the Member States, Member States' official bodies and statistics agencies. The research sought to collect official studies and statistics regarding road traffic accidents:

- The average amount of compensation per claim in the Member States;
- The average period of time before compensation is obtained within Member States;
- The number of compensation claims per annum;
- The figures related to foreign victims claims; and
- Where figures are available, the average amount of compensation granted per foreign victims claim.

European and International organisations were contacted to participate in this Study and for their previous studies and analyses. In particular:

- The European Federation of Road Traffic Victims,
- The European Parliament for its own studies on the issue,
- United States specialists for their studies on comparable issues on the federal level,
- PEOPIIL (Pan European Organization of Personal Injury Lawyers) for their studies on comparable issues,
- The CEA (Comité Européen des Assureurs) for their specific studies on road traffic accident issues,
- The CETE (Centre d'Études Techniques de L'Équipement) for their access to databases (CARE and BAAC) on road traffic accident issues.

CETE and PEOPIIL provided invaluable information.

Assignment 2/ Collection and analysis of data through surveys

In order to complete the information obtained under Assignment 1, confirm its reliability and increase its credibility, a number of surveys were organized in each Member State. Further, a detailed case study, the “Tartarin and Farandelle Case Study” was created and made precise enough to generate results that could be compared. All Country Experts participated and contributed. The Tartarin and Farandelle Case Study is presented in Section 3.16.1

The primary participants in the survey and the Tartarin and Farandelle Case Study

The Country Experts answered both the survey questions and the Tartarin and Farandelle Case Study.

The secondary participants in the survey

Professionals in each Members State were identified. They were mainly:

- Lawyers,
- Insurance companies.
- Victims' associations,
- Ministries of transport,
- Statistics agencies,

- Bar associations,
- Guarantee Funds, and
- Lawyers associations.

Participants answered the questionnaire anonymously, either directly through interviews, by submitting a completed questionnaire or by going online to the website created for this Study (“The Website”).

The Website was created to both present the Study and facilitate access to the Questionnaire and the Sub-questionnaires. The Website, presented in English, was accessible through the domain name acquired for that purpose; www.accidentscompensation.org. The Website presented the Study to the questionnaires’ targets and beyond them to every person contacted during the study and to the public at large.

The questionnaires were prepared in such a way as to provide for a number of closed answers, thus enabling the generation of statistical results. To facilitate the collection of statistics resulting from the online answers, interview answers, or Country Report answers, statistics-generating software was acquired and interfaced with the Website. Statistics were automatically updated when new verified answers were submitted.

The Table was only made up of numbers. The participants often completed them in writing or during interviews. The tables received were thus processed manually so as to use the data provided and generate statistics and analyses.

The Country Reports

Country Experts prepared reports to present each country’s approach to accident compensation and related issues. In the main these individuals were lawyers.

A general working Document was prepared for the Team to ensure that every aspect of the Study was understood by all who worked on it. The reason for providing such a document to the Country Experts was twofold. First, it gave them some background knowledge of the situation at EU level. Second, it described in great detail, including the Questionnaire, the scope and content of the work to be performed under the Study.

Because of the differences that exist between Member States a standard, unified terminology was necessary. Then a glossary (the “Glossary”) was prepared and written in line with the objectives of the project, and without plagiarizing an existing glossary. This is included at the beginning of this Study. The Team could then be sure that the Country Experts gave appropriate answers to the questions free of potential distortions from differing understandings of terminology.

To ensure that the reading process was pleasant, comprehension easy and the findings readily useable, a coherent and uniform whole was preferable. As a result, it was decided that all Country Reports would follow the same format and outline based on the Questionnaire. The Country Reports were mostly provided in the English language to add coherence to the whole and facilitate the preparation of the Final Report.

The Country Reports were prepared based on the Questionnaire. They basically included the answers to the questions but focused primarily on the more relevant questions and on providing an introduction, recommendations and conclusions. These answers provided an extensive overview on the relevant road-traffic accident compensation issues in all Member States.

Answers and results collected

The Country Experts have completed their Questionnaires and have also contacted professionals in their own countries asking them to participate in the Study by completing Sub-questionnaires. Professionals were contacted in all Member States and many agreed to participate in the study and completed Sub-questionnaires.

479 professionals were contacted by the Research Team in the 27 Member States as detailed in the table below:

	AT	BE	BG	CY	CZ	DK	EE	FI	FR	DE	EL	HU	IE	IT	LV	LT	LU	MT	NL	PL	PT	RO	SI	SK	SP	SE	UK	Sub-total	
Public administration	2	2	1	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	0	2	2	2	2	2	2	51
Judiciary	9	13	1	3	4	5	3	4	9	8	2	3	8	3	2	6	5	2	6	4	7	2	3	2	10	2	8	134	
Insurance industry	3	3	5	3	4	4	3	3	3	3	3	3	3	3	3	3	3	3	3	3	3	4	3	3	3	3	4	87	
Academics	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
Law practitioners	19	12	0	4	8	15	1	1	9	5	5	5	3	5	1	1	1	2	3	2	5	1	1	2	8	8	11	138	
International bodies	3	1	1	1	3	2	2	3	3	2	1	3	3	4	1	3	1	0	3	3	3	1	2	2	2	2	2	57	
Others	0	1	0	0	0	0	0	0	2	1	1	0	0	0	1	0	1	0	1	0	1	0	0	0	2	0	1	12	
Sub-total	36	32	8	13	21	28	11	13	28	21	14	16	19	17	10	15	13	9	18	14	21	8	11	11	27	17	28	479	

People or organizations contacted by the Research Team

In addition, Country Experts contacted 803 professionals directly:

	AT	BE	BG	CY	CZ	DK	EE	FI	FR	DE	EL	HU	IE	IT	LV	LT	LU	MT	NL	PL	PT	RO	SI	SK	SP	SE	UK	Sub-total
Public administration	13	0	4	4	4	4	11	4	13	4	9	9	15	11	7	2	0	9	17	13	0	9	2	2	2	2	7	178
Judiciary	4	0	2	7	0	0	4	2	9	0	0	2	0	7	0	0	0	0	0	4	0	9	0	0	0	2	2	54
Insurance industry	7	4	20	7	28	4	9	11	13	7	13	11	11	11	2	0	0	9	13	11	2	11	15	2	2	2	2	226
Academics	17	0	0	0	7	0	0	4	11	0	9	0	2	2	0	0	0	0	0	4	0	7	0	0	0	2	0	65
Law practitioners	11	2	13	33	28	7	9	0	17	4	0	0	7	0	0	0	4	0	0	9	2	9	37	0	7	2	4	204
International bodies	2	0	0	0	0	0	0	0	4	0	0	0	0	0	0	0	0	0	0	2	0	4	0	0	0	2	2	17
Others	9	0	0	0	0	0	0	2	9	4	0	0	0	2	0	0	0	0	9	0	0	17	2	2	2	0	0	59
Sub-total	63	7	39	50	67	15	33	24	76	20	30	22	35	33	9	2	4	17	39	43	4	65	56	7	13	13	17	803

People or organizations contacted by the national experts

The total number of professionals contacted was thus 1282, representing different categories of expertise on the issues under study.

Of this total only 390 people provided answers or help:

	AT	BE	BG	CY	CZ	DK	EE	FI	FR	DE	EL	HU	IE	IT	LV	LT	LU	MT	NL	PL	PT	RO	SI	SK	SP	SE	UK	Total
People or organizations contacted by the Research Team	36	32	8	13	21	28	11	13	28	21	14	16	19	17	10	15	13	9	18	14	21	8	11	11	27	17	28	479
People or organizations contacted by the National experts	63	7	39	50	67	15	33	24	76	20	30	22	35	33	9	2	4	17	39	43	4	65	56	7	13	13	17	803
Answers or help received	31	4	18	23	32	7	15	12	36	11	16	10	17	15	4	1	2	8	21	20	3	31	28	3	6	8	8	390

About 160 sub-questionnaires were answered. They were then processed by the statistics-generating software and used in the analysis presented in the Report.

Assignment 3/ Collection and analysis of the reports written by experts for each Member State

The Final Report is based on the Country Reports, answered Questionnaires, the Tartarin and Farandelle Case Study, information provided by PEOPIIL, statistical inputs from CETE using the CARE database and collected information from the surveys. The Country Reports constituted one of the pillars of the analysis.

The Country Reports are considered stand-alone reports. They are identified as the contribution of each Country Expert to this Project. The Country Reports were prepared in the most professional manner. No other study can at this time provide such in-depth analysis of compensatory practises over the 27 Members States of the European Union. Thus they constitute the main findings under Assignment 3.

The Country Reports and Case Studies provide a detailed perspective on the compensation system of each Member State, thus enabling comparison of various systems. They also provide the opportunity to reflect on changes necessary to build a sound compensation system for victims of road accidents throughout the European Union.

Result and Structure

Country Reports, the information gathered through research and the survey conducted all contributed to facilitate the preparation of the Final Report.

The answers provided by the Country Experts on their Questionnaires, their Country Reports, the Tartarin and Farandelle Case Study and the analysis provided in the Report and all documents collected constitute the results of the Study.

The results of the implementation of the Assignments provided sufficient information for the Team to prepare a Report fulfilling the General Objective of the Study.

The Report hereby presented contains:

- **An analysis on answers provided by Country Experts and other sources on national practices with respect to compensation levels for victims of road traffic accidents, and to statutes of limitations for claims by victims of road accidents,**
- **A presentation of the problems arising from the current situation and,**
- **An outline of the options available to remedy these problems and to achieve the identified policy objectives.**

It presents such results based on the following structure:

INTRODUCTION

EXECUTIVE SUMMARY

FINDINGS

PART I: COMPENSATION LEVELS

PART II: SOURCES OF DISTORTIONS IN COMPENSATION LEVELS

PART III: COMPENSATION PRACTISES

PART IV: LIMITATION PERIODS

PART V: ASSESSMENT OF SOLUTIONS

REPORT

INTRODUCTION

Each year 42.000 EU citizens are killed and 3.5 million are injured in road traffic accidents³. 55% of all injuries experienced by visiting tourists occur in transportation⁴.

In its 1995 Green Paper, the European Commission noted that in a single year, road accidents cost the European Union approximately 15 billion Euros in medical, administrative and damage reparation expenditures alone⁵. In 2002, the annual cost of road traffic accidents to society was estimated at 160 billion Euros⁶ and is now estimated at 200 billion Euros⁷. If the number of accidents has dropped between 1995 and 2005⁸, due partly to the European Transport Policy for 2010⁹, costs have risen. Medical costs and the level of compensation have also generally increased¹⁰. The decreasing trend in the number of accidents and the level of injuries is confirmed in many countries¹¹ but not all¹².

³ Source: European Transport Safety Council's (ETSC)

⁴ Scope and patterns of tourist accidents in the European Union, Final Report, Austrian Institute for Safety and Prevention, 1999, p41

⁵ Towards fair and efficient pricing in transport, COM(95)691, p23

⁶ Economic Commission Europe. Road Traffic Accidents in Europe and North America. XLII. Geneva: United Nation Publication, 2002.

⁷ See http://ec.europa.eu/research/transport/news/article_6924_en.html.

⁸ See Eurostat and CARE database for number of deaths and injured between 1995 and 2005 in all Member States except Romania and Bulgaria. See also Anna BIALAS-MOTYL, Statistics in focus, Transport, *EU road safety 2004: Regional differences*, 14/2007.

⁹ White Paper submitted by the Commission on 12 September 2001: "European transport policy for 2010: time to decide" [COM(2001) 370 final.

¹⁰ See UK Personal Injury Litigation, Datamonitor Report, Table 6 Motor bodily injury claims volume and average amount, 2000-4, March 2006.

¹¹ See for example Hungarian Statistical Office, Road Traffic Accidents Involving Personal Injury, Quarters I-II, 2008, Release August 21, 2008. At <http://portal.ksh.hu/pls/ksh/docs/eng/xftp/gyor/ser/eser20806.pdf>. See also Statistics Finland at http://www.stat.fi/til/ton/2008/07/ton_2008_07_2008-08-21_tie_001_en.html.

¹² See Slovenia for example at http://www.stat.si/eng/novica_prikazi.aspx?id=1197. See also Austria at http://www.kfv.at/fileadmin/webcontent/Publikationen/Verkehrsunfallstatistiken/2007/OEE07_en_glisch.pdf.

In the European Union, a division between “western countries” and “southern countries” can be discerned on this issue¹³. In fact, it appears that the mortality rate in road traffic injury is estimated at between 11 and 12 per 100, 000 population in the EU-15 while it is estimated between 16.3 and 19 per 100 000 population in the enlarged Europe (including new comers)¹⁴. Generally speaking, the victims of road traffic accidents are men between 15 and 44 years old¹⁵.

Compensation practices vary widely between Member States. Civil liability cover exists in all countries.

In 2004, WHO published a report on road traffic accident prevention: World Report on Road Traffic Injury Prevention¹⁶. Their conclusion was that the total road traffic system is very complex and differs from country to country. It involves motor vehicles, roads and road users and their physical, social and economic environments. Road traffic injuries are an important public health and development issue; each year 1.2 million people are killed worldwide and between 20 million and 50 million are injured or disabled.

A number of policies have been adopted to increase road safety and specific targets have been set¹⁷. As previously stated great improvements have been observed in recent years. However, increased road safety does not always translate into decreases in the number of claims or levels of compensation. Public awareness, better management of claims, the recognition of new types of losses and a general increase in compensation levels have meant that in some countries the increase in road safety has been paralleled by an increase in claims and levels of compensation. Thus, accident prevention and a general decrease in road traffic accidents do not have a simple or fully predictable impact on road traffic accident compensation levels.

¹³ See UK Department of Transport comparison tables for 2001 under <http://www.statistics.gov.uk/STATBASE/ssdataset.asp?vlnk=7254>.

¹⁴ World report on road traffic injury prevention: summary, WHO, 2004, p11

¹⁵ WHO Global Burden of Disease project, 2002, Version 1

¹⁶ World report on road traffic injury prevention: summary, WHO, 2004

¹⁷ White Paper submitted by the Commission on 12 September 2001: “European transport policy for 2010: time to decide” [COM(2001) 370 final.

A number of factors impact on compensation levels. One factor that is essential to ensuring that compensation is a reality for all victims is insurance. Third party insurance is compulsory in all Member States.

This is the result of the implementation of the Motor Directives in the different Member States.

The objective of ensuring that car drivers are insured, at least for third party liability coverage, is to limit the risk of victims not being compensated in the event of a car accident.

This does not mean, however, that insurance companies are the only source of compensation but merely that victims are no longer solely reliant on the driver or operator of a vehicle for compensation.

Guaranteeing minimum levels of compensation through compulsory third party insurance also has an impact on compensation levels but so do societal changes, standards of living, the evolution of mortality rates, new technologies in dealing with injuries, the circumstances in each case and how non-pecuniary losses are evaluated by the courts. All these will create differences in compensation levels with some merely creating differences between individual cases and others leading to important differences between countries as confirmed by Graph 1 below.

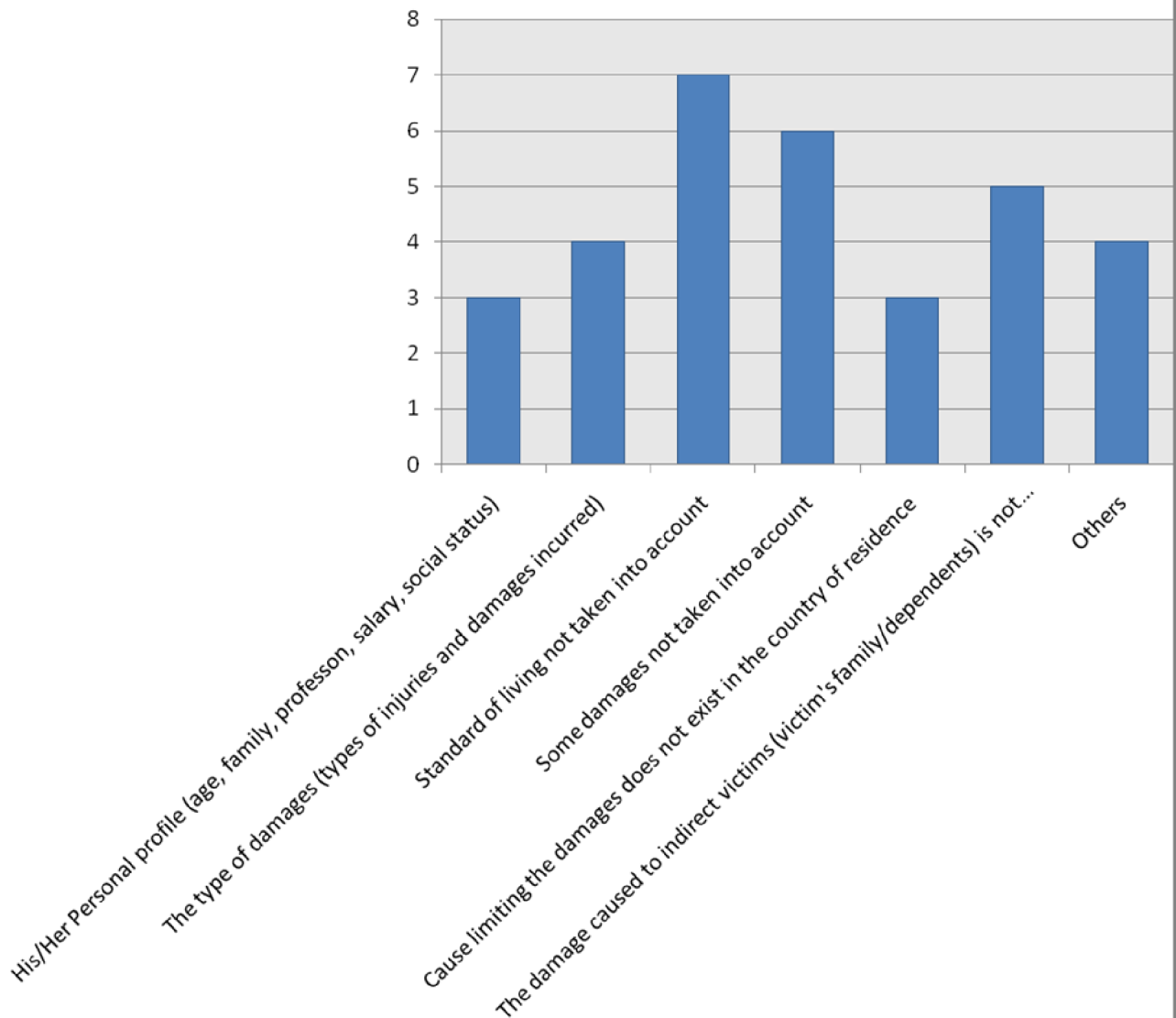
As between Member States, the main problems in levels of compensation *stricto sensu* relate to non-economic losses including the fact that in some Member States specific types of economic losses are not recognized irrespective of the fact that there may be only a general head for non-economic losses.

There are also issues in respect of indirect victims whose non-economic losses are not often recognized and, when they are, may lead to important differences in the actual level of compensation.

Graph 1

If it is not satisfactory, what are the main problems, taking into account the level of compensation that a victim would obtain had he/she had the accident in his/her own Member State, based on

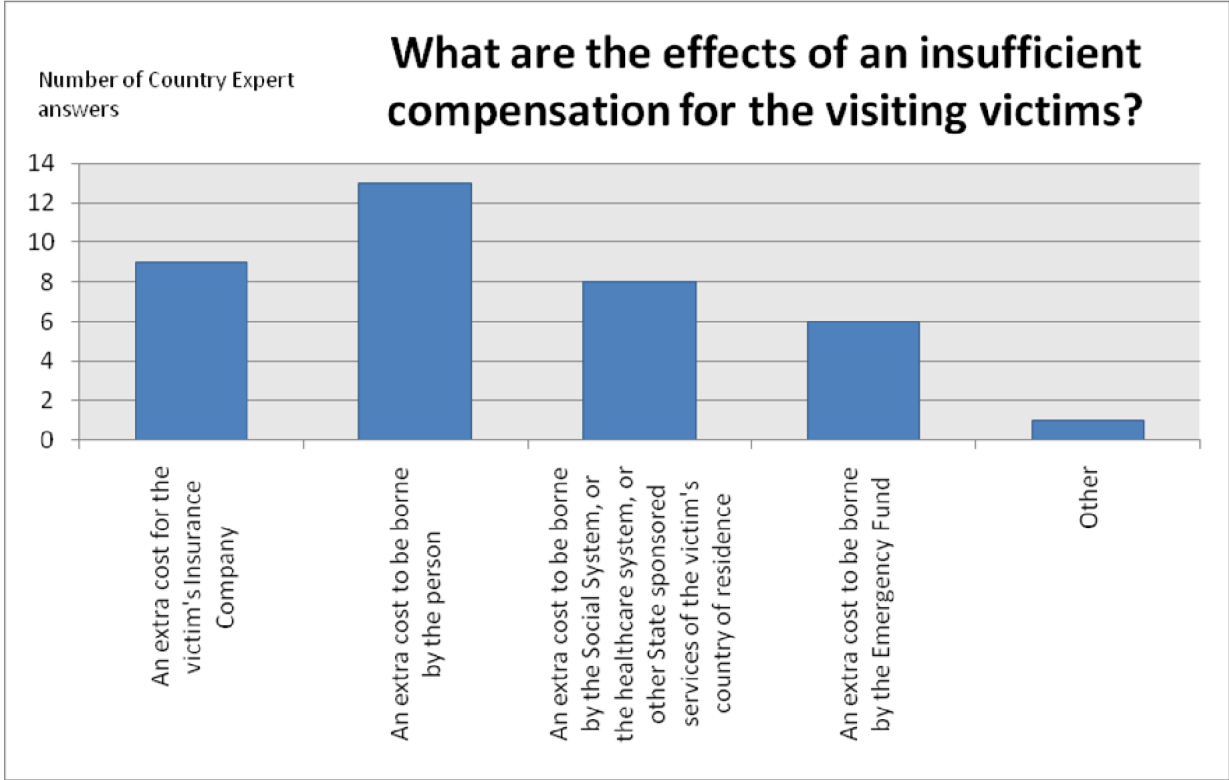
Number of Country Expert answers



Source: Questionnaire

Interestingly when the Visiting Victim is not adequately compensated, the losses are generally borne, in order of importance, by the victim himself or herself and by the victim's own insurance company. As shown below the social system is in third position.

Graph 2



Source: Questionnaire

EXECUTIVE SUMMARY

1 Background

1.1 The Motor Insurance Directives

The European Union has already implemented five Motor Insurance Directives aimed at better protection for EU citizens involved in cross-border road accidents and harmonization of the applicable legislation. These are fundamental to the free movement of vehicles within the EU.

The first three directives¹⁸ were adopted to establish a single market in the field of motor insurance. These directives made it compulsory for all drivers to be covered by third party insurance and abolished border checks on insurance to facilitate the free movement of vehicles. They also guaranteed better protection for victims of road accidents, even in accidents caused by uninsured or unknown vehicles.

The 4th Motor Insurance Directive¹⁹ has completed the system by establishing an efficient mechanism for quick settlement of claims when an accident takes place outside the victim's Member State of residence ("Visiting Victims").

¹⁸ Council Directive 72/430/EEC of 19 December 1972 amending 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.

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.

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.

¹⁹ DIRECTIVE 2000/26/EC of 16 May 2000 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 amending Council Directives 73/239/EEC and 88/357/EEC

The 5th Motor Insurance Directive²⁰ improves the provisions of the previous directives by making it “easier for drivers to get insurance”²¹. It sets a minimum insurance amount for personal injuries and damage to property. It also includes pedestrians and cyclists as specific categories of accident victims, likely to need more protection than automobile drivers.

The most important changes brought by the Directives are the following²²:

- Abolition of checks on insurance certificates at borders;
- Compulsory insurance against civil liability in respect of the use of vehicles;
- Protection of injured parties (in their own country or abroad) especially through the imposition of minimum amounts for compensation;
- Representatives responsible for settling claims to provide better information for victims;
- Guarantee funds, information centres, compensation bodies and central bodies must be established to enhance the protection/compensation of victims.

1.2 Regulation (EC) N° 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II)²³

Before the adoption of this regulation (applicable from July 2009), the Hague Convention of 1971 was applicable in some Member States.

This regulation provides that the applicable compensation principle is the principle of *restitutio in integrum*, taking into account the standard of living of the victim in his/her country of residence. The applicable law in cases of a foreign victim will be the law of the

²⁰ DIRECTIVE 2005/14/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 May 2005 amending Council Directives 72/166/EEC, 84/5/EEC, 88/357/EEC and 90/232/EEC and Directive 2000/26/EC of the European Parliament and of the Council relating to insurance against civil liability regarding the use of motor vehicles.

²¹ Press release from the European Commission, Charlie McCREEVY, European Commissioner for Internal Market and Services, Statement on Motor Insurance Directive, 12.01.2005.

²² Source: Motor vehicles liability insurance, Summaries of legislation, available at <http://europa.eu/scadplus/leg/en/lvb/l22028.htm>.

²³ Available at

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:199:0040:0049:EN:PDF>

country where the injury is sustained (art 4.1). However, when the liable person and the injured person come from the same country, the law of that country shall apply (art 4.2). Moreover, if all the circumstances of the case are, as determined by the court, more connected with another country than the one where the accident happens, the law of the former shall apply.

2 The main issues in terms of access to compensation (avoiding expiry of limitation period) for EU residents involved in road traffic accidents in a Member State other than the Member State of their habitual residence (“Visiting victims”).

2.1 Issues related to limitation periods

There are as many limitation period systems in the EU as there are Member States. Further, most limitation periods systems are complex and include principles that accommodate many exceptions. Finally, information on limitation periods is often difficult to obtain. The differences between Member States relate to the following:

- The triggering event determining when the limitation period starts to run;
- The existence and the nature of events or circumstances independent of the victim’s actions that may suspend or interrupt the limitation periods;
- The existence of factors and/or types of actions by victims that may suspend or interrupt limitation periods, and the different meanings given to the words “suspension” and “interruption”;
- The discretion granted to the courts to extend limitation periods;
- The existence of limitation periods differing in length depending on the type of damage (resulting from personal injury or property damage);
- The existence of general and specific limitation periods;
- The existence of different limitation periods for actions in tort and in contract;
- The existence of concomitant limitation periods: short/ flexible and long/ absolute;
- The impact of other limitation periods on the limitation period in tort.
- The duration of limitation periods; and
- The special regime applicable to disabled persons and minors.

2.2 Distortions in levels of Compensation due to differences in limitation periods and procedures

Given the complexities of limitation periods in each Member State, which are amplified by related procedures, it appears that Visiting Victims are no more disadvantaged than resident victims when it comes to understanding how limitation periods apply.

Both types of victims need professional advice to ensure that the limitation period does not expire.

Victims involved in an accident, even if they are not responsible, will report it to their local insurer. The victim's insurer will usually be the primary source of immediate advice, and legal professionals will often assist.

Most professionals, insurers and lawyers will advise the prompt filing of a claim. The only reasons a limitation period would expire might be related to the victim's inability to ascertain the other party involved, failing to clearly evaluate their damage, or misunderstanding of the possible effects of filing a claim with an insurer.

2.3 Importance of the risk of distortion

The risk of distortion in issues of compensation is high given the complexity and non-standardisation of limitation periods²⁴.

First, basic limitation periods differ from one Member State to another. For example regarding limitation periods against a third party's liable insurer, in **Spain: 1 year, Malta: 2 years, Austria, Germany, Finland, Poland, Portugal, Romania, Sweden, Slovenia and the United Kingdom (for personal injury): 3 years, Bulgaria, Luxembourg: 5 years; France: 10 years.**

Second, depending on whether tort or contract legal principles apply, a specific limitation period will attach. Some countries, such as **Austria and Ireland**, hold the same limitation period for tort or contract actions. Others like **France**, do not.

²⁴ See also on this issue *Personal Injury Compensation in Europe*, Peopil research Group, Kluwer, 2003.

Third, depending on whether accidents have implications in criminal law, the limitation periods that apply to crime may apply to the whole action: for example in **France**, if the litigation is joined to a criminal action, the limitation period is the same as that of the criminal procedure²⁵. This period is 3 years in cases of a minor criminal offence²⁶ and 10 years in cases of serious criminal offence²⁷.

These again can be different from those for tort actions and are by no means harmonized throughout the EU.

Fourth, the type of victim involved in a road accident may affect the application of a limitation period. In some countries special provisions protect minors and temporarily incapacitated persons. The relevant limitation period may only start when such parties have full capacity²⁸.

Fifth, some countries (**Estonia, Austria, Belgium and Malta**) have adopted the “date of knowledge” principle as the starting point for the limitation period. Others, such as **Hungary**²⁹, have opted for the “date of the accident” principle. Certain countries use a mixture of both with a “long stop” or “ceiling” limitation period starting at the date of the accident and a shorter limitation period based on the date of knowledge.

Sixth, some courts, such as those in **France**, have the power, in fairness to victims or depending on the circumstances of a case, to extend the limitation period.

Seventh, causes for interruption or suspension of a limitation period vary from one country to another. In some countries, the basic limitation period is very short but mere notification to the other party of a claim will suspend it. In other countries, the limitation period is longer but only a court action or an official settlement suspends it; this is the case in **Slovakia** for instance³⁰.

²⁵ Article 10 of the criminal proceedings code (introduced by the law n°2008/561 of June 17,2008).

²⁶ ARTICLE 8 of the criminal proceedings code (introduced by the law n°2008/561 of June 17,2008).

²⁷ ARTICLE 7 of the criminal proceedings code (introduced by the law n°2008/561 of June 17,2008).

²⁸ Following our Country Expert for France, Isabelle TINEL.

²⁹ Following our Country Experts for Hungary, Dr. Csaba Pataky and Dr. Tibor Pataky.

³⁰ Following our Country Expert for Slovakia, Peter BARTOSIK.

Eighth, the procedures for the lifting of a suspension differ from Member State to Member State.

Lastly, again depending on the Member State in question, once a limitation period has been suspended and starts running again it may either continue its course based on the remaining time left at the time of suspension, restart from the beginning or be established as an altogether different limitation period (usually shorter than the original one).

2.4 Importance of the level of distortion

The level of distortion created by the causes identified above is high, as shown in Chapter 4.

The causes that impact most upon the level of distortion are (i) the actual length of limitation periods, (ii) the starting point of limitation periods, including the application of the date of knowledge and/or the date of accident principles, and the special provisions on minors and incapacitated persons, and (iii) the factors that will result in the suspension of the limitation period. Other causes of distortion have milder effects, not least because they favour the victim.

The fact that there are significant levels of distortion does not necessarily mean that victims of road traffic accidents face a real prospect of expiry of a limitation period that would apply to them in a given case and country. There are cases of courts³¹ rejecting a claim based on expiry of a limitation period. However, although no relevant statistics were found on this issue, the surveys and interviews conducted indicate that these cases are relatively rare. Usually, the victim's insurer will play an important role in making sure that the victim files the necessary documents as soon as possible after the accident. Further, legal counsel always advises to file the claim as promptly as possible.

2.5 Difficulties encountered by Visiting Victims

The Visiting Victim's limited understanding of limitation periods in the Member State where the accident occurs will clearly be a cause for anxiety and can lead to the foreclosure of a right to claim. Accident victims will also possibly ignore or have limited

³¹ CZ Supreme Court, 25 Cdo 113/2006.

knowledge of the language and standard procedures of the country where they have had an accident, and the authorities with whom they have to deal. Important differences between Member States will accentuate this - see for example **Ireland** and **France**. The Visiting Victim is placed at a further disadvantage in comparison with a local victim in that the visitor will often have to go back to their country of residence and organize their claim from there.

Of necessity, reliance on insurance companies will be great and their assistance in ensuring that the relevant limitation periods are respected is essential. As stated above, Victims rely heavily on their insurance companies in this respect.

There are situations where this reliance will not be sufficient to guarantee that Victims are adequately protected; in particular in cases where the insurance company has a conflict of interest (i.e. it represents both the Victim and the faulty party).

Thus, although the differences between Member States are important, knowledge by insurance companies of how the limitation periods apply, limit their impact on litigation.

However, the Visiting Victim may not be able to benefit fully from local procedural subtleties and may not have enough time to prepare his or her claim adequately. Insurance companies could also be less interested in the actual functioning of limitation periods than in filing the claim as soon as possible. They may not completely understand the local situation and therefore cannot provide the best advice.

Finally, the fact that some Member States do not recognize specific rights for minors or incapacitated Victims may mean that they either will not file a claim, or that their claim have to be filed in their name by their representatives.

2.6 Solutions to issues related to limitation periods

A number of solutions to the problems highlighted herein have been identified following the interviews conducted and as provided in the different country reports. These are as follows:

- Do nothing³² (at the EU level);
- Apply the limitation periods of the Visiting Victim's place of residence;
- Harmonise traffic accident legislation based on existing EU regulations in other areas (e.g. product liability);
- Make it compulsory for insurers to inform victims on the limitation periods and related procedures, failing which they might be held responsible in case of expiry or the loss of a chance;
- Increase the limitation period by a period for Visiting Victims to take into account the fact that they will have to organize their action from their country of residence;
- Create a suspension rule that suspends the limitation periods as soon as the victim has sent a claim by registered letter with acknowledgement of receipt either to the third party, to the liable party's insurance company, to the victim's insurance company or to a guarantee fund. The limitation period would be suspended until the other party has either declined the claim or made an offer. If the other party declines the claim on the basis that it is not the appropriate organization to make a claim to, the limitation period will be suspended again when the victim makes his or her claim to the correct organization. The advantage of the suspension is that, as we have seen (e.g. in Spain), a limitation period may appear very short but in fact, because of a number of stipulated procedures, be rather long, and vice versa;
- Create a suspension or starting date rule to address the problems of minors and the disabled (this is already the case in **France**);
- Make better information available for people in cross-border situations or for European citizens who wish to travel to other Member States (for example a brochure that would explain the differences between limitation periods that could be provided by insurers);
- Create an agreement between insurers, with a view to harmonizing the time scale within which the claim must be presented to a foreign liability insurer, or to its claims representative in the country where the victim resides;
- Introduce a generally applicable minimum limitation period for cross-border motor insurance claims;

³² As proposed in *Full Compensation Of Victims Of Cross-Border Road Traffic Accidents In The Eu: The Economic Impact Of Selected Options*, Andrea Renda and Lorna Schrefler, Centre for European Policy Studies, Brussels, study requested by The European Parliament's Committee on Legal Affairs, 2007, p60.

- Introduce a general European regulation on limitation periods that would provide for a harmonized minimum period, with rules on possible extensions and suspension of the limitation periods in specific circumstances;
- Enable victims to argue before court for the application of the law of his/her country of residence (*lex conveniens*)
- Provide coverage through first party insurance instead of third party, meaning that the applicable law would most probably be the law of the country in which the contract was concluded, and therefore more likely the law of the victim's own country rather than that of the state in which the accident occurred. Additionally, the claim by the victim would be made against their insurer in their domicile state. Accordingly, the limitation period would then automatically be that of the victim's country of residence; and/or
- Create a new European tribunal which would follow a set of EU rules on limitation periods³³.

3 The main issues in terms of the level of compensation (risks of under-compensation or over-compensation) for EU residents involved in road traffic accidents in a Member State other than the Member State of their habitual residence.

3.1 Distortions in levels of Compensation for damage to property

3.1.1 Claims amounts in the EU

The different levels of compensation claimed for damage to property in the EU may in some cases simply be an indication of distortions within the EU. A used car may not be valued the same way in each Member State. However, variance in the amounts of compensation claimed may also result from other factors. Because of the divergence in living standards among EU Member States, items subject to claims may also differ and lead to varying amounts of compensation. Citizens of the richer Member States may purchase

³³ *Report on personal injury compensation legislation / General Purpose Standing Committee No. 1.* [Sydney, N.S.W.] : The Committee, 200, p27.

more expensive cars than citizens in other Member States. Further, the number of older cars may be greater in some Member States.

In **Estonia**³⁴, it has been determined by the Supreme Court that the compensation awarded to Visiting Victims should not be superior to that awarded to nationals. Thus, the standard of living in the state of habitual residence is not taken into account to calculate the compensation amount³⁵.

3.1.2 Determination of compensation levels

Compensation for damage to property is generally easier to determine and evaluate than it is for personal injury, especially non-economic losses. Damage to property is easily identified and quantified.

Personal injury can frequently be a shifting concept. Some injuries such as whiplash, did not exist years ago in terms of injuries that could be compensated, or did not generate sufficient compensation levels to trigger successful claims. However, whiplash and other conditions have transformed the personal injuries concept in recent years.

Injuries are now considered in light of their immediate and future impact.

The suffering of close relatives is also now recognized in many Member States as a damage that can be compensated. In **Malta**³⁶, however, such damage is neither recognized nor compensated.

This evolution is due to significant shifts in many areas of life including science, economics and social change.

3.1.3 Different types of losses taken into account

Most losses are taken into account, although in some countries the loss for spoiled holidays, for example, will not be compensated. It should be stated though that the

³⁴ Following our Country Expert for Estonia, Ants Mailend.

³⁵ Following our Country Expert for Estonia, Ants Mailend.

³⁶ Following our Country Expert for Malta, Dr Marse-Ann Farrugia.

recognition of such a loss by countries that have few visitors should not be placed on a par with countries that receive many. If **Greece** were to recognize this loss for example, it would have a greater effect on the numbers and levels of claims than would be the case for **Latvia**.

3.1.4 Risks of over or under compensation

The main issue in respect to compensation for property will be whether to replace lost or damaged property with identical property, or to apply a multiplier that will take into account the age, obsolescence or mileage of a car, for example. The replacement value may not be the same as the vehicle's economic value. Economic values of used cars will vary from country to country. The proposed settlement for a specific car model in one country may differ in another for exactly the same car. However, in many countries the practice is that the country where the Victim resides determines the value for compensation purposes. For example, the repair work for the car of a French Visiting Victim will be evaluated in **France** by an expert designated by the Victim's third party insurance company rather than by an expert in **Portugal** where the accident may have occurred. The **Portuguese** insurance company representing the faulty party may review the French expert's report and appoint its own expert but the compensation will take into account the costs of repairing the vehicle in **France** based on the French expert's assessment. If the vehicle was so damaged that it could not be brought back to **France**, a **Portuguese** expert would assess the value of the vehicle in **Portugal**. However this assessment would in turn be reviewed by a French expert, named by the Victim's insurance company. This is the practice in the EU³⁷.

3.2 Compensation for personal injury

There is no way to achieve perfect compensation for a personal injury claim. As a result it is difficult to talk about under or over compensation. What amount would "over compensate" the death of a loved one?

Not many victims of road traffic accidents or their loved ones will ever feel "over-compensated" for the psychological, emotional or physical effects of an accident.

³⁷ Interviews with Pierre Stewart, Director for Regional Coordination at the BCA, an expert body.

Further, there is no rule of thumb in respect of accident compensation levels. The Survey shows that lawyers in the same jurisdiction would seek different amounts of compensation given the same set of facts. This is a consequence of their different training, experience, or location within the jurisdiction. It could even reflect the reputation/name of a judge presiding in the case or how the lawyer's fees are calculated. There are differences in compensation practices from one region to another in the same country, from one court to the next and even between various levels of individual EU Member states' court and legal systems³⁸. If in cases of identical injury the amount claimed differs depending on elements exogenous to the injury itself, cases that are merely similar would generate even greater differences.

Further, where particular injuries are concerned, the same injury may have very different consequences for those who are victims of accidents. For example some injuries can affect the careers and lives of victims differently, so that the loss of one finger by a pianist will have a different impact on their career³⁹ than the same loss for a singer. Compensation levels may be adjusted as a consequence. The circumstances specific to each case will be the determinants of compensation levels.

Injuries may affect women and men differently. A road accident that causes an unintended abortion has obvious implications for one sex but not the other.

Injuries can also affect the families of victims differently. A victim who is a sole mother of five dependents will have more difficulty coping financially with the consequences of an accident than a victim with no dependents, provided they share comparable economic circumstances to start with.

Victims may cope differently with similar injuries for a variety of reasons. Some people recover faster than others, and some benefit from close family assistance whilst others rely more on help outside their immediate social circle.

This is why, in most countries, judges often have great discretion in determining the amount of the award. Each case is unique and requires specific attention. Although judges may take into account precedents, guidelines or expert advice so as to avoid the

³⁸ Case law 13 September 2007 Polish supreme court III CSK 109/07.

³⁹ Irish High Court 11 August 2003 Record 1394P/2000.

appearance of an arbitrary decision⁴⁰, generalization creates the risk of injustice⁴¹. According to Willi Rothley, an expert from the German Social Democratic Group in the European Parliament and vice president of the Legal Affairs Commission, personal injuries are compensated in the Member States between 1 million Euros per person and 5 million Euros per accident depending on the maximum sum insured. These amounts may seem low in comparison with the consequences of extreme, severe injuries⁴².

Some Member States do not take into consideration otherwise commonly accepted criteria in the calculation of the compensation of road traffic accident victims. In **Slovakia**, for example, “family”, “profession”, “standard of living” and “social status” are not taken into account⁴³, which explains why Visiting Victims may feel under-compensated.

The issue then is less that of “over or under” compensation than one of relative expectations.

3.3 General levels of compensation in the different EU countries

It is virtually impossible to calculate precisely the levels of compensation in each Member State because of the number of parameters that need to be taken into account, and because even when each of these is considered, data sets for some of the parameters are sometimes inaccessible. Thus, any presentation of compensation levels should be interpreted with great care and at most used to identify general trends or patterns.

3.3.1 General differences in compensation practices

The Team has prepared the graph below based on a number of sources including personal injury lawyers, insurance and reinsurance evaluations and country studies organized by specialized organizations over the last seven years.

⁴⁰ L. Reiss, *Le juge et le préjudice*. Etude comparée des droits français et anglais, préf. P. Delebecque, PUAM 2003, n° 358, p. 277.

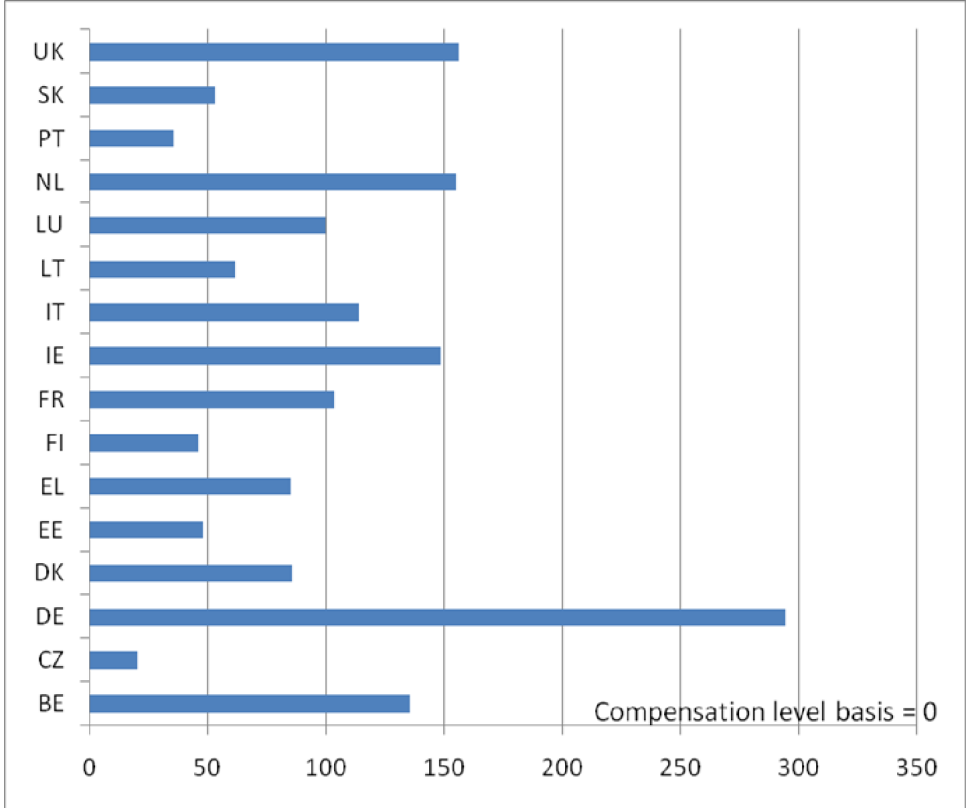
⁴¹ Judgment of the Court of Appeal of the 27th February 2004 in “Annunziata sive Nancy Caruana vs. Odette Camilleri”.

⁴² Report on the 6th Traffic Law Days in Trier, Prof. Dr. Christian Huber, Trier 2005, page 7

⁴³ See national report for Slovakia page 10

The result is useful only in that it shows differences so great between countries that even regressive corrections would not attenuate them substantially as shown in the graphs below.

Graph 3



Sources: various compiled

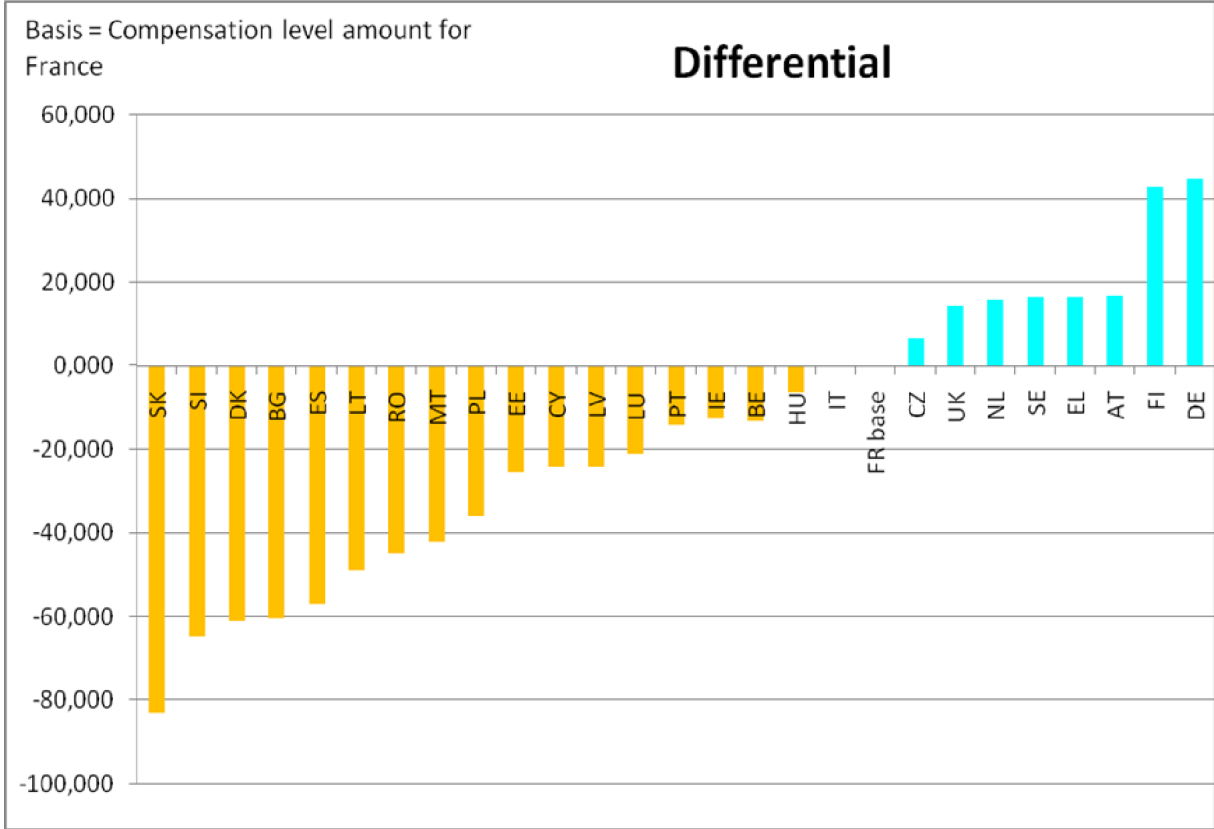
We can conclude from the graph above, as well as from the Country Reports, interviews and surveys that levels of compensation differ greatly between Member States⁴⁴.

Each study and survey conducted brings up different levels of compensation for each country. The case study (“Case Study” or “Tartarin and Farandelle Case Study”) undertaken in this Study confirms important differences between Member States.

The differential graph below shows the differing compensation levels between Member States relative to each other with France used as a basis or pivotal point.

⁴⁴ This is confirmed in studies such as *Personnel Injury Awards in EU and EFTA Countries*, Edited by David McIntosh and Marjorie Holmes, Kluwer Law International, 2003.

Graph 4

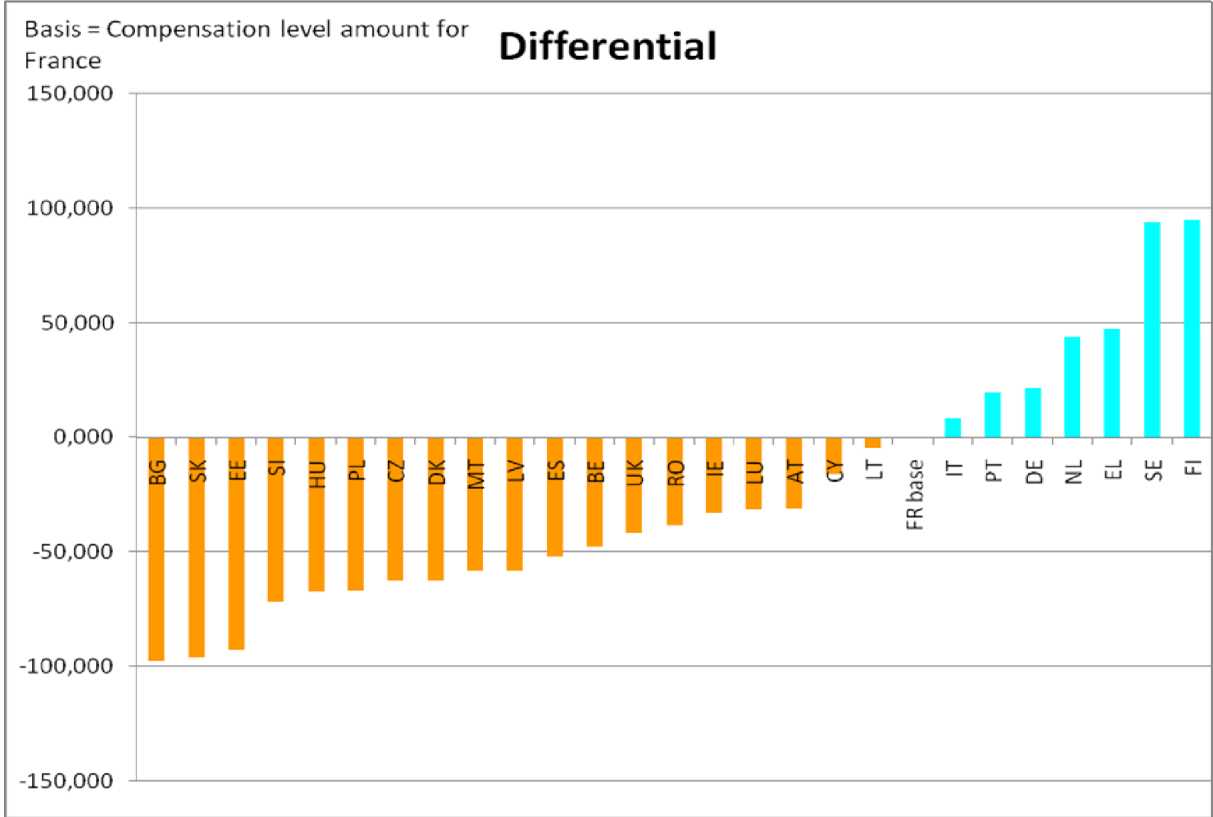


Source: Tartarin and Farandelle case study completed by the country experts under this Study

3.3.2 Some countries provide higher levels of compensation depending on the type of loss

It is important to note that based on a specific case one cannot conclude that as a general rule one particular country awards higher levels of compensation than another. The above case study involved a death, and injuries to the surviving spouse. The graph above identifies the estimation for total compensation to be awarded under the case study. But if one looks only at compensation levels for « death » excluding injuries to the surviving spouse, the differential results will vary. This is shown in the graph below which provides a differential result taking the « death » of Tartarin and damage to the car only into consideration.

Graph 5



Source: Tartarin and Farandelle case study completed by the country experts under this Study (counting only the consequences of Tartarin’s death).

This result is confirmed by other studies. In a study organized by Patrick Le Roy and Sascha Krahe of GeneralCologne Re, titled *A European Compensation of Bodily Injury Claims*, it is clear that some countries will award more compensation for “death” whilst others will have higher levels of compensation for tetraplegia or leg amputation⁴⁵.

As a result, not only are compensation levels different generally, but it cannot be said that any one country compensates at a higher level than another.

⁴⁵ Patrick Le Roy and Sascha Krahe, *A European Comparison of Bodily Injury Claims, The Bases and practice of the Law of Damages for Bodily Injury in the light of the Liability Implications for Motor Third Party Liability Insurers: A comparison of Six European Countries*, GeneralCologne Re, N 44, 2001. See also *Personnel Injury Awards in EU and EFTA Countries*, Edited by David McIntosh and Marjorie Holmes, Kluwer Law International, 2003.

3.3.3 Predictability and cross-border specificity

Many experts interviewed stated that it is difficult to evaluate compensation levels as a specific award will be granted for each set of circumstances.

It is also important to state that in determining compensation levels the impact of welfare systems should be disregarded as these can distort the results. In many studies, **Sweden** and **Finland** appear to show some of the lowest levels of compensation. This is because such studies do not take into account cross-border factors. The Case Study conducted herein integrates the cross-border reference fully. The result is that **Sweden** and **Finland** award the highest levels of compensation according to this present study. The role and function of the welfare system is disassociated in the Case Study as they cannot, in the given circumstances, exercise their role and function. The injured party goes back to his or her own country so that the compensation has to be evaluated outside the normal sphere of “welfare” compensation.

3.3.4 Increases in compensation levels over time

Interviews and research conducted under the Study show that levels of compensation have generally increased over time. Analysis of the speed of increase in compensation level per country would shed light on whether current differences are long-term, or whether there will be a convergence in compensation levels and practices in the future. Interviews confirm that losses that were not recognized in some countries a few years ago are now considered to be subject to compensation, and that there is a certain level of convergence in the developing recognition of losses.

3.4 Solutions for issues relating to the level of compensation

A number of solutions to the problems highlighted herein have been identified following interviews conducted, and as provided in the different country reports.

- Do nothing (application of Rome II);
- Apply the *lex damni* for assessing the quantum⁴⁶;
- Generate common principles for the assessment of damages on which judges could

⁴⁶ *Full Compensation Of Victims Of Cross-Border Road Traffic Accidents In The Eu: The Economic Impact Of Selected Options*, Andrea Renda and Lorna Schrefler, Centre for European Policy Studies, Brussels, study requested by The European Parliament's Committee on Legal Affairs, 2007, p60.

rely⁴⁷;

- Provide coverage for injuries through the third-party liability insurance of the victim;
- Create a European compensation fund for victims of cross-border road traffic accidents⁴⁸;
- Create European guidelines that would provide a list of recognized losses;
- Harmonise types of recognized losses and injury levels;
- Create European guidelines for the calculation of interest rates or discount rates in relation to awards;
- Develop tables that serve as guidelines for the assessment of injuries which could then be generalised, categorized, standardized and translated into all European languages so that when faced with a cross-border case, judges can apply the specifics of the Visiting Victim's home country (local life expectancy, retirement age, employment perspectives, rate of return on investments and so on) but using tables that are based on the same parameters. These would serve as guidelines and leave judges enough discretion to make an appropriate decision in the circumstances of the case;
- Enable the Visiting Victim to claim directly from his/her insurer (as is the case for Comprehensive and Third Party insurance with extra guarantees);
- Increase the amount of information available to judges so that they have accurate information in their own language about compensation levels, practices and expectations in other countries. Accordingly they would be more able and likely to take into consideration many aspects of the Visiting Victim's situation at home;
- Enable the Visiting Victim to claim from his/her own third party insurer, if within 30 days of sending a request or claim to a guarantee fund or the third party's insurance he or she has not received a reply;
- Enable the Visiting Victim to file a suit in his or her own country, if within 30 days of sending a request or claim to a guarantee fund or the third party's insurance he or she has not received a reply;
- Impose on Visiting Victim's insurer an obligation to provide information and assistance on how to proceed with a claim against a third party abroad;
- Provide better information for people in a cross-border situation or for European citizens who wish to travel to other Member States, such as a brochure that would

⁴⁷ *Id*, p60.

⁴⁸ *Id*, p60.

explain differences in damage awards between countries and the possibilities or options that exist to reduce or eliminate the risks of under compensation;

- Make driver's insurance compulsory in all Member States or allow for a specified time-frame during which the insured may visit another Member state but still be covered by their insurance, provided that they notified their insurer. This time-frame could be agreed at the European level;
- Extend direct settlement insurance claims as applied in **France, Italy, Germany**, to cross-border claims;
- Apply *restitutio in integrum* so that under-compensation is avoided;
- Create a European body to give recommendations on the average sums of compensation for personal injury/damage to property (such as the Road Traffic Accident Damage Board "Liikennevahinkolautakunta" in **Finland**), to harmonize European compensation rules and centralize the information concerning these rules;
- Enable the Visiting Victim to argue before courts for the application of the law of his/her country of residence (*lex conveniens*);
- Provide coverage through first party insurance instead of third party meaning that the applicable law would be the proper law of the contract rather than the law of the place of the accident;
- Create a single market in insurance distribution⁴⁹ to unify insurance products;
- Create a minimum award per type of injury table at the EU level (similar to Convention IDA⁵⁰ in **France**); and/or
- Create a European Court for compensation issues only.

4 Assessment of solutions

A number of solutions are identified above to resolve issues related both to access to compensation and levels of compensation. These solutions include all but one of the five solutions assessed in study conducted in 2007 by Andrea Renda and Lorna Schrefler of the Centre for European Policy Studies and requested by The European Parliament's Committee

⁴⁹ *An internal market strategy for services*, Communication by the European Commission, CEA Note, June 2001, p6

⁵⁰ Agreement between insurance companies on a scale of responsibility as a basis for compensation so as to avoid lengthy negotiations between insurers.

on Legal Affairs⁵¹. The solution that was not identified as a result of the analysis of the issues that arise in cross-border road traffic accidents is that which proposes the application by the courts of the “principle of ubiquity”. The reasons for this are outlined under Chapter 5. In the context of this study, if the principle were to be applied it would have to be redefined or its traditional interpretation extended. Further, it would have to be understood as a right granted to Victims rather than as a discretionary element enjoyed by judges as stated in the 2007 study. In any case, because this solution was proposed under the 2007 study, it was decided to assess it also assuming that in this context the principle of ubiquity refers to the application of a law by a court based on the location of the accident or the location of effects of the accident for the victim.

The solutions were assessed. Before being able to conclude whether or not to recommend a particular solution it was deemed appropriate to evaluate the extent of the problem of compensation for Visiting Victims of road traffic accidents in the EU. Solutions should be proportionate to the importance of the issue.

5 Road traffic accidents involving Visiting Victims

How many Visiting Victims are at risk of suffering from over or under compensation in the EU or from the effect of the expiry of a limitation period?

5.1 Gathering data on road traffic accidents

Statistics on road traffic accidents exist and are available in a number of databases. However, very few databases provided statistical information on road traffic accidents involving non-residents for each of the 27 Member States, let alone Visiting Victims⁵².

The main database used in determining the number of road accidents of concern to this study is the CARE database⁵³. To complete data sets obtained through CARE, guarantee

⁵¹ *Full Compensation Of Victims Of Cross-Border Road Traffic Accidents In The Eu: The Economic Impact Of Selected Options*, Andrea Renda and Lorna Schrefler, Centre for European Policy Studies, Brussels, study requested by The European Parliament's Committee on Legal Affairs, 2007.

⁵² See Commission Staff Working Document addressed to the European Parliament and to the Council on certain issues relating to Motor Insurance, SEC(2005)1777, 19.12.2005.

funds and compensation bodies have been specifically contacted in order to obtain statistics on the number of Visiting Victims who have sustained an accident caused by a non-insured or unidentified person. All EU insurance companies have been contacted and information was provided for a very limited number of countries.

The information gathered using the CARE database and other data sets indicates that, in the Member States for which information was available, the number of road accidents involving non-residents is not insignificant. However, it is important to note that non-residents involved in road traffic accidents generally fall into one of three very different profiles. The first main profile concerns tourists involved in road traffic accidents. The second main profile concerns cross-border commuters involved in road traffic accidents. The third profile relates to cross-border workers. The distinctions between these profiles are important.

Firstly, the propensity of each type of profile to be implicated in road accidents may vary. Each category of road user may well behave differently. It can be assumed that the cross-border commuter will be more familiar with foreign roads used than the tourist. It can also be assumed that tourists may have higher chances of being involved in car accidents than cross-border commuters given their unfamiliarity with foreign roads. However since tourists use foreign roads less often than cross-border commuters, the chances of cross-border commuters being in a road traffic accident are higher. Similarly, the cross-border worker is exposed to the risk of a road accident more often than the occasional tourist. However, the cross-border commuter will often know the local language, which can be important when driving.

Secondly, the impact of a road traffic accident will be different depending on the profiles of those involved. The cross-border worker may be covered by labour insurance policies and any compensation will be linked to work accident regulations. Cross-border commuters may be specially insured, either by their employer or by special regional insurance schemes⁵⁴. The cross-border commuter may not only understand the language of the foreign country but also have some knowledge of his or her rights and local regulations. Further, cross-border commuters usually commute to neighbouring countries where legal

⁵³ CARE - Community database on Accidents on the Roads in Europe created by Council Decision of 30 November, 1993, 93/704/EC, OJ No L329 of 30.12.1993, pp. 63-65.

⁵⁴http://gcportal.guycarp.com/portal/extranet/popup/pdf_2007/GCPub/Casualty%20Specialty%20Uodate%20Sept%2006.pdf

systems are similar to their own, and the provisions determining levels of compensation familiar. Tourism between neighbouring countries will benefit from this level of shared knowledge too. The statistics presented under this study show that a significant percentage of road traffic accidents in **Luxembourg**, that is around fifty percent of all accidents, implicate a non-resident. The statistics also show that most of the non-residents implicated in road accidents in **Luxembourg** are from **France** or **Belgium**, countries that have very similar compensation systems to that of **Luxembourg**. The shock of being involved in a road accident may be also be different for a tourist than it is for a cross-border commuter or driver. Tourists are often far away from home, and the likelihood of children being involved in accidents involving tourists is also greater.

As a result, although the number of road accidents involving non-residents is not insignificant, the profile of these visitors will determine first, their propensity to be implicated in a road accident and second, how the accident will affect them and whether the compensation issues raised fall within the scope of this Study.

The statistics do not distinguish between these profiles, and statistics that exist on tourism do not distinguish between the different types of tourists (those that hire cars, coach passengers, etc).

Further, the information collected does not indicate whether non-residents involved in road accidents are generally more at fault than local residents. Studies suggest that foreign drivers tend to be more at fault proportionally⁵⁵. A number of factors can be seen to support this. There is for example the lack of familiarity with local road infrastructure, difficulties with language, and greater carelessness in driving because of the belief that one can escape sanctions. However, no precise statistics on the subject have been found.

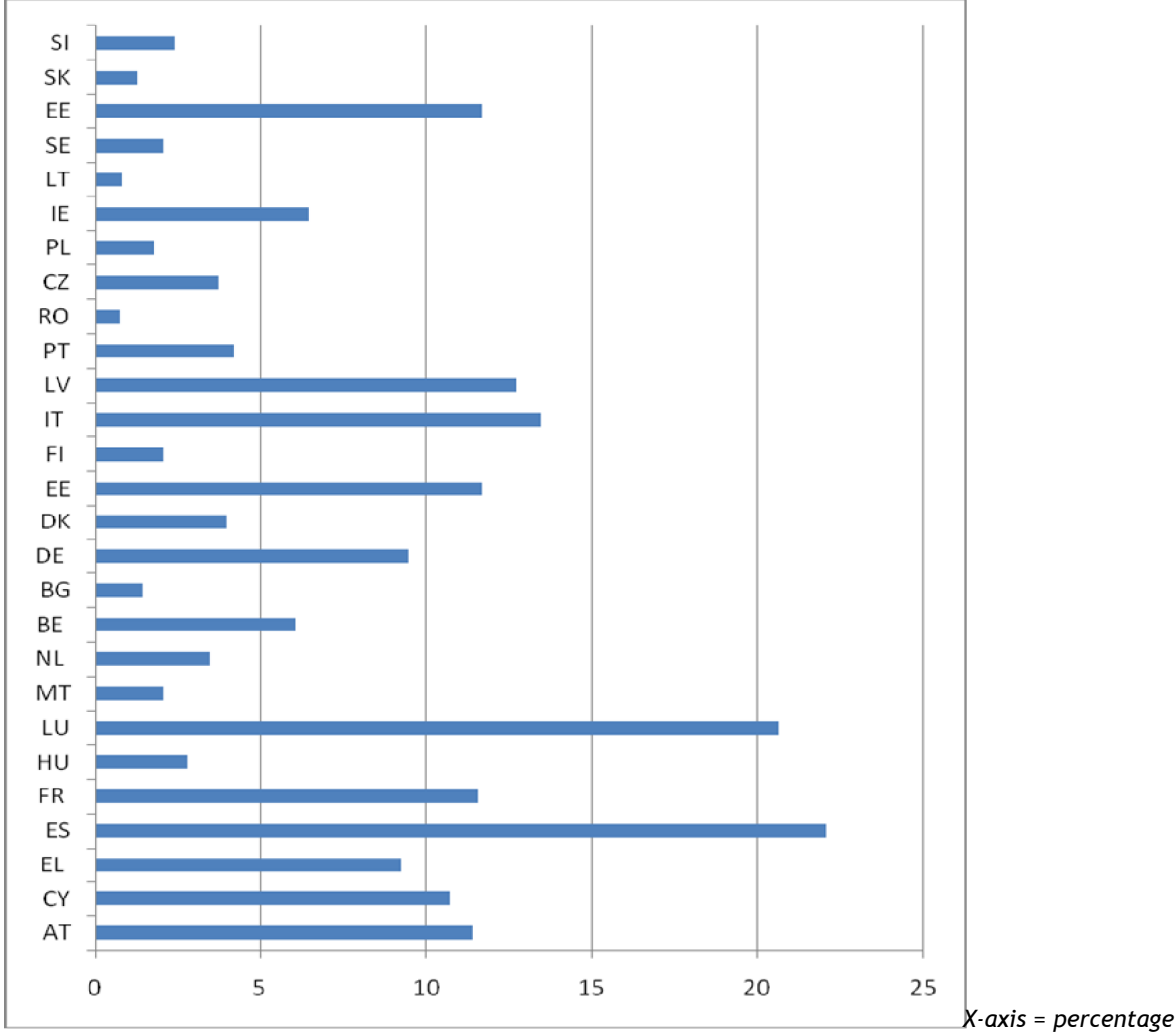
It should be noted that the absence of comprehensive and comparable data and cautions makes it difficult to generalize about the findings.

The Graph below was prepared using the CARE database and other data sets from insurance companies and road safety organizations in various Member States.

⁵⁵ E. Petridou, N. Dessypris, A. Sklalkidou, D. Trichopoulos. (1999). *Are traffic injuries disproportionately more common among tourists in Greece? Struggling with incomplete data.* Accident Analysis and Prevention, Vol 31 (6), pp. 611-15.

The Graph below presents the percentage of visiting persons involved in road traffic accidents over one year and where the injuries were serious (including death) taking into account a number of parameters and regressions.

Graph 6



Sources: Combined using CARE provided through CETE-SO-France, Road and Safety organizations, Insurance for 2006,

These statistics show that around 7 percent of all road traffic accidents causing serious injuries in the EU involve visiting parties.

Interestingly these results are very different than that reported in the 2007 study commissioned by the European Parliament⁵⁶. The authors of that study state that for **Germany** in 2004 up to 2 percent of road traffic accidents involved a cross-border dimension. The information provided in the graph above pushes that number to 9 percent for 2006. This seems an unlikely increase in such a short time even if the entry of new Member States may have led to more cross-border traffic.

Interviews conducted also show that over the last few years there has been an increased number of claims from Visiting Victims.

Graph 7



Source: Interviews

This suggests that the percentage of road traffic accidents involving foreign parties is not static and that it is set to increase in the years to come.

⁵⁶ *Full Compensation Of Victims Of Cross-Border Road Traffic Accidents In The Eu: The Economic Impact Of Selected Options*, Andrea Renda and Lorna Schrefler, Centre for European Policy Studies, Brussels, study requested by The European Parliament's Committee on Legal Affairs, 2007 at page 15.

5.2 Narrowing down the numbers

In their 2007 study for the European Parliament, the authors state that “less than 1 percent of road traffic accidents raise jurisdictional issues”⁵⁷. The vagueness of the statement and the fact that it is unsupported by firm data shows how difficult it is to clearly establish the extent of the issues raised by road traffic accidents involving Visiting Victims. Using the expression “less than” could relate to anything under 1 percent, right down to just above 0. The use of the expression “jurisdictional issues” should not be misinterpreted to mean EU Visiting Victims only. This could refer to any foreigner, whether or not from the EU, involved in a road traffic accident under third party liability insurance or not (tour operator contract). It is also applied to the EU citizen who is the victim of an accident in his or her own country but implicating a foreign party, whoever is at fault.

The authors of the present study believe that - based on the statistics presented above, the definition of the expression Visiting Victim and the focus of this study and Rome II on non-contractual obligations - the percentage of persons effectively concerned by this study is very limited and represents far less than one percent of people involved in all road traffic accidents within the EU.

Based on the information gathered through the CARE database, foreign parties involved in road traffic accidents represent around 7.5 percent of all those involved in road traffic accidents.

This percentage can be narrowed down to reflect more precisely the targets of this study.

Visiting Victims are:

- EU citizens,
- Those injured in a road traffic accident occurring in another Member State than their own,
- Those for whom third party insurance is relevant,
- Those who are not at fault.

Given that

⁵⁷ *Full Compensation Of Victims Of Cross-Border Road Traffic Accidents In The Eu: The Economic Impact Of Selected Options*, Andrea Renda and Lorna Schrefler, Centre for European Policy Studies, Brussels, study requested by The European Parliament's Committee on Legal Affairs, 2007.

- Foreign parties can include non-EU citizens (i.e. Russian citizens visiting Baltic states, for example),
- Less than half of the accidents can be assumed to result from the local (non foreign) party's fault⁵⁸, meaning that more than half of all relevant accidents are excluded from the scope of this study,
- In a significant proportion of all accidents, both parties are at fault,
- Many of the accidents involve commuters and cross-border workers protected under labour laws, special regional insurance schemes, and/or their contract with their employer, which again would be beyond the scope of this study as the issue would be either a contractual one or a labour law one,
- Some accidents involve foreigners in tour operated travels, where again the main issue will be a contractual one,
- many accidents occur in countries neighbouring that of the visiting party with similar laws or practices (meaning that compensation distortions are blurred), and
- Most cases will be settled out of court with insurance companies, which means that the parties will agree (the fact of agreement between the parties as to the amount of compensation should exclude any issues of under or over compensation)⁵⁹,

The appropriateness of changing the legal landscape in the EU with respect to this topic would be questionable from a subsidiarity and a proportionality perspective.

5.3 The extent of the problem

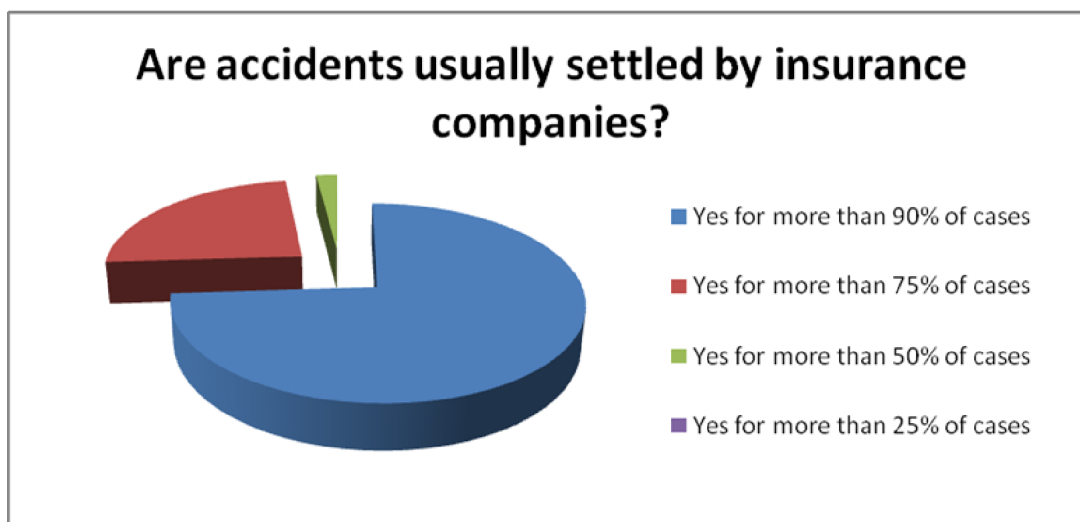
As show above, even if there are large differences in compensation levels between Member States, the importance of the issues at stake may not warrant further EU intervention.

As stated above, most cases involving road traffic accidents are settled between the injured party and an insurance company. Studies confirm this. In the present study, the Survey also confirms this as shown below.

⁵⁸ It is asserted in the European Parliament Study that a higher proportion of foreigners are involved in road traffic accidents.

⁵⁹ In the UK more than 90 percent of claims are settled out of court. See *Tort law and liability insurance: An intricate relationship*, Munich Re Group, 2007. See also CEA Annual Report 2007-2008 which states that throughout the EU a majority of cases are settled out of court.

Graph 8



Source: Interviews

It is also apparent from Graph 6 above that for some countries, such as **Luxembourg**, the number of accidents is related to the number of commuting and cross-border workers who are also covered by either labour laws or their contract with their employers, contrary to the situation of tourists⁶⁰.

6 Conclusions and recommendations

As stated previously, solutions should be proportionate to the objectives pursued. At the EU level, they should also be proportionate to the significance of the issues for the internal market.

⁶⁰ See in particular by Munich Re, *Commuting accidents, A Challenge for Workers' Compensation Systems*, 2004.

As shown in this study, there are important differences in compensation levels in the EU. This leads to potential under or over compensation in cross-border road traffic accidents.

The differences in compensation levels are not straight forward enough to clearly determine which Member State would provide higher compensation than the other. Compensation levels in each Member State depend on the nature and degree of the injury or loss. Some Member States will provide the highest levels of compensation for certain injuries whilst for others they provide levels of compensation that are among the lowest.

Further, not all types of losses are recognized by all Member States. Some Member States do not recognize sexual damage for example. Others include different types of losses under the same heading. This adds to the confusion and makes comparisons difficult.

Similarly, many differences exist between the different limitation periods systems of the Member States. Again the differences are not straight-forward and it is not clear which Member State offers the longest limitation period. Exceptions and specific suspension or interruption rules blur the apparent simplicity of the solution.

The difference in compensation levels and limitation periods lead to a great amount of uncertainty and risks of under and over compensation.

However, it is not clear that the distortions created by these differences significantly impact the internal market at least with respect to road traffic accidents since the actual number of Visiting Victims as referred to under the 4th Directive is not significant.

Given that the number of people concerned is relatively limited, the most appropriate solutions would be those that do not lead to overhauling the whole legal framework of Member States as it pertains to victim compensation. Targeted solutions would better meet the needs in this case although any chosen solution would have to take into account the increasing amount of cross-border traffic within the EU.

Among the solutions that could address the issues in a proportional manner to the numbers concerned are:

- Do nothing (at the EU level) and evaluate the impact of Rome II once its effects are apparent in approximately two years;

- Provide better information for people in cross-border situations or for European citizens who wish to travel to other Member States;
- Oblige insurance companies to provide information to their clients to try and foster greater awareness and higher levels of coverage;
- Create a EU Court or mediator/ombudsman for compensation issues;
- Create an ad hoc European compensation fund or commission for victims of cross-border road traffic accidents or create a fund for Victims who feel that they have been under compensated;
- Creation of a European body to give recommendations on the average sums of compensation for personal injury/damage to property (such as the Road Traffic Accident Damage Board “Liikennevahinkolautakunta” in Finland) but only within the framework of a system where appropriate questioning would be carried out by the national court (similar to prejudicial questioning), to help it determine quantum in cross-border cases.

Other solutions could be relevant, not simply to address cross-border road traffic accidents but rather, as Rome II does, to resolve a number of cross-border issues.

FINDINGS

1 Compensation Levels

1.1 Road traffic accidents involving Visiting Victims

1.1.1 Gathering data on road traffic accidents

Statistics on road traffic accidents exist and are available in a number of databases. However, very few databases provided statistical information on road traffic accidents involving non-residents for each of the 27 Member States, let alone Visiting Victims⁶¹.

The main database used in determining the number of road accidents concerned by this study is the CARE database. Insurance companies were contacted but few accepted to provide information.

To complete data sets obtained through CARE, guarantee funds and compensation bodies have been specifically contacted in order to obtain statistics on the number of visiting victims who have sustained an accident caused by a non-insured or unidentified person.

The information gathered using the CARE database and other data sets indicates that, in the Member States for which information was available, the number of road accidents involving non-residents is not insignificant.

However, it is important to note that non-residents involved in road traffic accidents generally fit three very different profiles. The first main profile concerns tourists involved in road traffic accidents. The second main profile concerns cross-border commuters involved in road traffic accidents. The third profile relates to cross-border workers. The distinction between these profiles is important.

⁶¹ See Commission Staff Working Document addressed to the European Parliament and to the Council on certain issues relating to Motor Insurance, SEC(2005)1777, 19.12.2005.

Firstly, the propensity of each type of profile to be implicated in road accidents may vary. They may behave differently. It can be assumed that the cross-border commuter will be more familiar with the foreign roads used than the tourist. It can also be assumed that because the tourist uses the foreign road (the roads used as a tourist) less often than the cross-border commuter, the chances of the cross-border commuter of being in a road traffic accident are higher even though tourists may have higher chances of being involved in car accidents due to their unfamiliarity with foreign roads. Similarly, the cross-border worker is exposed to the risk of a road accident more often than the occasional tourist. However, the cross-border commuter and cross-border worker will often know the local language, which can be important when driving.

Secondly, the impact of the road traffic accident will be different depending on the profile. The cross-border worker may be covered by labour insurance policies and any compensation be linked to work accident regulations. Cross-border commuters may be specially insured, either by their employer or by special regional insurance schemes⁶². The cross-border commuter may not only understand the language of the foreign country but also have some knowledge of his or her rights and the local regulations. Further, cross-border commuters usually commute to neighbouring countries where legal systems are similar to their own, including levels of compensation. Tourism between neighbouring countries will benefit from this too. The statistics presented under this study show that a significant percentage of road traffic accidents in **Luxembourg**, that is around fifty percent of all accidents, implicate a non-resident. The statistics also show that most of the non-residents implicated in road accidents in **Luxembourg** are from **France** or **Belgium**, countries that have very similar compensation systems to that of **Luxembourg**. The shock of the accident may be different for a tourist than it is for a cross-border commuter or driver. Tourists are often far away from home, and the likelihood of children being involved in accidents involving tourists is also greater.

As a result, although the number of road accidents involving non-residents is not insignificant, the profile of these visitors will determine first, their propensity to be implicated in a road accident and second, how the accident will affect them and whether the compensation issues raised fall within the scope of this Study.

⁶²http://gcportal.guycarp.com/portal/extranet/popup/pdf_2007/GCPub/Casualty%20Specialty%20Update%20Sept%202006.pdf

The statistics do not distinguish between these profiles, and statistics that exist on tourism do not distinguish between the different types of tourists (those that hire cars, coach passengers, etc.).

Further, the information collected does not indicate whether non-residents involved in road accidents are generally more at fault than local residents. Studies suggest that foreign drivers tend to be more at fault proportionally⁶³. A number of factors can be seen to support this. There is for example the lack of familiarity with local road infrastructure, difficulties with the language, and greater carelessness in driving because of the belief that one can escape sanctions. However, no precise statistics on the subject have been found.

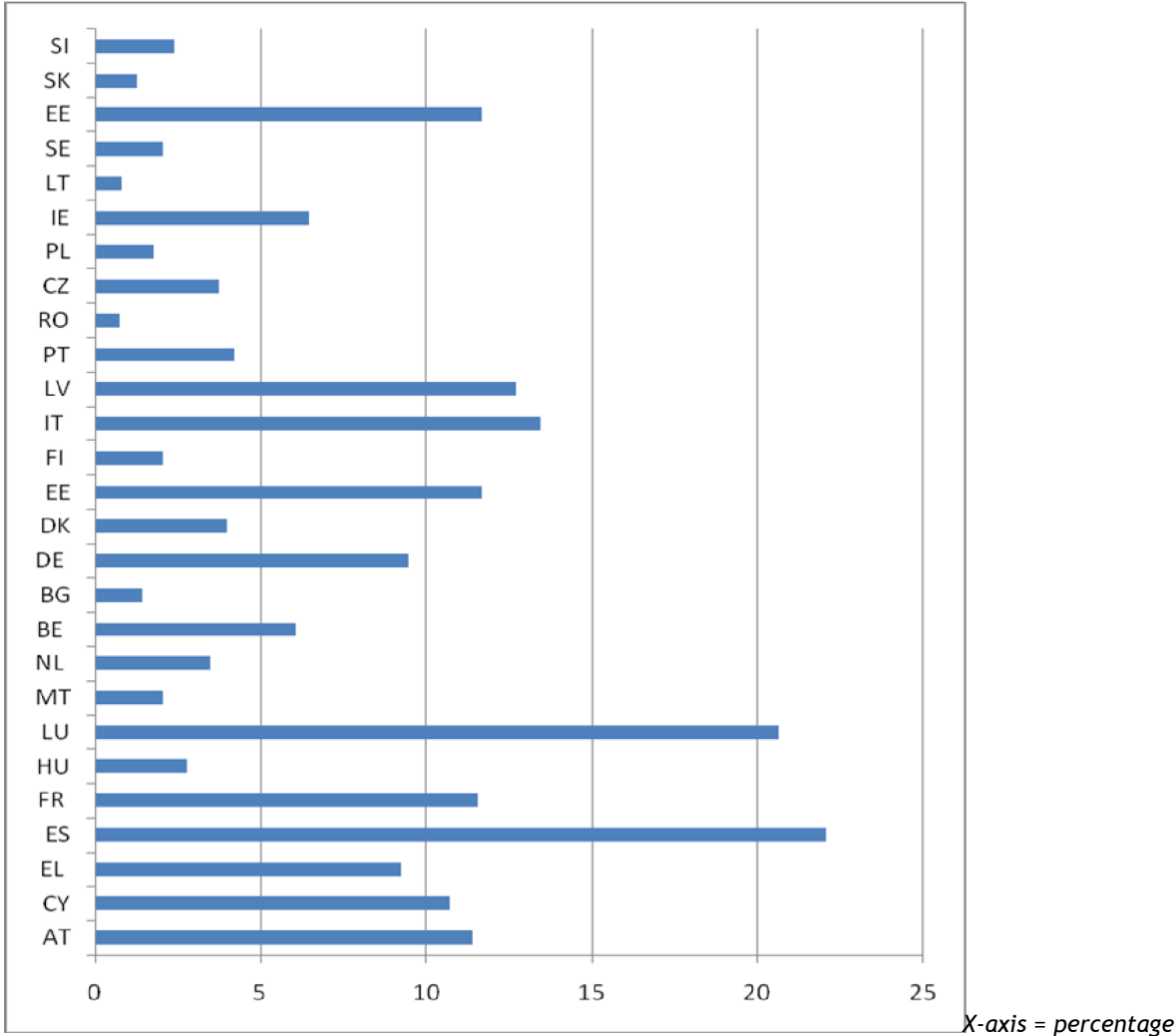
It should be noted that the absence of comprehensive and comparable data and cautions makes it difficult to generalize about the findings.

The Graph below was prepared using the CARE database and other data sets from insurance companies and road safety organizations in various Member States.

The Graph below presents the percentage of visiting persons involved in road traffic accidents over one year and where the injuries were serious (including death) taking into account a number of parameters and regressions.

⁶³ E. Petridou, N. Dessypris, A. Sklalkidou, D. Trichopoulos. (1999). Are traffic injuries disproportionately more common among tourists in Greece? Struggling with incomplete data. *Accident Analysis and Prevention*, Vol 31 (6), pp. 611-15.

Graph 6



Sources: CARE provided through CETE-SO-France, Road and Safety organizations, Insurance for 2006,

These statistics show that around 7 percent of all road traffic accidents causing serious injuries in the EU involve visiting parties.

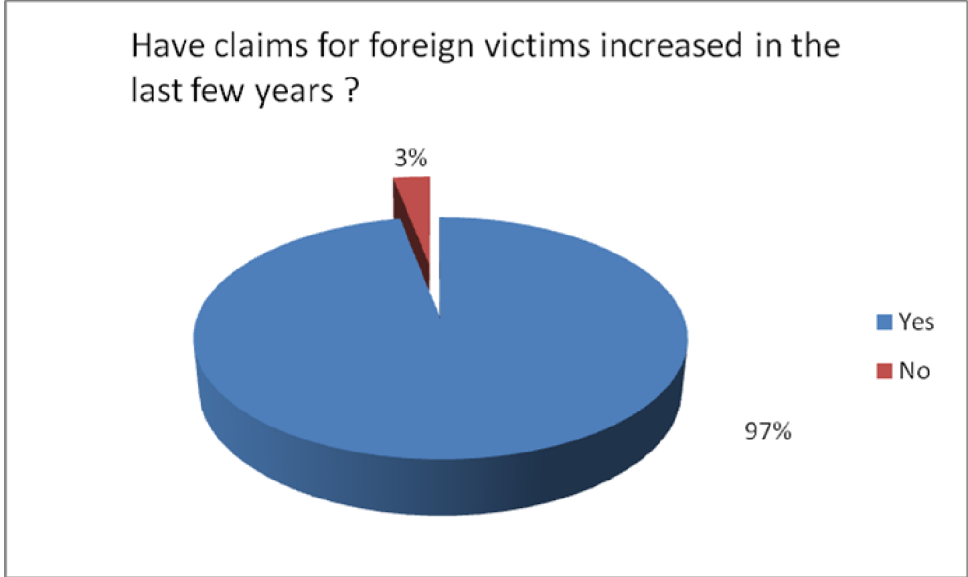
Interestingly these results are very different than that reported in the 2007 study commissioned by the European Parliament⁶⁴. The authors of that study state that for **Germany** in 2004 up to 2 percent of road traffic accidents involved a cross-border

⁶⁴ *Full Compensation Of Victims Of Cross-Border Road Traffic Accidents In The Eu: The Economic Impact Of Selected Options*, Andrea Renda and Lorna Schrefler, Centre for European Policy Studies, Brussels, study requested by The European Parliament's Committee on Legal Affairs, 2007 at page 15.

dimension. The information provided in the graph above pushes that number to 9 percent for 2006. This seems an unlikely increase in such a short time even if the entry of new Member States may have led to more cross-border traffic.

Interviews conducted also show that over the last few years there has been an increased number of claims from Visiting Victims.

Graph 7



Source: Interviews

This suggests that the percentage of road traffic accidents involving foreign parties is not static and that it is set to increase in the years to come.

1.1.2 Narrowing down the numbers

In their 2007 study for the European Parliament the authors state that “less than 1 percent of road traffic accidents raise jurisdictional issues”⁶⁵. The vagueness of the statement and the fact that it is unsupported by firm data shows how difficult it is to clearly establish the extent of the issues raised by road traffic accidents involving Visiting Victims. Using the expression “less than” could relate to anything under 1 percent, right down to just above 0. The use of the expression “jurisdictional issues” should not be misinterpreted to mean

⁶⁵ FULL COMPENSATION OF VICTIMS OF CROSS-BORDERROAD TRAFFIC ACCIDENTS IN THE EU: THE ECONOMIC IMPACT OF SELECTED OPTIONS, Andrea Renda and Lorna Schrefler, Centre for European Policy Studies, Brussels, 2007.

Visiting Victims. This could refer to any foreigner, whether or not from the EU, involved in a road traffic accident under third party liability insurance or not (tour operator contract) or an EU citizen that is the victim of an accident in his or her own country that implicates a foreign party, whether or not they are at fault.

The authors of the present study believe that - based on the statistics presented above, the definition of the expression Visiting Victim and the focus of this study and Rome II on non-contractual obligations - the percentage of persons effectively concerned by this study is very limited and represents far less than one percent of all road traffic accidents.

Based on the information gathered through the CARE database, foreign parties involved in road traffic accidents represent around 7.5 percent of all road traffic accidents.

This percentage can be narrowed down to reflect more precisely the targets of this study.

Visiting Victims are:

- EU citizens,
- Injured in a road traffic accident occurring in another Member State than their own,
- For which third party insurance is relevant,
- Who are not at fault.

Given that

- Foreign parties can include non EU citizens (ie Russian citizens visiting Baltic states for example),
- Less than half of the accidents can be assumed to result from the local (non foreign) party's fault⁶⁶ meaning that more than half of the accidents are excluded from the scope of this study,
- In a significant proportion of all accidents, both parties are at fault,
- many of the accidents involve commuters and cross-border workers protected under labour laws, special regional insurance schemes, and/or their contract with their employer which again would be beyond the scope of this study as the issue would be either a contractual one or a labour law one,
- Some accidents involve foreigner in tour operated travels where again the main

⁶⁶ It is asserted in the European Parliament Study that a higher proportion of foreigners are involved in road traffic accidents.

issue will be a contractual one,

- many of the accidents occur in neighbouring countries to that of the visiting party with similar laws or practices (meaning that the compensation distortions are blurred), and
- Most cases will be settled out of court with the insurance companies which means that the parties will agree (the fact of agreement between the parties should exclude any issues of under or over compensation)⁶⁷,

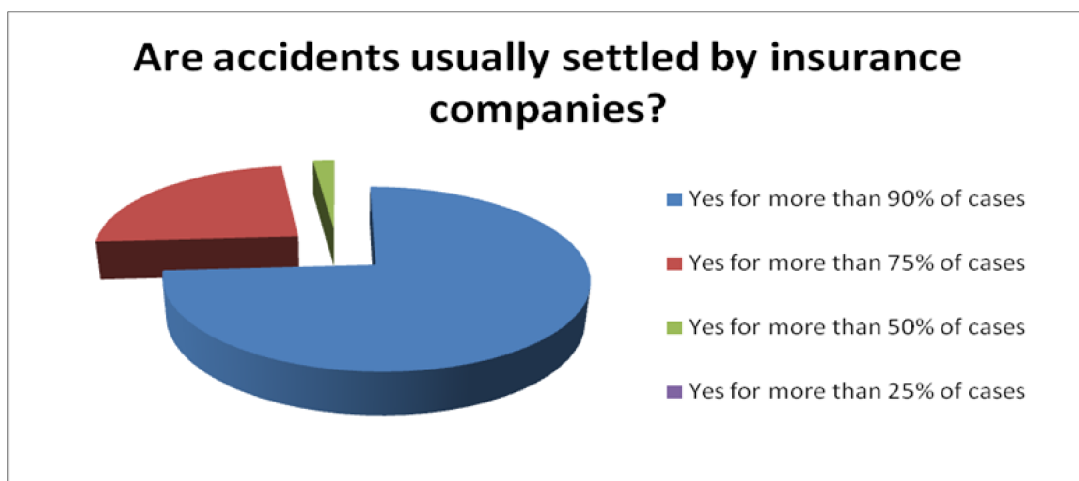
The appropriateness of changing the legal landscape in the EU would be questionable from a subsidiary and a proportionality perspective.

1.1.3 The extent of the problem

As shown above, even if there are important differences in compensation levels between Member States, the importance of the issues at stake may not warrant further EU intervention.

As stated previously, most cases involving road traffic accidents are settled between the injured party and an insurance company. Studies confirm this. In the present study the Survey also confirms this as shown below.

Graph 8

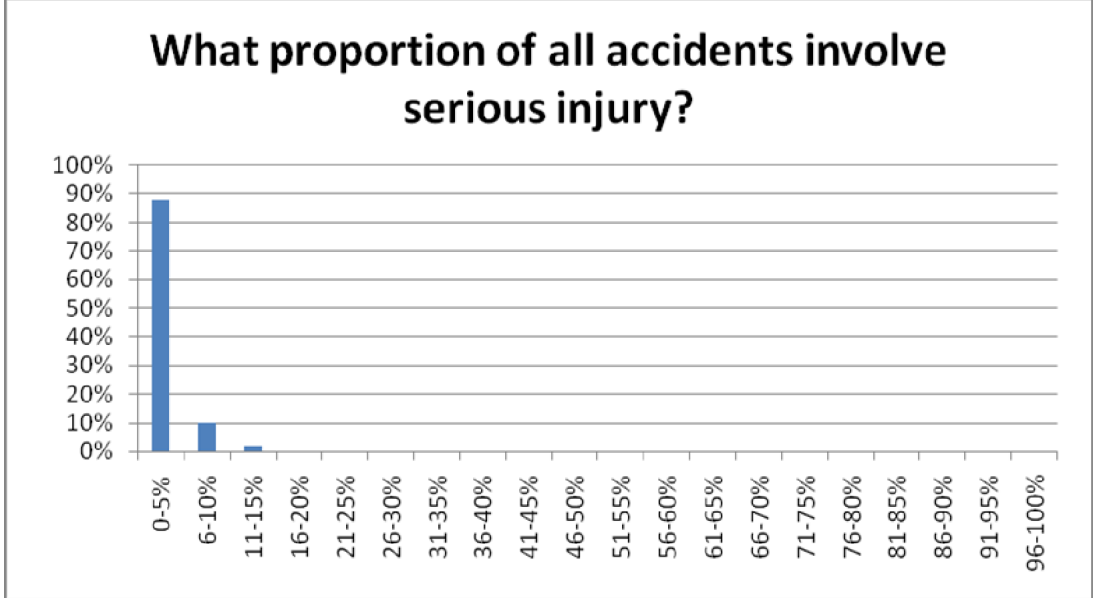


Source: Interviews

⁶⁷ In the UK more than 90 percent of claims are settled out of court. See Tort law and liability insurance: An intricate relationship, Munich Re Group, 2007. See also CEA Annual Report 2007-2008 which states that throughout the EU a majority of cases are settled out of court.

Further, to confirm other studies, it appears that very few accidents involve serious injury.

Graph 9



Source: Interviews

It is also apparent from Graph 6 above that for some countries such as Luxembourg the number of accidents is related to the number of commuting and cross-border workers who are also covered by either labour laws or their contract with their employers, contrary to the situation of tourists.

1.1.4 Avoiding under and over compensation or the expiry of limitation periods

Even if the numbers concerns are very limited this does not mean that the amounts involved are themselves limited.

Further, one may say that the problem remains so long as even one EU citizen suffers the injustice of being under-compensated.

However, targeted actions may be more appropriate where the numbers are very small.

1.2 The Green Card System

The Green Card system was created in 1953 and covers 44 countries in the world. This system was implemented when road traffic became heavier in order to control the movement of vehicles across borders. Its objectives are (i) to facilitate the movement of vehicles across international borders by the use of an internationally acceptable document proving the existence of insurance (the Green Card or International Insurance Card) and (ii) to ensure that victims of foreign registered vehicles are not disadvantaged⁶⁸.

This system was settled when, after the Second World War, it appeared that differences between countries, especially in respect to liability rules, were impeding the movement of road traffic. The system ensures that people obtain the right information when involved in road traffic accidents abroad⁶⁹.

The Green Card system has a double function: 1) to ensure that Third Party victims of road traffic accidents do not suffer because injuries or damage sustained by them were caused by a visiting motorist rather than a motorist resident in the same country; 2) to avoid the need for motorists to obtain insurance cover at the borders of each country they visit and so they know where to find help (local representatives) in the country they are visiting in case of an accident.

The Green Card is an equivalent of the national Motor Insurance Certificate. It certifies that the Visiting driver has at least the minimum compulsory Third Party insurance cover. For each driver, the Green Card can be obtained from the Insurer who has issued his/her motor insurance policy.

The Green Card System is implemented through national bodies such as⁷⁰:

- National bureaux (such as the Slovenská Kancelária poisťovateľov in **Slovakia** or the National Bureau of Bulgarian Motor Insurers in **Bulgaria**)

⁶⁸ Source : <http://www.mib.org.uk/GreenCard/en/About/GCHISTORY.htm>

⁶⁹ *International Motor Insurance Cards - A Report on the Provision of Insurance in Relation to the issue of International Motor Insurance Cards*, Presented to Parliament in pursuance of Section 9 of the Monopolies and Restrictive Practices (Inquiry and Control) Act 1948, 1967, p7

⁷⁰ A complete list of all the national bodies is available at http://www.cobx.org/modules/doc/public/get.php?id_doc=152.

- Compensation bodies (such as the Fondul de Protectie a Victimelor Străzii in **Romania** or the Polish Motor Insurers' Bureau in **Poland**)
- Guarantee funds (such as the Česká Kancelár Pojistitelu in **the Czech Republic** or the Verkehrrsopferhilfe e.V in **Germany**)
- Information centres (such as the Istituto per la vigilanza sulle assicurazioni private e di interesse collettivo (SVAP) in **Italy** or the Fonds de Garantie Automobile in **France**).

In the current year, 2008, the Multilateral Agreement between the National Insurers' Bureaux of the Member States of the European Economic Area and other countries is being revised.

Within the EU countries, the Green Card is not needed because motorists must normally comply with the directives on motor insurance that fix statutory minimum and maximum insurance cover.

1.3 Levels of compensation in the different EU countries

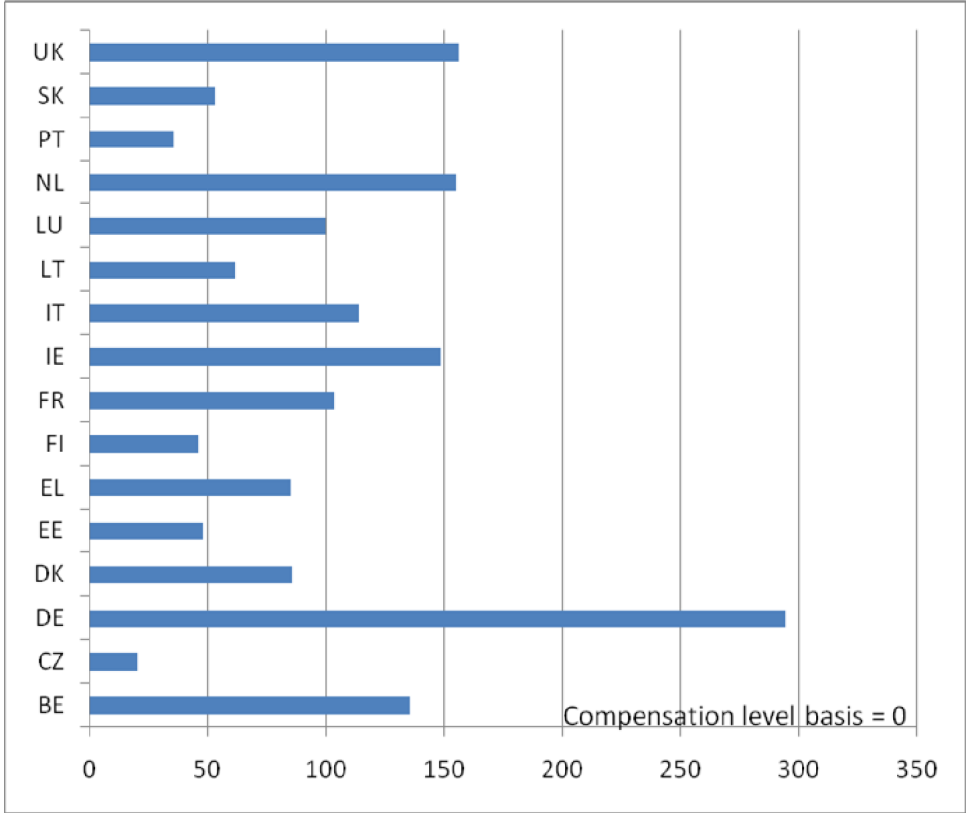
It is virtually impossible to precisely calculate levels of compensation in each Member State because of the number of parameters that need to be taken into account, and because, even when each of these is considered, data sets for some of the parameters are sometimes inaccessible.

1.3.1 General differences in compensation practices

The Team has prepared the graph below based on a number of sources including personal injury lawyers, insurance and reinsurance evaluations and country studies organized by specialized organizations over the last seven years.

The result is useful only in that it shows differences so great between countries that even regressive corrections would not attenuate them substantially.

Graph 3



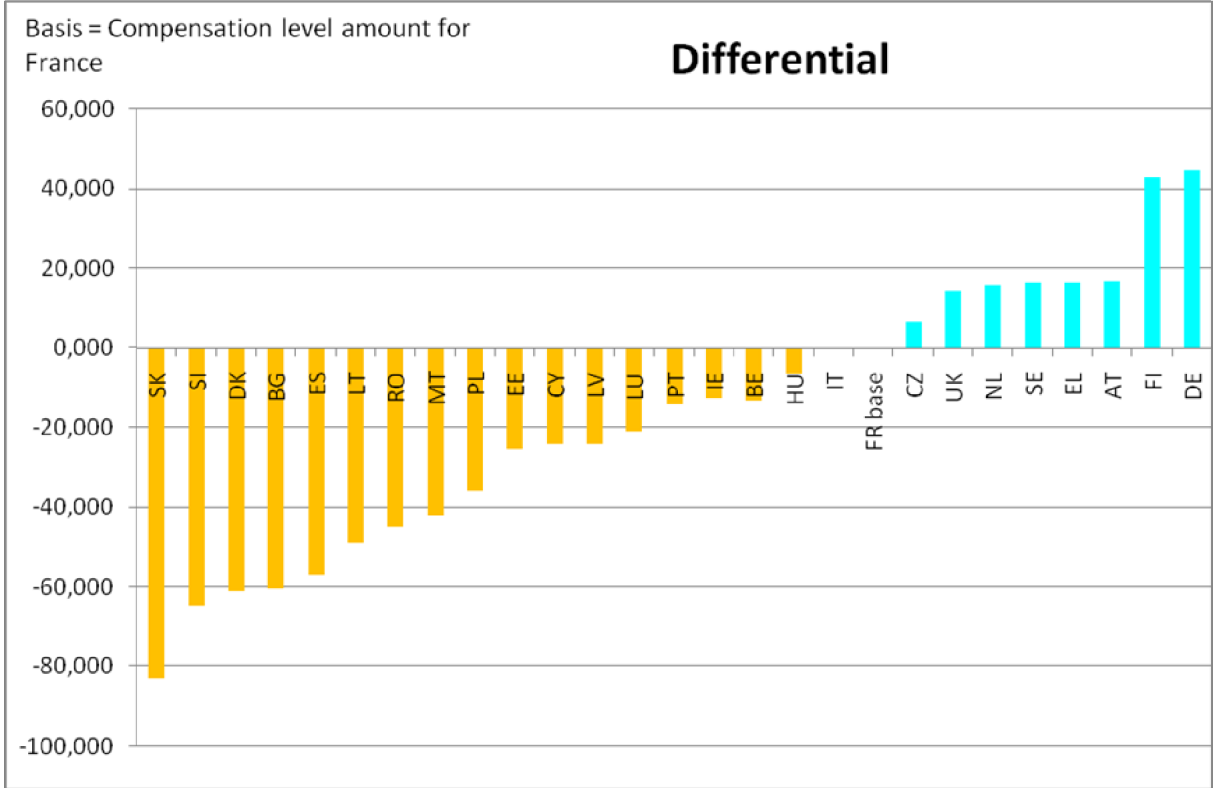
Sources: various compiled

We can conclude from the graph above as well as from the Country Reports, interviews and surveys is that levels of compensation differ widely between Member States.

Each study and survey conducted brings up different levels of compensation for each country. The case study undertaken in this study confirms the existence of important differences between the Member States.

The differential graph below shows the different compensation levels between Member States relative to each other with France used as a basis or pivotal point.

Graph 4

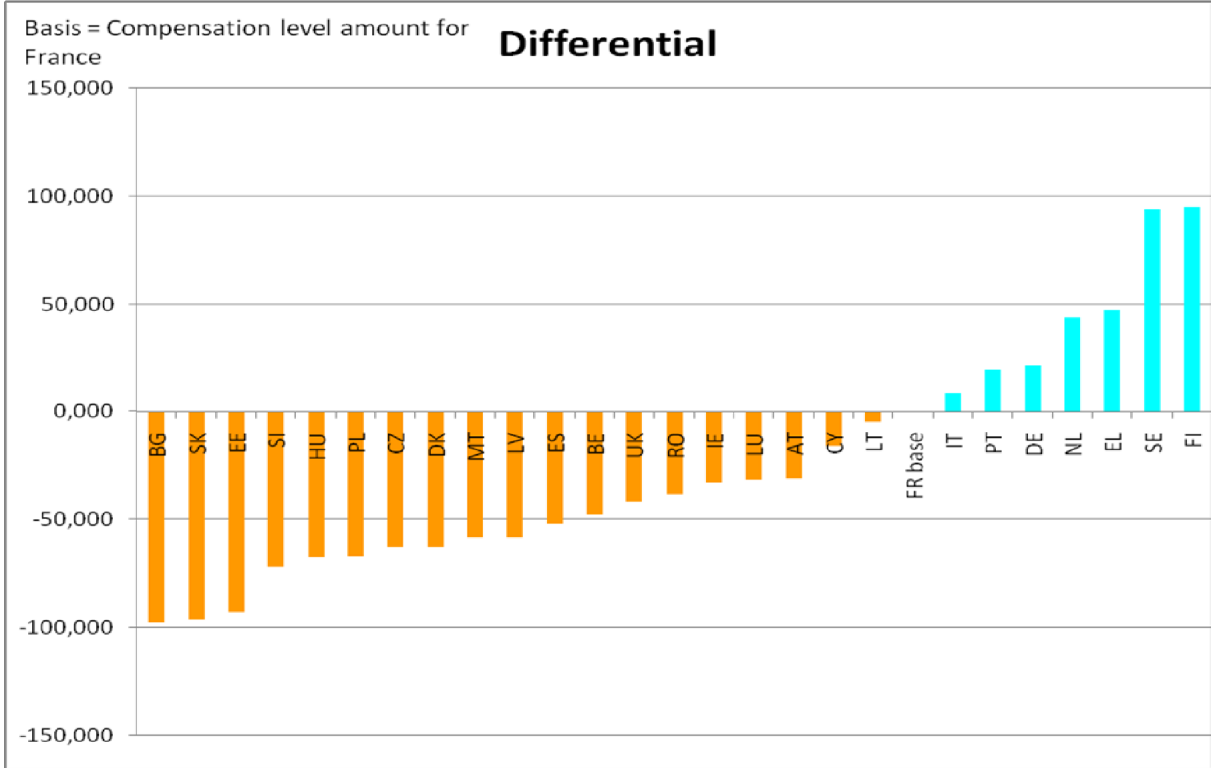


Source: Tartarin and Farandelle case study completed by the country experts under this Study.

1.3.2 Some countries provide higher levels of compensation depending on the type of loss

It is important to note that one cannot conclude based on a specific case that, as a general rule, a country awards higher levels of compensation than another. The above case study involved a death and injuries to the surviving spouse. The graph above identifies the estimation for total compensation to be awarded under the case study. But if one only looks at compensation levels for « death » excluding injuries to the surviving spouse, the differential results will be different. This is shown in the graph below which provides a differential result taking the « death » of Tartarin into consideration and the damage to the car only.

Graph 5



Source: Tartarin and Farandelle case study completed by the country experts under this Study (counting only the consequences of Tartarin’s death).

This is confirmed by other studies. In a study organized by Patrick Le Roy and Sascha Krahe of GeneralCologne Re, titled A European Compensation of Bodily Injury Claims, it is clear that some countries will award more compensation for “death” whilst others will have higher levels of compensation for tetraplegia or leg amputation⁷¹.

As a result, not only are compensation levels different generally but it cannot be said that one country compensates better than another.

1.3.3 Predictability of compensation level

Similarly, there is no predictability in respect to compensation. Every case study researched shows that predicting a compensation outcome is impossible. The tables below

⁷¹ Patrick Le Roy and Sascha Krahe, A European Comparison of Bodily Injury Claims, The Bases and practice of the Law of Damages for Bodily Injury in the light of the Liability Implications for Motor Third Party Liability Insurers: A comparison of Six European Countries, GeneralCologne Re, N 44, 2001. See also Personal Injury Awards in EU and EFTA Countries, 2003.

show the results for two different case studies. One of the case studies was organized in 2003 and the other was organized during the implementation of the current project. Each case study relates to the consequences of the deaths of a man aged forty leaving behind him a wife and two children. Because the assumptions in each case are slightly different, only the differentials should be taken into account. They show that results differ from one expert to the other on outcome even when taken into account the difference in the dates at which the studies were conducted.

The results of the two case studies are shown below:

Doctor, man, 40, married, 2 dependent children, currency at 4 July 2001

Injury: **Instant death**

COUNTRY	Amount	Proportional	Differential
FI*	42 241	8,298	-91,702
AT	117 572	23,095	-76,905
SE	119 360	23,446	-76,554
ES	168 308	33,061	-66,939
DK	183 870	36,118	-63,882
GR	348 698	68,496	-31,504
PT	325 149	63,870	-36,130
NL	459 276	90,217	-9,783
FR base	509 077	100	0,000
LU	587 805	115,465	15,465
BE	591 798	116,249	16,249
DE	666 124	130,849	30,849
ENGLAND**	861 129	169,155	69,155
IE	1 015 129	199,406	99,406
IT	1 115 193	219,062	119,062

*Funeral Expenses "reasonable". Reasonable expenses: 7000

**Calcul for Scotland was performed but gives very similar results (almost identical : 852388)

Source: *Personal Injury Awards in EU and EFTA Countries, 2003*

COUNTRY	Amount in Euros	Proportional	Differential
BG	15000	2,424	-97,576
SK	24310	3,928	-96,072
EE	45400	7,337	-92,663
SI	175000	28,280	-71,720
HU	201400	32,546	-67,454
PL	203000	32,805	-67,195
CZ	231160	37,355	-62,645
DK	231635	37,432	-62,568
MT	259600	41,951	-58,049
LV	259609	41,952	-58,048

COUNTRY	Amount in Euros	Proportional	Differential
ES	297322,64	48,047	-51,953
BE	325331	52,573	-47,427
UK	360151,8	58,200	-41,800
RO	380700	61,521	-38,479
IE	415164,22	67,090	-32,910
LU	424500	68,599	-31,401
AT	428600	69,261	-30,739
CY	519000	83,870	-16,130
LT	588250	95,060	-4,940
FR base	618817,2	100,000	0
IT	670441,19	108,342	8,342
PT	738740	119,379	19,379
DE	751556	121,450	21,450
NL	889646	143,766	43,766
EL	912100	147,394	47,394
SE	1200440	193,989	93,989
FI	1205340	194,781	94,781

Source: Tartarin and Farandelle case study completed by the country experts under this Study (counting only the consequences of Tartarin's death).

Differences stem from the appreciation by each expert of the different set of circumstances given to him or her. One of the reasons for the differences may be that in the case study conducted in 2001 few details were provided to the experts with respect to the specific circumstances of the victim. On the other hand, the case study conducted for this project ("Case Study") includes a very detailed set of circumstances.

1.3.4 Cross-border specificity

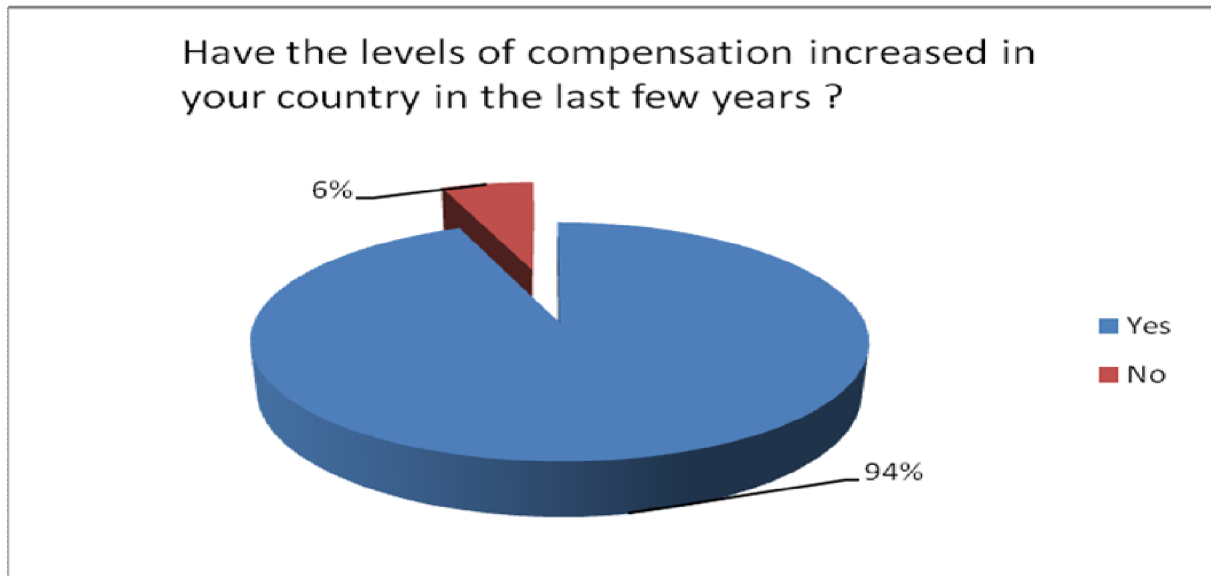
Another difference may also stem from the precise "cross-border" reference made in the Case Study. The cross-border reference will explain why **Sweden** and **Finland** award the highest levels of compensation. The role and function of the welfare system is disassociated in the Case Study as they cannot in the given circumstances exercise their role and function. The injured party goes back to his or her own country so that the compensation has to be evaluated outside the normal sphere of "welfare" compensation.

Interestingly, a cross-border case study, such as the one conducted to implement this Study, extracts from the compensation levels the portion normally absorbed by public health services in countries that have adopted "no fault" systems.

1.3.5 Increases in compensation levels over time

The graph below also shows that levels of compensation have generally increased over time. Analysis of the speed of increase in compensation levels per country would shed light on whether current differences are long-term, or whether there will be a convergence in compensation levels and practices in the future.

Graph 10



Source: Interviews

2 Sources of distortions in compensation levels: compensation practice

Based on the data of compensation practices collected we have tried to identify the main sources of distortions in compensation levels.

2.1 Numerous Sources

Numerous sources of distortion in compensation levels are to be found in compensation practices, which stem from historical, cultural, social, political and economic factors.

Further, the importance of access to or ownership of a car differs for example, between countries and occupations, and very often shows variation within a single country.

To avoid listing all possible sources of distortions, we have focused on those potential sources that are directly related to the compensation process.

2.2 The compensation system as a source of distortion

As explained elsewhere, the Member States have adopted different types of compensation systems either based on liability or on a strict liability/no fault basis.

Most Member States have also at some stage embraced welfare state principles.

These choices, as shown in many studies - in particular those pertaining to the US - influence (i) levels of compensation, (ii) length of procedures and (iii) litigation costs.

As a result, the sources of compensation vary from one country to another. Today, all Member States have compulsory third party liability insurance. However, in some Member States compensation levels based on such insurance may seem low by comparison to others. That is because in some Member States, national social and health care services are very developed and compensate for most of the losses.

The chosen compensation system will have a distorting effect on four main levels. First, compensation levels will not be the same, as accident risk is spread differently. Second, any determination of the difference between compensation levels will be difficult in that compensation may be absorbed, totally or partially, by the Member State. Third, the time factor⁷² and litigation cost factor⁷³ will impact compensation levels differently. Four, the compensation system may in itself limit the aggravation of injuries and lead to smaller needs for compensation⁷⁴.

⁷² The impact of an injury on a person's life may be a lot greater than the interest rate awarded for late compensation.

⁷³ Where the compensation system allows for general and immediate compensation regardless of fault, litigation costs decrease. See the New Zealand ACC system.

⁷⁴ Where compensation is prompt or the welfare system ensures prompt and free medical treatment and hospitalisation for the injuries the chances of an aggravation of the Victim's health are less likely than if the Victim has to tend for him or herself before being adequately compensated.

2.3 The courts' discretion: a source of distortion

2.3.1 The role of courts

Courts in Member States generally enjoy great discretion in determining the quantum especially for non-economic damage.

Approach	Characterisation
Unlimited discretion	An unlimited approach to the courts' discretionary power in assessing the quantum of damages. This is the case in Romania ⁷⁵ , Poland ⁷⁶ , and Luxembourg ⁷⁷
Strong guidance	Scales and tables are highly recommended. This is the approach in the majority of Member States, France ⁷⁸ for instance.
Specific limits on discretion	Legislatively imposed caps on damages, fixed tariffs or limits to the discretionary power of the courts in some specific and limited areas of personal injury such as road accidents. Many Member States do have some maximums on certain types of damage. For example, Malta ⁷⁹ , Portugal ⁸⁰ , Latvia ⁸¹ , Italy ⁸² and Slovakia ⁸³
General limit on discretion	Fixed maximum statutory awards applicable to all kinds of accidents leaving no space for the courts' discretion to 'personalise' awards. This is the case in Hungary ⁸⁴ , Spain ⁸⁵ and Lithuania ⁸⁶ for example.

⁷⁵ Following our Country Expert for Romania, Virgil Melnic.

⁷⁶ Following our Country Expert for Poland, Piotr Sadownik.

⁷⁷ Following our Country Expert for Luxembourg, Patrick Goergen.

⁷⁸ Following our Country Expert for France, Isabelle Tinel.

⁷⁹ Following our Country Expert for Malta, Dr Marse-Ann Farrugia.

⁸⁰ Following our Country Expert for Portugal, Dr. Ronald Charles Wolf.

⁸¹ Following our Country Expert for Latvia, Valters GENCS.

⁸² Following our Country Expert for Italy, Enrico Adriano Raffaelli.

⁸³ Following our Country Expert for Slovakia, Peter Bartosik.

⁸⁴ Following our Country Experts for Hungary, Dr. Csaba Pataky and Dr. Tibor Pataky.

⁸⁵ Following our Country Expert for Spain, Emilie Pavageau.

⁸⁶ Following our Country Expert for Lithuania, Valentinas Mikelenas.

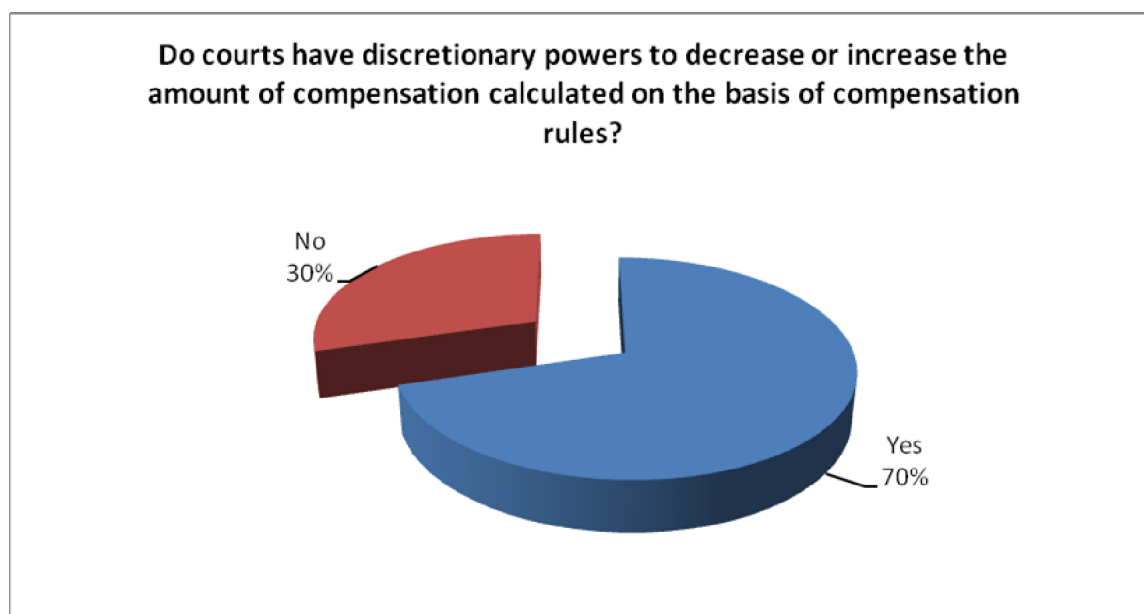
2.3.1.1 Courts influence levels of compensation

Courts play an important role in defining the levels of compensation. As shown below under graph 11 in 70 percent of the Member States courts enjoy an important discretion.

This role is attributed to the fact that courts have to appreciate the case based on the facts. In respect to property damage, the facts can be straightforward. However in respect to injury cases, the determination of the extent of the injuries in time, their impact on the victim and the situation of the victim, will have to be assessed by the judge.

In some countries, the role of the judge is more constrained. In Ireland⁸⁷, for example the Personal Injuries Assessment Board was created in 2003 to speed up the settlement of claims and bring down the costs related to the claim⁸⁸. This organization has created a Book of Quantum to determine amounts per injury⁸⁹. In Sweden⁹⁰ and Finland where compensation is organised mostly outside the court system, the discretion of judges, if it exists, has less of a general impact on compensation levels. In Spain⁹¹, the legislator has adopted a series of tables that courts are to follow in assessing losses.

Graph 11



Source: *Questionnaire and Surveys*

⁸⁷ Following our Country Experts for Ireland, John SWEETMAN & Neil LONG

⁸⁸ Act No. 46 of 2003

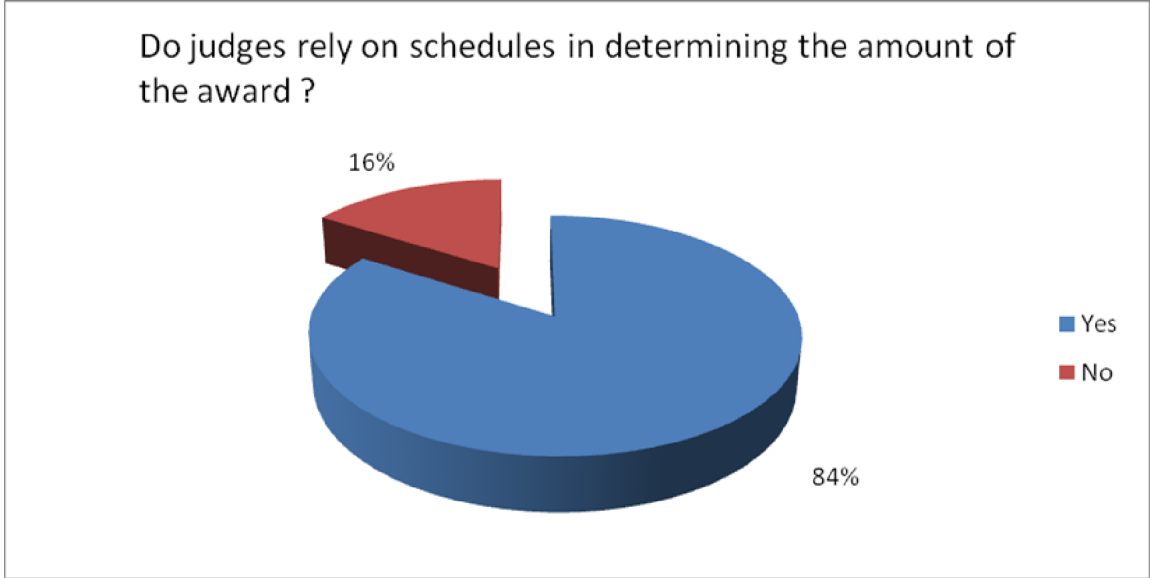
⁸⁹ http://www.injuriesboard.ie/eng/Forms_and_Publications/Book_of_Quantum.pdf

⁹⁰ Following our Country Expert for Sweden, Dr. Roland Dahlman.

⁹¹ Following our Country Expert for Spain, Emilie Pavageau.

The Interviews show that the judges take schedules into account in making their determination of the award.

Graph 12



Source: Interviews

Many different types of schedules exist. Some schedules are medically oriented and aim to distinguish different types of injuries and their severity. Other schedules are created by actuaries and facilitate the calculation of the losses over time taking into account a number of criteria. Other tables determine the amount of damages per type and level of injury. These are categorized below.

Tool	Characterisation
Collections of judicial precedents on the quantum of awards	<p>Advantage: rationalisation of information, more uniformity in awards, more certainty on level of compensation</p> <p>Disadvantage: against judicial independence from precedents, limits evolutions reflecting changes in society, tends to generalize cases.</p>
Medical scales	<p>Advantage: provides the judge with scaling system compiled by experts</p> <p>Disadvantage: risk of generalization</p>
Actuary tables	<p>Advantage: provides the judge with tables to determine compensation for future losses based on statistical information</p>

	Disadvantage: risk of generalization and of using these on visiting victims whose countries of residence are not included in the data sets used to compile the tables.
--	--

In most countries, these tables serve as guidelines for judges. In few countries are they compulsory; this is the case, for example, in **Spain**⁹². In **Italy**⁹³ too, but their constitutionality is contested.

2.3.1.2 Levels of compensation can vary within a Member State

In some Member States, such as **France** or **Italy**, the levels of compensation for the same injury and very similar facts can vary within the country. The differences can be significant. As a result, the general levels of compensation in a Member State may not reflect local court practice. Courts in Northern **Italy**, for example, tend to be more generous than their counterparts in the South. As a result, if the accident is in the Northern part of Italy, the Visiting Victim may obtain a higher level of compensation than if the accident occurs in the Southern part of **Italy**. He or she may be over or under compensated depending on the location of the accident within one Member State.

This leads to an important question: if a Visiting Victim to **France** comes from Southern **Italy**, should his or her expectation be based on a national Italian average or on the level of compensation as practiced by the local court closest to where he or she resides?

The scales imposed in **Spain**⁹⁴ by the legislator are aimed precisely at resolving the situation of large divergences between court awards within the country⁹⁵.

2.3.1.3 Courts shape compensation

In many Member States, the law does not provide lists of possible injuries or of types of possible losses. **The Netherlands**⁹⁶ and **Denmark** extensively regulate compensation. But in most other countries it is less so, like in **France**⁹⁷. As a result courts play an important

⁹² Following our Country Expert for Spain, Emilie Pavageau.

⁹³ Following our Country Expert for Italy, Enrico Adriano Raffaelli.

⁹⁴ Following our Country Expert for Spain, Emilie Pavageau.

⁹⁵ <http://www.bcf.asso.fr/Documents/indemnisation-espagne.pdf>

⁹⁶ Following our Country Expert for Netherland, Sietske Banga.

⁹⁷ Following our Country Expert for France, Isabelle Tinel.

role in the recognition of types of injuries and the level of award attached to them and to the types of possible loss. This role is less obvious in respect of property damage than it is in personal injury cases. In **France**, for example, the “chance de survie” was recently recognized as a patrimonial right by the courts.

Even the way trials are conducted can have an impact. In the **UK**, jury trials in personal injury cases were mostly abandoned following a 1998 decision of the House of Lords. This was important as jury awards created great uncertainty in outcome.

2.3.2 The discretion exercised by judges and compensation levels

The discretion exercised by judges concerns compensation for both property damage and personal injury. However, almost all cases appear to involve personal injury issues. This may be the result of the limits on the amounts at stake. The amount of loss that can be sustained by property damage claimants is limited and insurance companies tend to make offers based on standardized values of property. Accordingly, the incentives for victims to incur further expenses and time delays by starting litigation are minimized.

As a result, the presentation below focuses on issues associated with the incidence of personal injury that arise before the courts.

2.3.3 Marked differences in the level of discretion

In **Greece, Italy, Belgium, Malta, Germany and France**⁹⁸, judges have wide discretion on a number of levels in respect of awards. They determine the quantum based on the injury but they may also, when applicable, determine discount rates or interest rates and sometimes even whether lump sums or instalments should be paid. Judges also determine the level of the injuries sustained. In **Malta**⁹⁹, for example, the judge decides on the percentage of disability and makes a final decision based on this, especially where medical experts disagree¹⁰⁰.

⁹⁸ Civ, 2^e, 17 February 1972, Bull civ, II, n 50 p. 39.

⁹⁹ Following our Country Expert for Malta, Dr Marse-Ann Farrugia.

¹⁰⁰ Following our Country Expert for Malta, Dr Marse-Ann Farrugia. In the Court of Appeal decision *Annunziata sive Nancy Caruana v. Odette Camilleri*, of 27th February, 2004 the ex parte experts had estimated that the permanent disability was at 20% while the expert appointed by the Court estimated it at 7%. The Court of Appeal referred to the general practice that the Court does not

In **Luxembourg**, the courts generally follow the case law set by French and Belgian courts.

2.3.4 The impact of courts on the recognition of losses

Together with legal professionals and academics, courts play a role in conveying social changes and expectations in terms of compensation.

Many laws are general and case law plays an important role in shaping the levels and structure of compensation.

It was the **French** “Cour de Cassation” that saw, on March 2007, in the general principles set out by articles 1147 and 731 of the Civil Code, the affirmation of the right to be compensated for the “loss of a chance to survive”¹⁰¹. The court found in a particular case that the moral suffering of a victim prior to her death had resulted from the knowledge that she would not live, and that this in itself represented a loss that should be compensated. The court deemed compensation for such loss to be part of the victim’s estate, to be transferred on the day of the victim’s death to her heirs.

In **Austria**, compensation for the emotional suffering of children resulting from their presence at the scene of an accident in which their mother was seriously injured was recognized by the Supreme Court of **Austria** on July 16, 1994¹⁰². The same Supreme Court went on to allow compensation for extreme suffering of close relatives in a decision of May 16, 2001¹⁰³.

In **Italy**¹⁰⁴, moral damage was traditionally only awarded within the context of a crime. The Supreme Court allowed moral damages, also called “Pretium Doloris”, for personal injuries in general in a decision rendered on May 31, 2003. This decision follows the lead taken by many lower courts.

depart from conclusions of its experts without a serious and valid reason, and in this case it held that there were sufficient reasons for it to decide arbitrio boni viri on a percentage of 12%.

¹⁰¹ Civ 1 13 mars 2007, n° 05-19020

¹⁰² 2ob 45/93

¹⁰³ 2ob 84/01

¹⁰⁴ Following our Country Expert for Italy, Enrico Adriano Raffaelli.

2.3.5 The impact of the recognition of losses on compensation levels

The principles of compensation for personal injuries develop incrementally over time. The first time an injury is recognized and compensated, the amount of compensation for such injury, the quantum, is based on a number of factors with the judge's intuition being the predominant one. The level of compensation may start quite low, as was the case for whiplash originally. However as studies develop and experience increases, compensation levels increase and stabilise.

2.3.6 The difficulties that too great a discretion may create

As outlined earlier, judges have considerable discretion in many Member States, such as in **France**¹⁰⁵ and **Luxembourg**¹⁰⁶, in the determination of awards. Such discretion is necessary, as an important part of compensation is fact based. However, with such discretion should come the need for detailed and reasoned decision-making. Justifications for findings on awards are often limited in range and transparency and it is sometimes difficult to assess how a judge has come to a decision on a specific amount. In particular it can be difficult to determine what elements have been factored into the decision and how each has been weighed in relation to others¹⁰⁷. It is especially difficult to understand how decisions based on the principle *restitutio in integrum* can generate very different outcomes for similar sets of facts depending on the judge or the court. In effect, an injury may lead to an award of "10" in a Dijon court and "20" in a Paris court, both decisions having been based on *restitutio in integrum*¹⁰⁸.

Important differences in terms of compensation levels exist within each Member State depending on the judge or the Court¹⁰⁹. There are even important differences between Appellate Courts. Supreme Courts may have a unifying effect, although in many cases they

¹⁰⁵ Following our Country Expert for France, by Isabelle TINEL.

¹⁰⁶ Following our Country Expert for Luxembourg, Patrick Goergen.

¹⁰⁷ G. Viney and P. Jourdain, *Les effets de la responsabilité*, LGDJ, 2ème éd. 2001, n° 61.

¹⁰⁸ G. Viney, *L'état du droit*, in *La réparation du dommage corporel*, Gaz. Pal., 11-13 février 2007, p. 50.

¹⁰⁹ In some countries such as France administrative courts may be competent in the case of accidents involving the public authority. Before these courts compensation levels (and procedures) will again be different to what they may be before civil courts.

are reluctant to review amounts of compensation or the extent of injuries¹¹⁰. In **Belgium**, not only do courts have full discretion in respect to quantum but they are also unrestrained by previous case law.

Austria, France¹¹¹, Italy, Belgium, Greece and the **Czech Republic** courts have great leeway in deciding on compensation levels.

In **Spain**, the courts retain some discretion but this has become rather limited since the adoption of legal tables for the assessment of personal injuries¹¹².

These variances in compensation levels for the same injuries between courts in the same jurisdiction make determination of compensation levels throughout the EU even more difficult and render statistical comparisons between Member States flawed.

A Visiting Victim may obtain compensation from a Paris court that is comparable to what he or she would obtain from a court in Milan, if Milan is the Visiting Victim's place of residence. But the level of compensation could be much lower if the court happened to be located in Dijon. A Milanese Victim would be under-compensated in a Dijon Court. Compensation in Naples however is lower than in Milan. Conversely, the Neapolitan Victim might be over-compensated if the case is brought before the Paris court¹¹³.

From the existence of significant divergence in compensation levels within one country one can draw the following conclusions:

- (i) general statistics on overall compensation levels from country to country would only give a very broad and possibly erroneous view of actual levels,

¹¹⁰ See for France, G. Viney and P. Jourdain, *Les effets de la responsabilité*, LGDJ, 2ème éd. 2001, n° 61. See for Belgium, Cour de Cassation 8 December 1999, in Bull 1999, P.165.

¹¹¹ French Court case: Cour d'appel de Paris 17e ch A 12 December 2005, Gazette du Palais, 23-24 August 2006

¹¹² See RESOLUCIÓN de 17 de enero de 2008, de la Dirección General de Seguros y Fondos de Pensiones, por la que se da publicidad a las cuantías de las indemnizaciones por muerte, lesiones permanentes e incapacidad temporal, que resultarán de aplicar durante 2008, el sistema para valoración de los daños y perjuicios causados a las personas en accidentes de circulación.

¹¹³ See *Personal Injury Awards in EU and EFTA Countries*, Edited by David McIntosh and Marjorie Holmes, Kluwer Law International, 2003, page 391.

- (ii) depending on the location of the accident within a country, the resulting compensation may approximate to that expected in the victim's country of residence, and
- (iii) it could also lead to over or under compensation depending on the Victim's address in his or her own country.

2.3.7 The limitations on discretion and the resulting effect on differences between Member States

Decisions should hence be well reasoned to allow consistency and follow processes that are applied systematically to every case and each set of facts, and that without making the court too reliant on abstractions, enable it to follow a methodology for assessing damage that is identical in every court. Lord Denning, in *Ward v. James* (1966), considered that personal injury cases were unsuitable for jury trials owing to the technical expertise and experience needed in assessing damage¹¹⁴. Today given the importance of scientific evidence and the level of expertise required to assess damage, it seems appropriate to further Lord Denning's argument and impose a requirement that decisions be clearly and completely reasoned and that any prescribed decision-making processes are followed.

2.3.8 The solutions aimed at canalizing discretion

In recent years a number of schedules or tables have emerged to assist the court in its determination of awards.

Many countries have adopted such tables. **Austrian** courts each follow different sets of tables or guidelines for pain and suffering, depending on the level of pain. In **Belgium**, tables also exist that incorporate previous awards and are aimed at providing guidance to courts on quantum. Courts in **England** and **Wales** are encouraged to use tables called the Ogden tables¹¹⁵ following the House of Lords' decision in *Wells v. Wells*¹¹⁶. Along with these tables, the Judicial Studies Board publishes "Guidelines for the Assessment of General Damage in Personal Injury Cases"¹¹⁷. In **Ireland**¹¹⁸, the Personal Injuries

¹¹⁴ [1966] 1 QB 273, CA.

¹¹⁵ www.gad.gov.uk/Documents/Ogden_Tables_6th_edition.pdf

¹¹⁶ *Wells v. Wells* [1999] 1A.C. 345.

¹¹⁷ www.oup.co.uk/pdf/0-19-920757-7.pdf

¹¹⁸ Following our Country Experts for Ireland, John SWEETMAN & Neil LONG.

Assessment Board publishes a “book of quantum”¹¹⁹. In **Italy**, tables also exist but are used mainly in northern Italy.

In **Finland** and **Sweden**¹²⁰, highly standardized compensation tables are used. This is a feature of the no-fault systems that exist in these countries.

In **Spain**¹²¹, legal tables considerably limit the courts’ discretion. These tables even tend to limit a judge’s ability to take into account the Visiting Victim’s personal situation and their standard of living in their own country. This is a problem, and should the trend of legalising or slowly imposing obligatory reference to guidelines and tables continue, judges may lose the ability to take into account the background and circumstances of a Visiting Victim. Such tables should however provide for exceptions in specific cases - cross-border cases - and allow judges some degree of discretion in setting compensatory sums.

Although, as explained above, tables or guidelines have been developed in many Member States to assist courts or insurers in their determination of awards, these tables vary from Member State to Member State in their content, their purpose and their binding force.

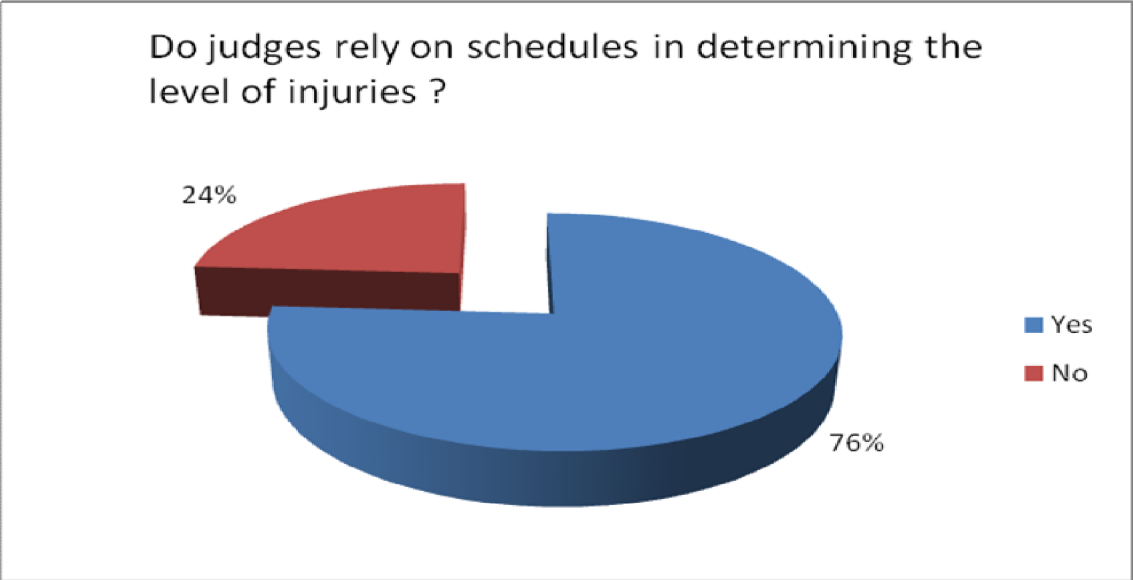
As is confirmed in the following graphs, they are used by courts for purposes of evaluating levels of injury.

¹¹⁹ http://www.injuriesboard.ie/eng/Forms_and_Publications/Book_of_Quantum.pdf

¹²⁰ Following our Country Expert for Sweden, Dr. Roland Dahlman.

¹²¹ Following our Country Expert for Spain, Emilie Pavageau.

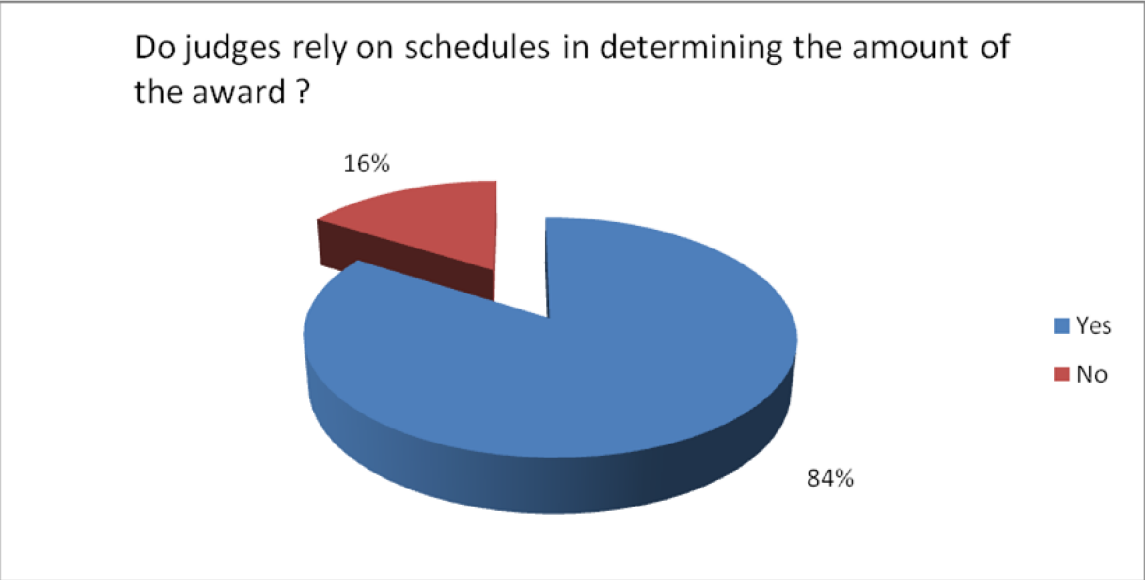
Graph 13



Source: Interviews

They also often rely on tables to determine the quantum.

Graph 12



Source: Interviews

These tables remain limited to the geographic confines of Member States' borders.

However, given that the principle of using such tables is becoming increasingly accepted, it is possible to envisage the development of tables that could provide for the same basic parameters applicable across the EU whilst taking into account the specific situation of a

Visiting Victim. This would mean that courts and legal systems would be more tuned in to the differences between each jurisdiction whilst applying similar principles and offering greater legal certainty to Visiting Victims.

2.3.9 A solution that may create new problems

The discretion granted to judges creates uncertainty in terms of outcomes. However, such discretion also enables courts to take into consideration the personal situation of the Visiting Victim in his or her country of residence.

The use of actuarial tables or scientific tables to assist courts in determining awards may create more certainty and result in more equitable compensation amounts. However, imposing tables based on national data sets may lead judges to award compensation at a level that is appropriate for nationals but inadequate for a Visiting Victim when their place of residence is taken into consideration.

2.3.10 The difficulties that judges may experience when taking into account the victims' situation in their country of residence.

Generally speaking, in compensating Visiting Victims courts will take into account the victim's situation, wherever they reside. For example, loss of earnings will be calculated based on a victim's earnings, and whether the victim is from **England** or **Romania** will be of little relevance.

However, in respect to some losses national courts may find it difficult to take into consideration a Visiting Victim's situation at home for at least two reasons. The first is that language differences may make it difficult for a judge to determine local conditions. It is notable that in determining compensation, judges in **Luxembourg** will use case law from **France** and **Belgium**, but not from **Italy**. Language here is a barrier.

The Visiting Victim will have to incur significant translation costs if he or she wishes to convince a local judge that the differences between the two countries concerned are such that the expectations of the visitor in terms of compensation should be based on his or her local conditions rather than the court's usual compensation practice.

This does not solve the issue of a Visiting Victim who would be compensated more than would otherwise have been the case, had a competent court been located in his or her

place of residence. In such a case, it should be expected that the Visiting Victim will not complain about being compensated more than he or she would have been in his or her own country. It will then be for the insurer to convince the court that other compensation criteria should be applied to the Visiting Victim. However, judges are frequently reluctant to fall in with such reasoning, as apart from the fact that it is more convenient for them to apply the prevailing standards; they tend to favour the position of the victim in such cases.

The second issue that arises when establishing an accident victim's bona fides and setting compensation relates to fraud. Insurance fraud is a real concern in the EU and many cases attest to the existence of fraudulent "victims"¹²². It is beyond doubt that fraud exists on a national level, where it is supposedly harder to commit, let alone within the pan-European context¹²³. Judges are reluctant to apply standards that cannot be verified locally. Similarly, the local insurance provider will find it difficult to check claims made by the Visiting Victim as to what level of compensation should apply, especially when the victim's country of residence is one in which levels of compensation vary from court to court or are not easily accessible.

2.4 The existence of different types of losses

Many countries today recognize a broad range of losses, usually classified under the headings of economic or non-economic losses.

However, some types of losses are recognized and lead to compensation in some countries but not in others, as shown below.

Moreover, to avoid the issue of lists of recognised losses, compensation in some countries is based on general headings of losses; thus making it difficult to discern the existence of a particular type of loss or its specific level of compensation.

Interestingly, the recognition of different types of losses stems from the principle *restitutio in integrum*.

¹²² See reports by Associazione Nazionale fra le Imprese Assicuratrici.

¹²³ See for example Supreme Court of Ireland in *Vesey -v- Bus Eireann/Irish Bus*, [2001] IESC 93.

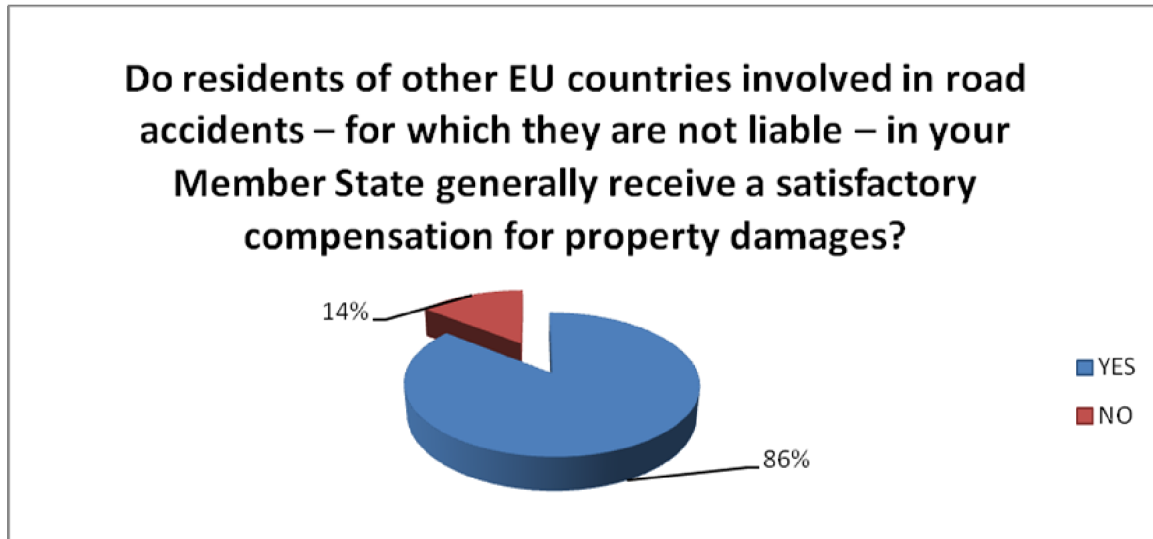
2.4.1 Restitutio in integrum and losses

All EU countries abide by the *restitutio in integrum* principle of compensation.

However a distinction should be drawn between economic losses and non-economic losses.

In relation to economic loss, there is a common basis in the application of the principle. The Graph 14 below shows this.

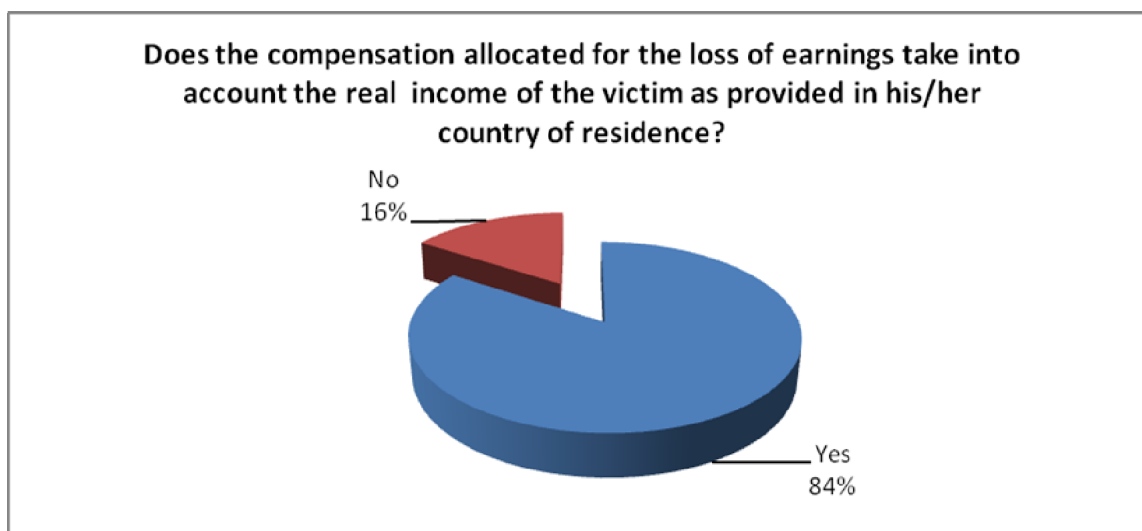
Graph 14



Source: Questionnaire and Survey

As shown in the Graph 15 below, in a vast majority of cases the real income of the victim in their country of residence is used as the basis for the award in respect to lost earnings.

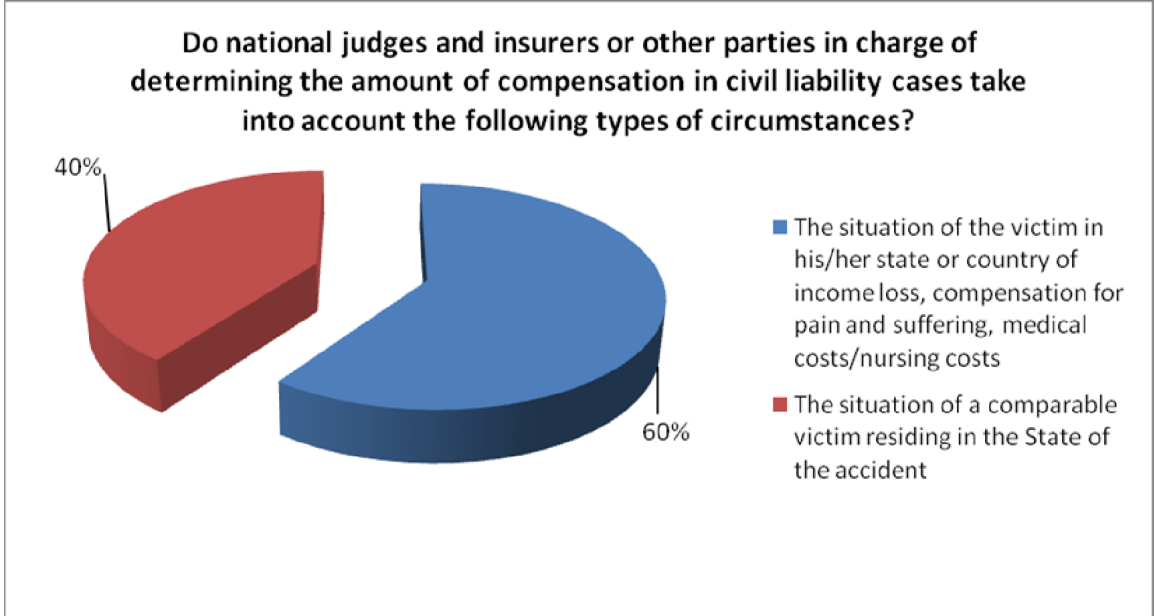
Graph 15



Source: Questionnaire and Survey

This is confirmed in Graph 16 although to a lesser extent when other types of losses are taken into consideration.

Graph 16



Source: Questionnaire and Survey

With the exception of future economic losses and particular cases, such as the unemployed or minors, full compensation occurs in most cases in relation to economic losses.

It is not usually possible to restore a victim to their status quo ante in relation to non-economic types of loss. For this reason, the application of the *restitutio in integrum* principle differs from country to country. Non-economic losses arising from the same kind of injuries with a similar impact on the victim’s life are compensated by completely different awards depending on the jurisdiction in which compensation takes place.

These differences stem from a multitude of factors, including different economic, industrial and social contexts, different ways of conceiving of the social function of non-economic loss compensation and citizen’s expectations from the liability system.

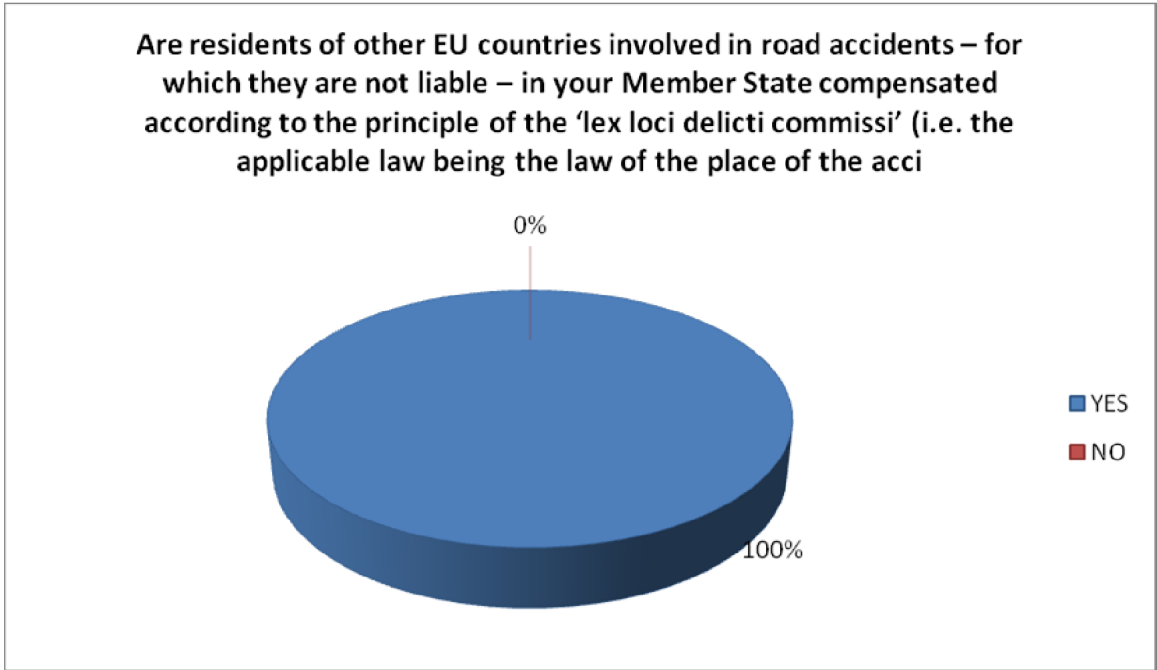
Further compulsory compensation tables set caps and statutory sums for some types of victims, such as in **England and Ireland**, and impose strict regulations on compensation, such as in Denmark, limit the application of the principle of *restitutio in integrum*.

The interaction of the *lex loci* and the *restitutio in integrum* principles are important in cases of Visiting Victims and are at the heart of this study.

All EU countries abide by the principle *lex loci delicti commissi*. It should be stated however that in some countries, such as the **UK**, citizens are offered the possibility to file the claim in the **UK** rather than in the country of the accident whilst in **France** courts apply the principle *lex loci delicti commissi* strictly.

2.4.2 Restitutio in Integrum and lex loci

Graph 17

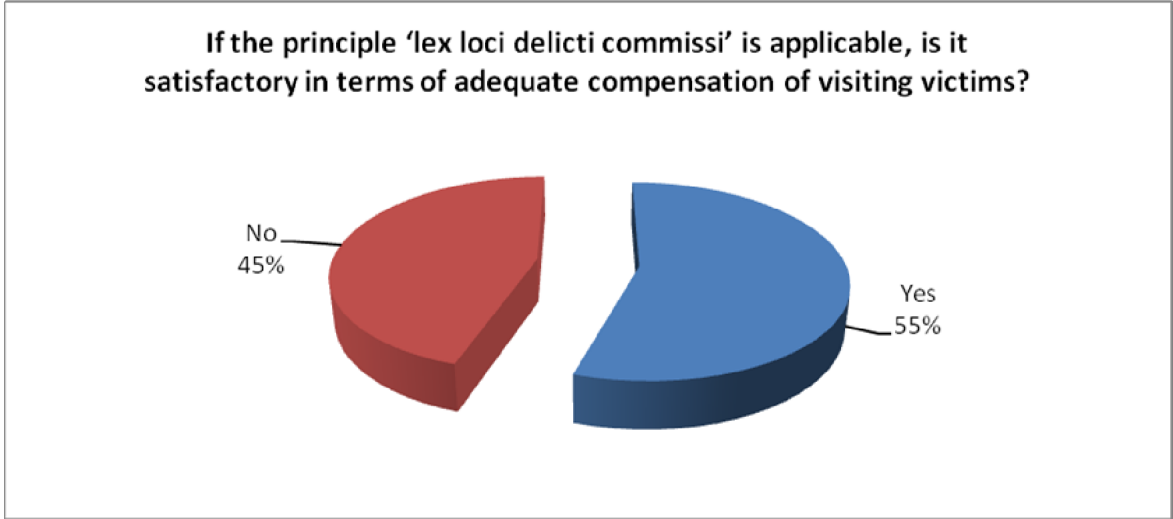


Source: Questionnaire and Survey

Where there are caps, limits or strong guidelines, or exhaustive lists of types of losses that can be compensated, judges may not have the ability to apply the *restitutio in integrum* principle so that the Visiting Victim is compensated in such a way that his or her situation in his or her place of residence is fully taken into consideration.

Graph 18 below shows that the principle is considered to allow an adequate compensation of the Visiting Victim in most EU Member States; although, the majority is slim.

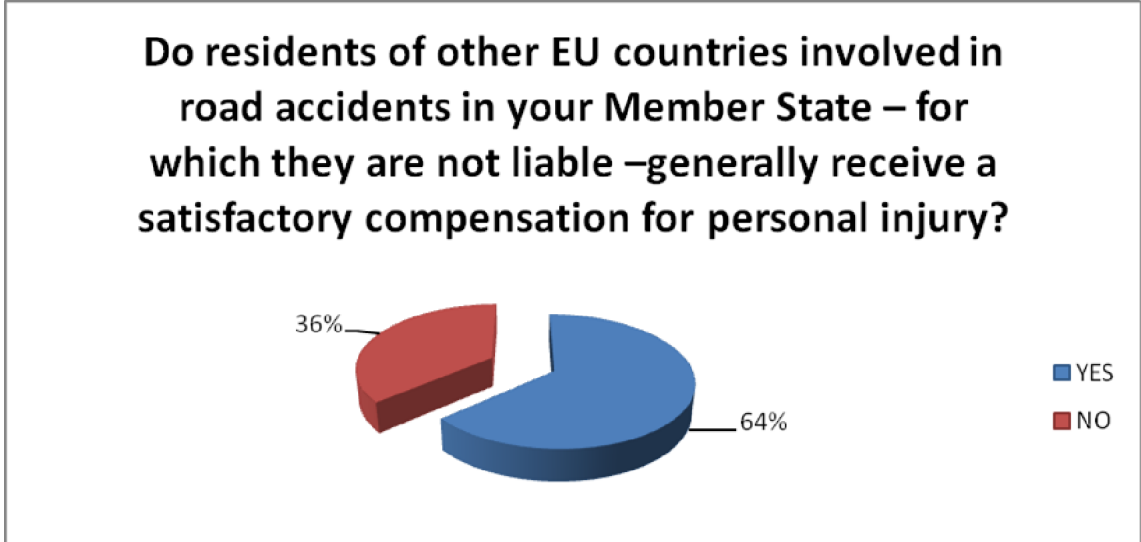
Graph 18



Sources: Surveys and Questionnaires

But it is nevertheless reinforced by the following graph.

Graph 19



Source: Questionnaire and Survey

The two preceding graphs highlight the bias that surrounds the *lex loci delicti commissi* principle. When the question is phrased in general terms, as it was in graph 18, people tend to imagine themselves as the victims and are more critical of the principle. However, when the question relates to how residents from other Member States would be compensated in the interviewee’s Member State, as in graph 19, almost two thirds of respondents believe that the principle would provide adequate compensation.

One can conclude that for any economic losses, such as property damage and lost earnings in personal injury cases, courts take into account the situation of the victim wherever such victim resides. However, in terms of non-economic losses the outcome will be different and courts will follow one of two main approaches:

Approach	Characterisation
No distinction between foreign victims and citizens	As a general rule, national courts do not make any substantive distinction between foreign victims and citizens. This is the case, for example, in France ¹²⁴ and Germany ¹²⁵ .
Distinction between foreign victims and citizens	Judges tend to take into account likely levels of awards in the victim’s own state as in Greece ¹²⁶ .

2.4.3 Types of damage taken into account

In most countries, there is no statutory or codified definition of the concept of ‘damage’ thereby leaving the term open to broad interpretation by the courts and jurisprudence.

There is a basic meaning of ‘damage’ common to all European jurisdictions: ‘damage’ is the negative difference between the situation in which the victim would have been had the accident had not occurred and the circumstances after the event.

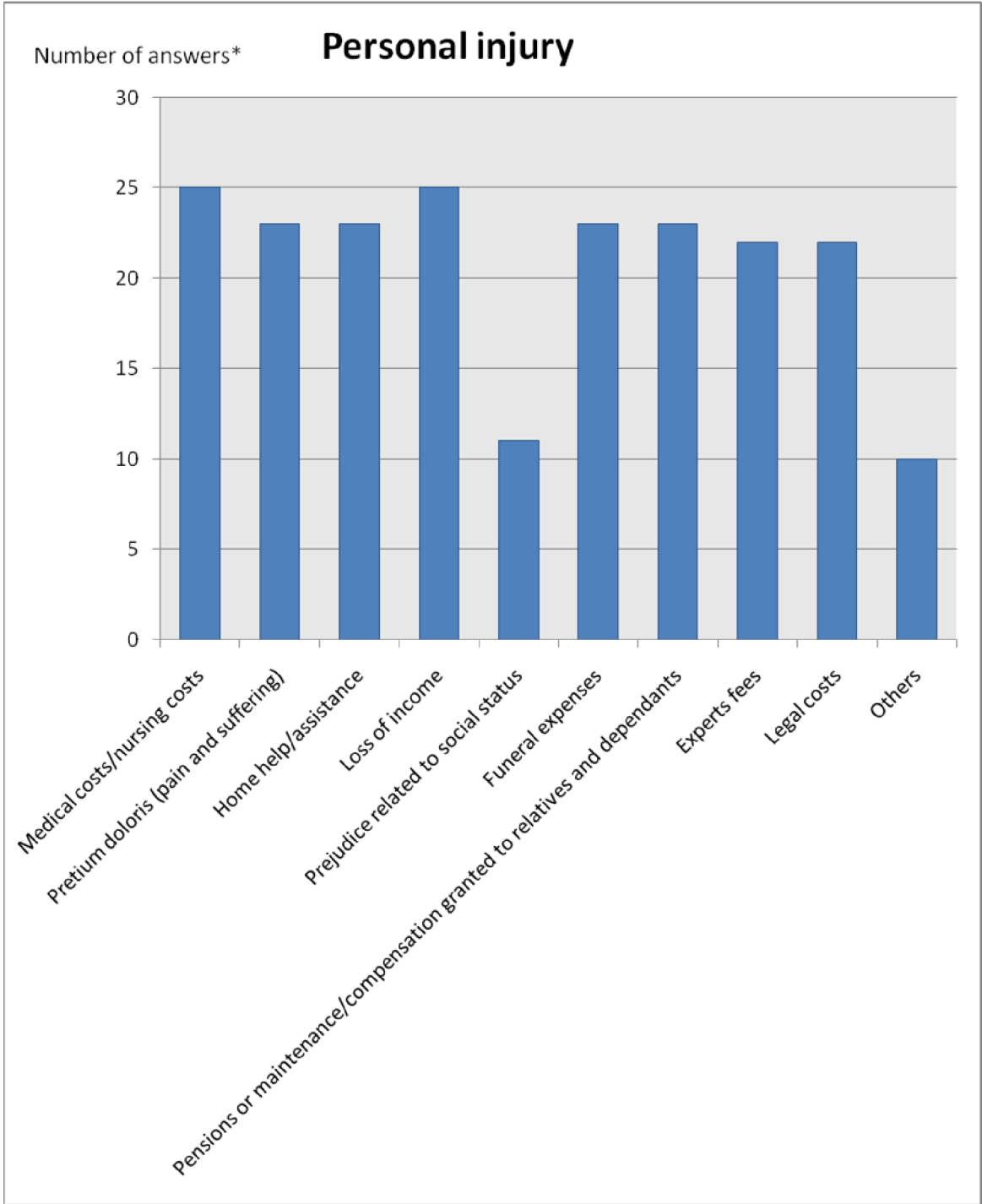
It is a fundamental point of convergence for all Member States that such a difference may be both economic and non-economic.

Member States have now fully accepted that non-economic losses are recoverable. However, various restrictions apply in the majority of these countries.

Graph 20 shows the different losses taken into account. The prejudice related to social status is the type of loss that attracts the lowest level of recognition among Member states.

¹²⁴ Following our Country Expert for France, Isabelle Tinel.
¹²⁵ Following our Country Expert for Germany, Norbert Häger.
¹²⁶ Following our Country Expert for Greece, Vassiliki Panagiotidou.

Graph 20



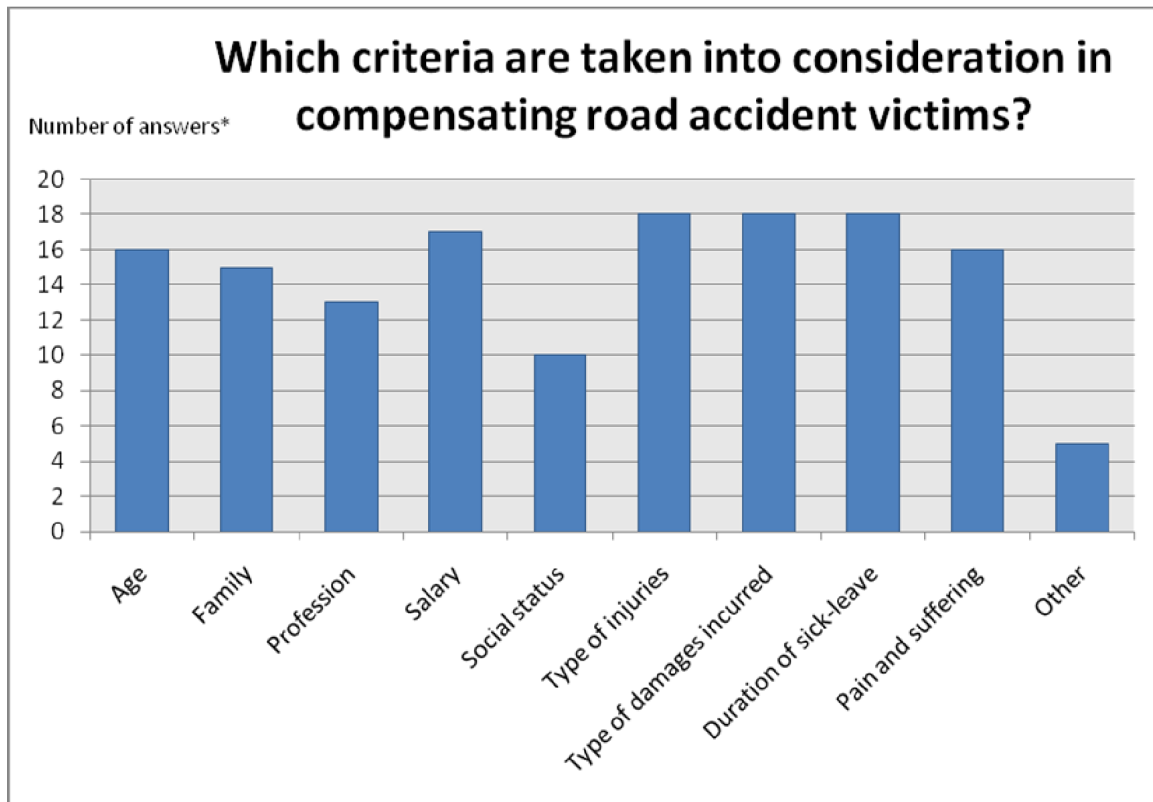
* Multiple answers possible

Source: Questionnaire and Survey

2.4.3.1 Criteria used to determine quantum

The criteria that are used the most and given greater weight are generally those that can be easily ascertained and have a direct impact on the victim's wellbeing.

Graph 21



* Multiple answers possible

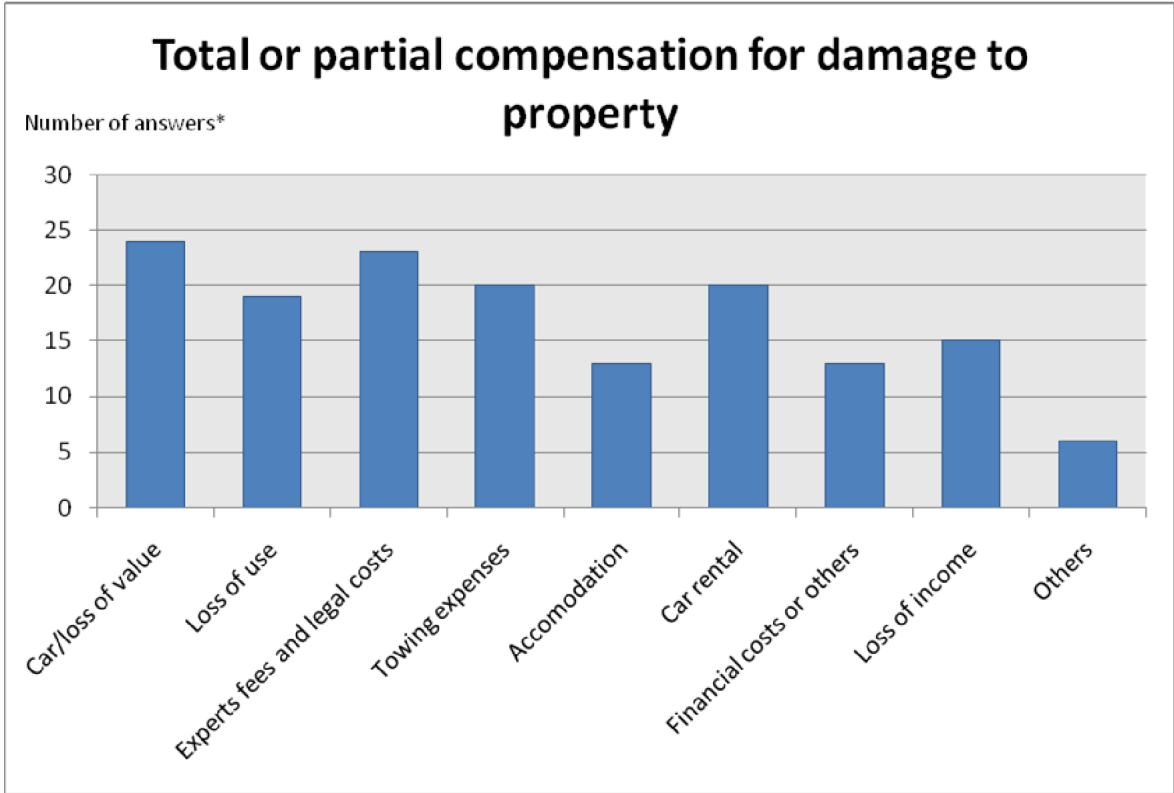
Source: Questionnaire and Survey

2.5 The existence of different types of methodologies to assess losses

2.5.1 Property damage

Most costs related to property damage are compensated. However, the cost of accommodation is not always taken into account and nor are other financial costs as shown in the graph below.

Graph 22



* Multiple answers possible

Source: Questionnaire and Survey

The most important cost is often related to the replacement of the car when it has been determined that the car cannot be repaired.

In relation to damage to property, each country has its own system for determining the value of property. Same model cars, purchased in the same year, will likely generate a different value in two different Member States. The difference stems in part from the differences in prices for new vehicles among Member States. Aging multipliers are also different. However, the differences may not be as significant as those that exist in respect of personal injury compensation. Additionally, if the Visiting Victim can demonstrate the value attributed to a car in their own Member State, courts will be inclined to use that value in setting compensation.

2.5.2 Personal injury Compensation calculation methods - capital v. periodic payments

2.5.2.1 Lump sums and periodic payments

In most countries, there is a marked preference for lump sum awards, thus personal injury damages are normally awarded on a full and final basis (**Belgium, England and Wales, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Scotland and Spain**).

However, most countries also have special sets of rules for periodic payments which are sometimes applied in the case of minors and persons under a disability, or for future losses (**England and Wales, Germany, Greece, Italy, Luxembourg, The Netherlands, Portugal and Spain**); although, this power is rarely used in practice.

In **Sweden**¹²⁷, periodic payments are the norm where there is a significant loss of earnings, while lump sums are preferred in all other cases.

2.5.2.2 Interim payments

Interim payments are obtainable in **England and Wales, Denmark, Greece, Italy, Luxembourg, the Netherlands and Portugal**. Large differences can be found among these countries in respect of the level of detail in provisions relating to such payments.

Points that most of these countries have in common are that, generally, it is much more likely that interim payments will be made in respect of road traffic accidents and that there appears to be the high level of protection given to the defendant (i.e. the defendant must have insurance cover and, absent an admission of liability, there must be substantial evidence that the plaintiff is likely to obtain a final judgment for a substantial award).

Depending on the type of damage and depending on the country, either a single lump sum payment or periodic payments are made. This has an important impact on compensation levels.

¹²⁷ Following our Country Expert for Sweden, Dr. Roland Dahlman.

Often, lump sum payments are made at a discount in comparison to periodic payments in order to take into consideration the ability of the victim to invest the capital. Awards involving periodic payments, on the other hand, may include interest rates to take into consideration inflationary pressures.

In some countries, interest rates on periodic payments and discount rates on lump sums are the same. This is the position in **France**. In other countries, they can be different; for example, the interest rate may be aimed at limiting inflationary pressures and the discount rate may be set to align with return rates on existing investment vehicles.

When the periodic payment does include an interest rate, such interest rates vary from one country to another and are not always compounded. Even within a country, issues arise respecting determination of the rate itself. In the **UK** for example, the Retail Price Index is mainly used. But this has been challenged in the courts. In *Flora v Wakom* 2006 [2006] EWCA Civ, 1103, [2007] PIQR Q23 CA the Court of Appeal considered the Average Earnings Index instead.

When a periodic payment is made, it may be turned into a lump sum at a discounted rate to take into account the possibility for a victim to invest the lump sum and generate a return. In **France**, the traditional discount rate was 6.5 percent. It is still used by four French Appellate Courts. Six other Appellate Courts use rates between 2.8 and 3 percent and another twenty between 3.5 and 5 percent¹²⁸. Thus, it appears that even within a country victims are not treated equally, and which capitalisation table applies depends on the court and the insurance company involved in a settlement.

This has far-reaching consequences. If, for example, it is considered that a victim who is 30 years of age and who suffers personal injury damages may be paid 100,000 Euros per year until the end of his or her life in one jurisdiction, this does not hold true for all countries. In addition a lump sum payment can vary greatly from country to country. It can also vary according to whether it is an insurance settlement or one decided by litigation.

¹²⁸ Following our Country Expert for France, Isabelle Tinel.

The table below shows the real effect of discount rates on compensation for bodily injury. The basic compensation amount is 100,000 Euros for a 30 year old victim. The result is edifying. The same basic compensation is transformed into four very different life-time compensations.

	Is payment in form of capital or lump sum permitted	Discount rate as used by courts	Life expectancy as used by courts	Total
BE	Yes	3%	72	2406100
FR	Yes	6.5%	62	1356700
IT	Yes	4.5%	67	1801900
UK	Yes	2.5%	78	2822000

Source: Study and P. Le Roy, *Differences in the right to compensation for bodily injury in Europe, 2003*¹²⁹.

For countries that provide either lump sum payments calculated on average life expectancy, or structured settlements using similar methods of calculations, the resulting compensation levels will differ from one to another, as indeed will life expectancy. In 2002, the Eurostat figures indicated a life expectancy of 64.8 years for men in **Latvia** and 77.7 for men in **Sweden**. Corresponding multiplier tables lead to different levels of compensation. These differences could also increase if the multiplier tables are not regularly updated. For example, in **France**, the multiplier table used for many years was the MKH 60/64 which was established more than 40 years ago. But all the practitioners admit that this table is obsolete and many courts now use the “barème de la Gazette du Palais”¹³⁰

In the case of lost earnings, in **Malta** as an example, the amount is calculated on a monthly basis¹³¹ and then the lump sum determined.

The judge will take into account the age of the person, their actual income, the difference between the retirement age (60 in **Malta**) and the age of the person at the time of the

¹²⁹ At <http://www.genre.com/sharedfile/pdf/Topics11LeRoy-en.pdf>

¹³⁰ Following our Country Expert for France, Isabelle Tinel.

¹³¹ Court of Appeal, 27th February 2004 in *Annunziata sive Nancy Caruana vs. Odette Camilleri*.

accident, and the percentage of established disability (as determined by the judge). The judge will also use multipliers based on income inflationary pressures, and when granting a lump sum the judge will apply a discount rate¹³². The basic formula applied by the judge in **Malta**¹³³ will be:

$$D\% \times [R - C] \times cl \times r = C$$

D% = disability percentage

R = retirement age

C = age at time of accident

cl = constant income

r = discount rate

In **the UK**, other parameters will be taken into account such as the likelihood of a person having no periods of unemployment prior to retirement and the relative change in income levels over the course of a working life. These are not taken into account in **Malta**, although inflation and the resulting decrease in the purchasing power of money are.

The parameters taken into account in the Ogden Tables in **the UK** will not be the same as in other countries. Countries have more or less active systems of evaluation. For many years, the tables or schedules used were static, with life expectancy levels only re-evaluated once every twenty years. Now the situation has changed. Guidelines, tables and schedules are updated regularly and include more and more parameters so as to reflect as closely as possible the situation of those they are applied to.

Some periodic payments or structure settlements are basically a lump sum paid as instalments for a period of time determined by reference to average life expectancy. Other periodic payments are granted for the life of the victim.

Periodic payments make the comparisons between compensation levels in different countries difficult. Often periodic payments apply for the life of the victim only. This means that if a victim dies within one year of their injury their compensation will seem

¹³² See for example Judgment of the Court of Appeal of the 27th February 2004 in *Annunziata sive Nancy Caruana vs. Odette Camilleri* where the applied discount rate was 10 percent.

¹³³ Following our Country Expert for Malta, Dr Marse-Ann Farrugia.

small when compared to that obtainable in other countries where compensation is made as a lump sum. However, if the victim lives for another fifty years after the award is granted, compensation will reach a much higher level than in other countries.

In the UK for example, the Courts Act of 2003 that came into force on April 1, 2005 gives Courts the option to award a periodical payment order without the agreement of the victim in respect of damage for future pecuniary loss in bodily injury cases. These periodic payments are limited to special damage. The aim of the Act was to reduce the cost burden on the National Health System and avoid victims finding themselves unable to meet their needs after spending the whole lump sum awarded to them in the first few years after an accident. When a periodic payment order is awarded the victim receives an annuity in the form of an annual or monthly payment from the insurer until the time of his or her death.

Lifelong periodic payments are said to be beneficial for the victims as they are more tailored to their needs. Lump sum payments are usually made on the basis of the average life expectancy of a person. If the person dies before this average, they will have received more than they should have. If the person dies after this average, they will have received less than they need. Lifelong periodic payments ensure that the victim is compensated for the whole of his or her life.

The availability of lifelong periodic payments may lead to less structured payments. Structured payments typically stop after a set period whereas lifelong payments last for the life of the victim.

Another consequence of the existence of lifelong payments is an increase in litigation, at least until insurers propose lifelong periodic payments as part of their settlement packages.

Lifelong periodic payments have disadvantages in that they create an uncertainty for insurers and may lead to a spread of this uncertainty through higher premiums¹³⁴.

¹³⁴ Another danger for the victim is the risk of the insurance company becoming insolvent during their lifetime. This consideration may be more pertinent now given the current economic climate and the fact that many banks offer personal insurance products.

Finally, periodic payments made to citizens from other countries may be more difficult to implement than lump sum payments. If anything goes wrong with the periodic payment after a number of years the victim may find it difficult to make a claim in another country. This is specifically recognized in **Sweden**, where although the Law of Damages states that compensation must be paid in the form of an annuity if the compensation is of essential importance as a means of support to the claimant, it may be paid in the form of a capitalized lump sum amount if this can be justified by the fact that the victim is a non-resident¹³⁵. This principle is not recognized in every country and in countries where lump sum payment is prohibited or is heavily discounted, the Visiting Victim is disadvantaged.

- Example of the Ogden Tables in the UK

The Ogden tables are actuary tables. These tables are formally recognized in the Damages Act of 1996 and by the House of Lords.

Future pecuniary losses are determined by the courts, and decided by multiplying two different elements. The first of these is the multiplicand which represents the annual loss (such as the salary prior to the accident), and the second is the multiplier which is essentially the number of years that the victim would expect to work but for the accident multiplied by a number of contingencies which include the following:

- A discount rate which accounts for the fact that the money is received as a lump sum immediately, instead of being received annually as a salary would be.
- The fact that the victim might die before attaining retirement age, a risk also taken into account.
- The fact that a percentage of the population retires early and that the victim may have otherwise retired early.
- The fact that a percentage of the population is unemployed and that the victim may during the course of his or her working life also be unemployed for a period of time. (The pertinent question here is what are the chances of a person being employed up to retirement age using empirical methods provided by the UK labour force survey?¹³⁶).
- The fact that a percentage of the population is on sickness leave and that the victim may during the course of his or her working life become sick.

¹³⁵ See Swedish Motors Insurers, Compensation for Personal Injury in Sweden.

¹³⁶ The UK Labor Force Survey provides a cross-sectional data-set of social-economic variables of the working age population including the dynamics of the labour force

- The fact, previously noted, that a percentage of the population dies before reaching retirement and that the victim may regardless of the accident have died before retirement.
- The impact of the victim's residual earning capacity.
- The fact that the victim may be out of the labour force due to sickness.

The purpose of tables is usually to try to bring some scientific principles to bear on a process undertaken to evaluate damage prior to setting compensation. Without such tables, courts would need to rely primarily on intuition and precedent to settle cases.

Given the complexity of the information, including national statistical data taken into account in the Ogden tables, it is clear that in the case of a visiting victim to whom the court applies the Ogden table, the visitor will be treated as an English resident for determination of the multipliers and the **UK** mortality rate and retirement age. **UK** unemployment risks will also be applied to the visitor's situation, creating either over- or under-compensation, and if the court decides not to apply the table, it will rely on intuition or precedent and the arguments of the parties. It will not be able to recreate calculations similar to those of the Ogden tables, which again are the product of scientific work, but adapted to the conditions of the victim in their country of residence.

The UK's Ogden tables could be used as a model for European Union tables designed to provide consistent and transparent information to a wide range of courts, judges and agencies involved in accident victim compensation. However they would have to be regularly updated in order to ensure that they remain relevant to the visiting accident victim's needs and entitlements.

Basic formulas such as the reduction factor - the proportion of the life expectancy up to the retirement age likely to be spent in employment - would be applied to different data sets - depending on specific country data.

The reason the Ogden Tables were created was to remedy difficulties **UK** courts were experiencing when evaluating damages for personal injury. The tables provide scientific guidelines the courts can use as a basis for their decisions. If the court is faced with a visiting victim, applying the table will equate to bias whether or not the victim ends up being over or under compensated. If the court were to follow little more than its own intuition, a set of precedents and the arguments of the respective parties, the result would

be as unsatisfactory to visiting applicants seeking compensation as it would have been to **UK** residents prior to the existence of the tables. Another solution would be for European courts to use scientifically based tables provided by a victim's country of residence.

2.6 The different parameters taken into account when calculating awards

Courts will take into account a number of parameters when calculating awards, and the relative weight of each parameter will be different from one Member State to another and sometimes even from one court to another within a single jurisdiction.

2.7 The role of lawyers and academics

Lawyers and academics play an important role in the levels of compensation awarded.

Academics, commenting on and criticizing court decisions and legislative changes, can influence judges and propose new categories of losses or new levels of compensation. They can also be involved in the drafting of new regulations, influencing legislative work. Academics may also, thanks to a potentially wider point of view and to a broad knowledge of other European legislations, contribute to improving awareness on differences between European systems and thus help to facilitate the harmonization of legislation. By participating in European research groups or meetings, they can also introduce new ideas to national legislatures and assist in making the best tools available to each Member State.

The contributions of academics are thus essential in promoting a common way of legal thinking among EU members where damages and compensation are concerned.

In **Belgium**, academics have seldom examined new methods of obtaining compensation, one reason for stagnation of the Belgian compensation system which is still based on damage as it is recognized by individual judges¹³⁷.

In sharp contrast, the work of **Italian**¹³⁸ academics has led to the development of new concepts that give rights for victims to claim full compensation. They introduced new

¹³⁷ Personal Injury Compensation in Europe, Peopil research Group, Kluwer, 2003, page 54

¹³⁸ Personal Injury Compensation in Europe, Peopil research Group, Kluwer, 2003, page 247

categories of losses and criteria for assessing quantum. The Italian personal injury compensation was then built upon academics' initiatives followed up with case law. For example, the category of compensation known as "danno biologico" was the result of scholars seeking appropriate responses to developments occurring in forensic medicine. Such exchanges of ideas have fostered an important evolution in Italian compensatory practices that appear to result from cooperation between academics, judges and lawyers¹³⁹. Similarly, academics have also helped develop the concept of "loss of a chance" adapted from a French category of losses¹⁴⁰.

Academics have contributed much to the harmonization of European legislation surrounding compensation for accident victims. To a great extent they have participated in the debate, mainly through comparative studies on tort law and personal injury claims, research projects, studies to find new tools for harmonization, and recommendations on harmonization and cross border litigations¹⁴¹.

2.8 The role of medical expertise

In some countries, the courts rely on tables compiled by medical experts to determine the level of injury and its permanency.

Experts play an essential role in the assessment and evaluation of personal injuries.

In most countries medical experts are regularly called to evaluate injuries. If a judge chooses not to follow a medical expert's opinion, such a decision should be based on convincing evidence and a transparent process.

In most countries the courts rely on doctors' prescriptions to patients and the numbers of days of sick leave awarded to determine compensation.

¹³⁹ For a general framework of scholars' contributions see Comandè, G., & Ponzanelli, G., Il contributo della dottrina, in *La valutazione del danno alla salute*, edited by Bargagna, M., & Busnelli, F.D., 4th edition, Cedam, Padova, 2001, p. 49-78.

¹⁴⁰ A. Benabent, "La chance et le droit". LGDJ, 1973. I. Vacarie, "La perte d'une chance" Droit prospectif, 1987, p 917.

¹⁴¹ *Personal Injury Compensation in Europe*, Peopil research Group, Kluwer, 2003, page 549

There are differences between Member States on appropriate qualifications and roles of medical experts in compensation cases¹⁴². The first major difference concerns the qualification of medical experts. In some countries, any doctor can act as a “medical expert” without further requirements (Ireland, Austria, Sweden...) while in other countries, medical experts must have obtained a specific university qualification (Italy) or cannot assume such a role while at the same time acting as the plaintiff’s own doctor. The second difference lies in the form and content of the medical expert’s contribution. In some countries, they must describe in detail injuries of the victim, in others they may also evaluate which degree of disability applies to the victim. The third difference lies on the medical scales used by the experts, which will be either a single official scale or different scales depending on the types of losses. A fourth difference lies on the relationship between the medical experts and the court. The courts are generally not bound by the experts’ reports but usually they follow them.

2.8.1 Role of medical experts in evaluating and assessing non-economic losses

Although medical experts do not in any jurisdiction assess the actual monetary value of the victim’s claim, they do play an essential role, in most countries, in the process that leads to quantification of compensation for non-economic losses.

Three categories of country may be distinguished in respect of the role of medical experts in assessing non-economic losses¹⁴³:

Approach	Characterisation
Non-medical scoring	<p>Medical experts give opinion on the extent of injuries and their effect on the victim’s life, and to the future prognosis.</p> <p>Medical experts do not give percentages of invalidity relevant for assessing non-economic losses.</p> <p>Courts have a freer role in evaluating the extent of the injuries and calculating the amount of damages.</p>
Non-determinative Medical scoring	<p>Medical experts provide opinions that assess the extent of invalidity in percentage terms.</p> <p>Quantification of damages is not strictly linked to any medical</p>

¹⁴² Personal Injury Compensation in Europe, Peopil research Group, Kluwer, 2003, page 474-475.

¹⁴³ Personal Injury Compensation in Europe, Peopil Research Group, Kluwer, 2003 pp 570-576.

Approach	Characterisation
	scores or tables.
Determinative medical scoring (also called the 'calcul au point' approach)	<p>Medical experts rate the victim's physical and psychological injuries by reference to medical scoring tables (in Denmark, regard is had directly to tables compiled by the National Board of Industrial Injuries without the need for medical experts).</p> <p>These scoring tables may be published by medical experts, the legislature, commissions appointed by the Government or other special boards.</p> <p>The courts quantify damages by assigning money values corresponding to the score for the severity of the injury.</p>

The medical opinion of a medical expert may not be followed by the courts especially when more than one expert testified and their opinions diverge. However, in general the court will motivate its decision not to follow an opinion. In practice, however, it is not always the case.

2.9 The role of insurers

The Team is currently gathering general information on premiums to determine the importance of the relationship between levels of compensation as identified by Member State and levels of premiums. Premiums are calculated by an assessment of risk. In countries where compensation levels are low, premiums should be relatively low.

2.10 Insurers are one of the main sources of compensation

Insurers are the main source of compensation in road traffic accidents and they are also one of the main settlers of claims. They determine compensation and they do so to a large extent based on premiums or prior compensation amounts.

Insurance companies will be reluctant to increase premiums suddenly or dramatically revise their compensation practices as a result of sharply increasing costs.

Compensation levels can only increase incrementally over a period of time.

Policyholders have to become slowly accustomed to higher prices and be able to afford them. This is to avoid higher numbers of uninsured vehicles especially if the increase in premiums is disproportionate to income levels.

2.11 Taxation on compensation

In most countries, the general rule is that personal injury non-economic damages are not taxable (**Austria, Belgium, England and Wales, Denmark, France (for lump sum only), Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Scotland, Spain and Sweden**).

The same rule generally applies to economic loss. However, there are some exceptions: In some jurisdictions, taxation does apply to a certain extent.

2.12 Legal costs and practices

As detailed below, some countries allow the reimbursement of full legal costs and others do not.

3 Compensation practices

3.1 Introduction

In many countries the level of compensation will depend on procedural issues. For example in **Austria**, the claimant must seek declaratory judgment concerning future damage so that the limitation period is interrupted.

3.2 Multiple sources in all European countries

There are multiple sources of compensation for injured persons and compensation for personal injury always comes from more than one of these. Each country has its own peculiar combination of sources and has developed its own rules to govern the interaction between them.

We have tried to attribute a particular source to each country. Some countries may be associated with multiply sources of compensation when two or more systems coexist.

Sources of compensation	Characteristics of Compensation	Other Remarks	Country
The faulty party or their insurance company in the liability System (also known as the ‘tort system’)	<ul style="list-style-type: none"> • Paid by the person who has caused or who is, directly or indirectly, responsible for the damage. • Delivered through the litigation process (award or settlement between parties). • Governed by rules typical of tort and contractual law. 	<ul style="list-style-type: none"> • In general strict liability is imposed on owner of vehicle and fault based liability on driver. • Traditional and, in most jurisdictions outside Scandinavia¹⁴⁴, still the leading source of compensation where someone is at fault. • Closely linked to the Court system. 	Austria, Bulgaria, Cyprus, Czech Republic, Estonia, Greece, Ireland, Spain, Hungary, UK, Malta, Romania, Lithuania, Luxembourg, Latvia, Poland, Portugal, Slovakia, France, Belgium, Germany, Italy, The Netherlands
The owner or driver of a vehicle or their insurance company in a	<ul style="list-style-type: none"> • Provided by statute where the person who caused the loss is responsible for the loss by virtue of operating the vehicle. • The operation of a vehicle is 	<ul style="list-style-type: none"> • Reversal of the burden of proof and the driver must prove victim’s 	Estonia, Greece, Czech Republic, Hungary, Spain,

¹⁴⁴ Includes Sweden, Finland and Denmark in this study.

Sources of compensation	Characteristics of Compensation	Other Remarks	Country
strict liability system	<p>seen as the cause of the loss and the operator the liable party.</p> <ul style="list-style-type: none"> • Strict liability usually comes with more limited compensation levels 	<p>fault.</p> <ul style="list-style-type: none"> • Exists in some countries to protect passengers, pedestrians and cyclists and enable them to obtain fast and adequate compensation 	Germany, Netherlands, Poland, Slovenia, Lithuania, Slovakia, Germany, The Netherlands
Insurance of owner or operator of vehicle in a no-Fault System	<ul style="list-style-type: none"> • Obtained from the insurance of the driver or operator of the vehicle. • No requirement for someone to be found liable (victim's involvement in specified accident thereby suffering recoverable loss/damage is usually sufficient) • Compensation usually limited and strictly organized • Contributory negligence rarely recognized since no-fault principle 	<ul style="list-style-type: none"> • Exists in some countries to protect passengers, pedestrians and cyclists and enable them to obtain fast and adequate compensation 	France, Belgium,
A special compensation fund in the no-Fault System	<ul style="list-style-type: none"> • Obtained from a fund designed to cover specific types of accident and risk (either a State-appointed, statutorily-regulated private insurance company or a public insurance fund). 	<ul style="list-style-type: none"> • Found in very few Member States • Sometimes funded entirely from taxation 	Finland, Denmark, Sweden

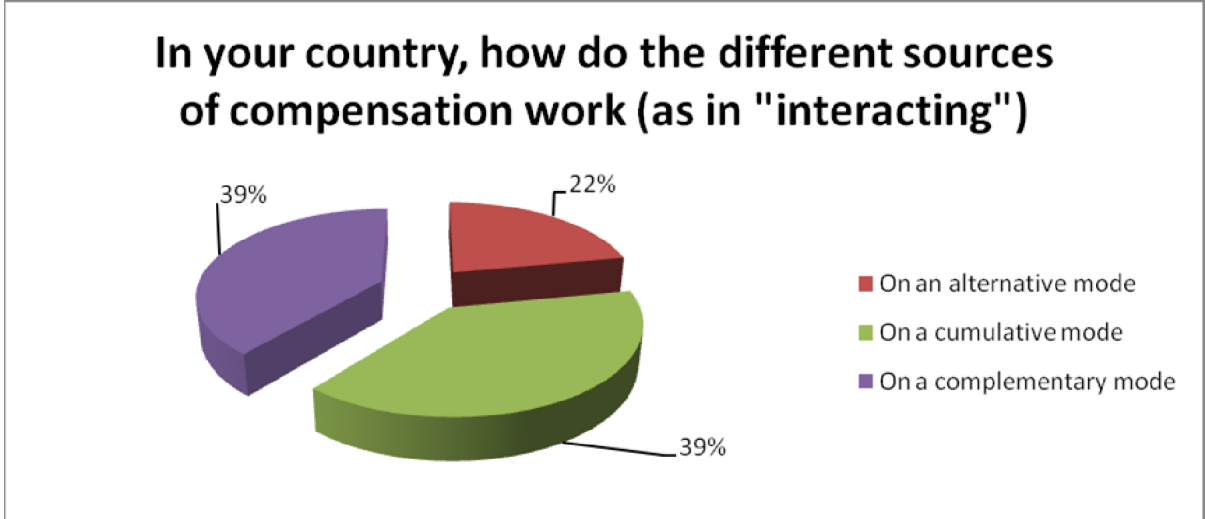
Sources of compensation	Characteristics of Compensation	Other Remarks	Country
	<ul style="list-style-type: none"> • Fund is financially supported by persons involved in risk-creating fields covered by the scheme (e.g. employers and employees, vehicle owners). • No requirement for someone to be found liable (victim's involvement in specified accident thereby suffering recoverable loss/damage is usually sufficient). • Compensation usually limited and strictly organized • Contributory negligence rarely recognized since no-fault principle 	thereby resembling a social security system	
A guarantee fund where the owner of a vehicle is not identified or uninsured	<ul style="list-style-type: none"> • Fund designed to cover as a result of the faulty party's non coverage or the risk that the victim will not be compensated because of the faulty party's absence or lack of insurance • Limits or excesses may apply for property damage 	<ul style="list-style-type: none"> • Guarantee Funds exist in all EU countries as a feature of EU regulation • Guarantee funds are unnecessary in no-fault systems 	All Member States
Social Security	<ul style="list-style-type: none"> • Can be in the form of money, medical and social services, goods or property - e.g. accommodation. • Paid directly by the State through its welfare system or 	<ul style="list-style-type: none"> • Efficiency and capacity to provide adequate compensation as linked to 	Most Member States have some form of social security or public health systems

Sources of compensation	Characteristics of Compensation	Other Remarks	Country
	special funds. <ul style="list-style-type: none"> No requirement for someone to be found liable. 	the national economy and the efficiency of the taxation system. <ul style="list-style-type: none"> May lead to partial or total reimbursement once compensation is determined 	
Private Insurance	<ul style="list-style-type: none"> Paid by private insurance company in accordance with the terms of the particular insurance policy. 	<ul style="list-style-type: none"> 	All Member States

3.3 Multiple compensation systems

There can be different sources of compensation simultaneously applicable to losses incurred in an accident, as shown in the graph below.

Graph 23



Source: Questionnaire

It is important to note that in the vast majority of countries, compensation systems operate in either cumulative or complementary modes.

The fact that compensation sources function in a cumulative mode may pose a risk of over-compensation.

Countries operating in an alternative mode of compensation may not run the risk of under-compensation so long as their primary compensation system can totally cover the risk.

The existence or level of compensation provided by each source of compensation will depend on the type of compensation system that applies.

One reason for this is that although there are three main types of compensation system, many countries have adopted multiple systems. Further, the existence of public health services in many countries means that the victim will be treated, at least for emergency purposes, regardless of the nature or cause of the injury. Finally, people can always insure themselves privately to cover unforeseen events.

There are basically three types of compensation system currently operating in the EU.

The first of these is the tort or “fault” system, which makes compensation dependent on the determination of an at-fault or liable party¹⁴⁵.

The second is the strict liability system, which does not look at the act of the defendant, and instead of focusing on the “parties” to the accident examines the situations of victims and compensates them without an inquiry into fault being conducted.

In a strict-liability system the source of compensation is the owner or operator of the vehicle or his or her insurance.

What is usually called a “no-fault” system would fall into the strict-liability system category because there is no inquiry into fault. However, a no-fault system differs from a

¹⁴⁵ See Antonio Nicita and Matteo Winkler, *The Cost of Transnational Accidents: Evolving Conflict Rules on Torts*, Paper prepared for the 2007 EALE conference.

strict liability system because it designates a different source of compensation. In no-fault systems, the generating factor for compensation is the accident and resulting injury. Neither the parties involved nor their respective vehicles are the major focus of attention in granting compensation. This is why the source of compensation in cases dealt with by no fault mechanisms is usually either a compensation fund supported by insurance companies, or health care and social security systems.

Health care and social security intervene within the context of either a fault or strict liability/no-fault system. In a fault system, they may have an action for recovery of expenses incurred, but this is not always the case. Although in some Member States a fault system applies to the parties involved in accidents, the intervention of health and welfare agencies may be directed by general principles of compensation for injuries regardless of fault.

The compensation of the victim by his or her own insurance regardless of fault would also fit within a “no-fault” system. This is also called the first party liability system, in which the party who suffers the loss technically pays for it¹⁴⁶. In practice, the party is insured and it is the insurance company that supports the risk¹⁴⁷. First party liability is not used in the EU, but the fact that more and more people take out special insurance cover that supplements third party liability insurance indicates that there is an element of first party liability in play.

Sources of compensation will depend to a large extent on the compensation system adopted. It should be noted however that in many cases in order to protect vulnerable victims such as pedestrians, Member States have adopted a strict liability system alongside a fault system. As a result, many Member States in fact combine both systems.

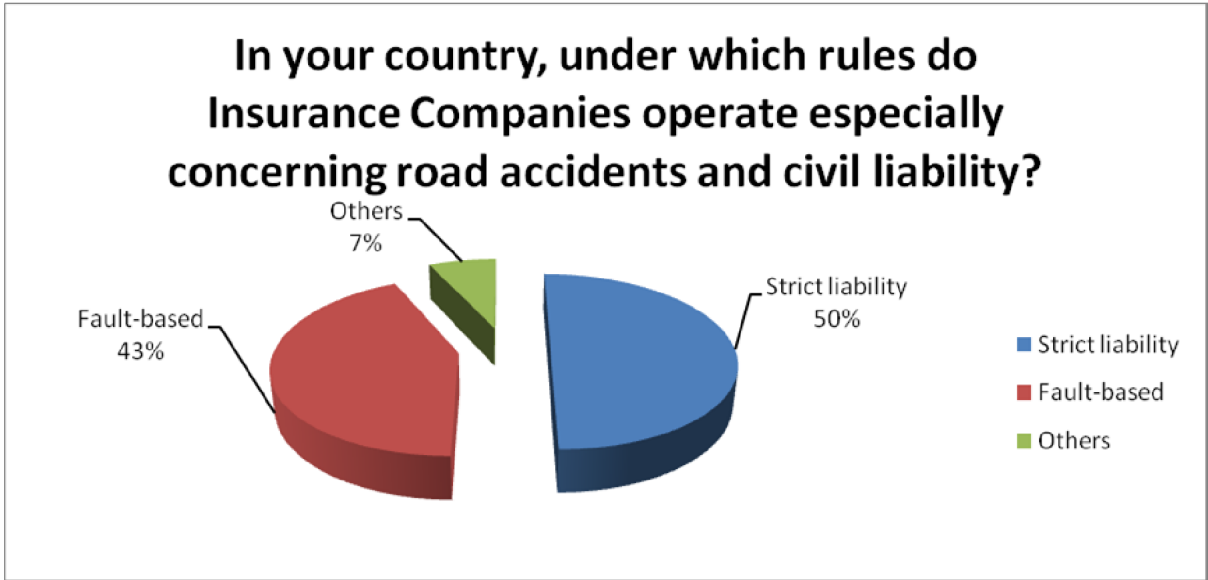
Further, numerous Member States’ health services will provide victims of accidents with health and social security protection, regardless of fault. In other Member States such as the UK, the health services provider will require reimbursement for services provided from the liable third party.

¹⁴⁶ Who Pays for Car Accidents?: The Fault Versus No-Fault Insurance Debate, Jerry J. Phillips, Stephen Chippendale, Georgetown University Press, 2001, pp. 129.

¹⁴⁷ Tunc. A, Traffic Accident Compensation, in Towards a European Civil Code, edited by By A. S Hartkamp, Christian von Bar, Martijn W. Hesselink, Ewoud Hondius, Carla Joustra, Edgar Du Perron, Kluwer Law International, 1998, p 470.

The following graph illustrates the difficulty of identifying the type of compensation system operating in Member States by collating responses to a single question. Many Member States do use strict liability for specific issues such as in case of an accident involving a car and a pedestrian. Many countries use a no-fault based system for compensation purposes although fault is still an issue to identify the ultimate liable party. The result is that it is difficult to obtain a straight answer from a single closed question.

Graph 24



Source: Questionnaire

In respect to those accidents involving two or more vehicles, most Member States have adopted a form of the fault system.

3.4 The “fault” systems

3.4.1 Common features in fault systems

The “fault” system is the traditional system used to determine an appropriate source or sources of compensation in the EU.

Most European States still have a “fault” based system and share the same basic operational approach in assessing cases when the accident involves vehicles only. A defendant’s liability for damage is based on the breach of a duty of reasonable care.

The fault system is generally based on the following elements.

First, the circumstances of the accident or the relationship between the parties define a duty of care. Second, a party owing a duty commits an act or omission which constitutes a breach of the duty. Third, the act and circumstances have consequences which define the cause. Fourth, the injury or harm suffered by the party (owed the duty) as a result of the breach of such duty defines the loss.

3.4.2 Limitations of fault systems

Main criticisms of the fault system concern delays in delivering compensation. Determination of fault can be a lengthy process and a highly contested one¹⁴⁸. Hence it often leads to increased litigation costs and uncertainty as to outcome.

The victim may thus have to wait a long time before obtaining adequate compensation. This wait is costly to society, the victim, and his or her family.

These problems are solved by improving other sources of compensation that can co-exist and that are not based on “fault”, especially the social security/health care system, whose purpose is to provide victims with immediate assistance and protection whilst waiting for compensation to be delivered through the liability system.

They are also resolved by increasing claims management efficiencies and encouraging settlements. It remains the case however, that for serious injuries, i.e. those that are most urgent for victims to be compensated for, the process of redress remains slow in many fault-based systems.

Another issue arises from the fact that because the fault-based system is fundamentally a court-centred system, there has been a lot of uncertainty around outcomes. In fault based systems, the litigation that can arise to determine the faulty party or how faulty each party was can lead to endless proceedings with parties dropping their cases at one point for lack of financial means to support a lengthy litigious process. To overcome this, many Member States have implemented changes. Member States which allowed cases involving personal injuries to be tried by jury have now abandoned the practice, except in

¹⁴⁸ Personal Injury Compensation in Europe, Peopil research Group, Kluwer, 2003, page 540

exceptional circumstances. Further, the discretion judges used to have recourse to in deciding compensation cases has been gradually eroded; tables of past cases, injury evaluation tables or actuary tables are now more commonly used. In Spain these indemnification tables are even compulsory where compensation is being decided.

3.4.3 Consequences of the limits of the fault system

In some countries, other systems have emerged alongside the fault system to counterbalance its inefficiencies. In particular, no-fault or strict liability systems have emerged. In some Member States, more than one system co-exists. In others the “fault” system has been replaced entirely in these countries.

In strict liability systems, the main element that disappears from the fault system equation is the second element, referred to above as the breach of duty. There is no enquiry into the act or omission of the party owing a duty allowed for in these systems.

Instead the circumstances or the relationship between the parties first define a duty of care. Then the act and circumstances have consequences which define the causation. Finally, the injury or harm suffered by the party owed the duty defines the loss and the extent of compensation.

In no-fault systems, the duty element disappears and the injury or harm suffered by a party as a result of the accident defines the loss and the extent of compensation.

Some Member States rather than adopting a different system, allowed for responsibility for the burden of proof to be reversed, an outcome dependent on the specific circumstances. For some types of victims, referred to as vulnerable victims¹⁴⁹, the driver or operator of the vehicle is presumed at fault in case of an accident causing an injury. The premise for this is that operating a vehicle is dangerous. Therefore, at base the fault system remains, except that the breach of duty is predetermined. This is hard to distinguish from the strict-liability or no-fault system, whereby the driver or operator of a vehicle is liable or where the fact of being injured following an accident results in automatic compensation. The distinction lies mainly in the source of compensation and the defences available to the defendant.

¹⁴⁹ The Compensation of Vulnerable Road Accident Victims, Report by Professor Hubert Groutel, Academy of European Law (ERA), 2001.

3.5 The “no-fault” systems

Because the tort or liability system often leads to long and costly court battles over who was at fault and to what degree, policymakers in some Member States decided to change from a “fault-based” system to some form of a “no-fault” system. It should be noted that calling a system “no-fault” is a misnomer. What some States have adopted is a system where there is no inquiry into fault and this is what is generally meant herein when a reference is made to a no-fault system.

In the EU, **Finland, Sweden, Denmark** have adopted a no-fault system. The application of a no-fault system differs slightly in each country that has adopted it. The main source of compensation in these countries is insurance company supported funds or the welfare state. It should be noted that gross negligence committed by the victim may limit the level of compensation awarded.

In **France, Slovakia and Belgium**, compensatory systems are a mixture of no-fault and fault, where the victim claims from his or her own insurance company for damage sustained, having a right to claim back from the faulty party’s insurance company. In case of litigation, and when two or more vehicles are involved, the fault system will be applied. This no-fault version is in fact mainly aimed at primary coverage.

These countries also have versions of no-fault in respect to vulnerable victims of accidents. Pedestrians for example may not have proper insurance if they are involved in an accident with a car. The idea is to consider that the car, as an insured dangerous object, is the cause of the accident and the insurance attached to it should be the source of compensation.

The application of the no-fault system differs slightly in each country that has adopted it¹⁵⁰.

However, for each country the basic idea is to eliminate fault from the system of compensation with a view to increasing fairness by making the claim process simple, so that victims with meritorious cases can access the system easily and be awarded for injuries which have resulted from an accident.

¹⁵⁰ The Compensation of Vulnerable Road Accident Victims, Report by Professor Hubert Groutel, Academy of European Law (ERA), Trier 2001, page 8.

Under no-fault automobile insurance laws, the victim does not have to prove that the accident was somebody else’s fault before obtaining compensation. The victim’s insurance company or a special fund will pick up medical bills, rehabilitation costs, and lost wages. The trade-off is that some injuries may not be recognised and the victim may not be able to sue the faulty party.

In both non-fault based systems and fault based systems, insurance companies play an important role in shaping compensation levels. In no-fault based systems, such as Sweden’s, insurance companies are actively involved in the implementation of the system itself. In fault based systems, courts have a more important role in structuring compensation but the large number of out of court settlements indicates that insurance companies are taking an active role in such cases.

3.5.1 The limits of no-fault systems

Although the no-fault system provides speedy compensation, the levels of compensation are generally lower than in fault systems, with stricter schedules for compensation.

Because the no-fault system precludes enquiries into fault, contributory negligence is rarely taken into account to limit a right to compensation. A clear example of this is the Finnish Supreme Court’s position (KKO 2005:145) that even a passenger who was aware of the driver’s alcohol consumption before the driver started his vehicle cannot be denied compensation for her personal injury. As a result, poor judgment or behaviour on the part of the victim is not sanctioned.

Advantages of no-fault systems	Disadvantages of no-fault systems
<ul style="list-style-type: none"> • Quicker payment of claims • No splitting of fees with lawyers • Reduction in number of lawsuits • No subsidising uninsured motorists 	<ul style="list-style-type: none"> • No compensation for pain & suffering • Less incentive to be good driver • Higher premium rates (25% more) • Economic damage compensation limited

Source: Fidelity investments (insurance.com, 2002)

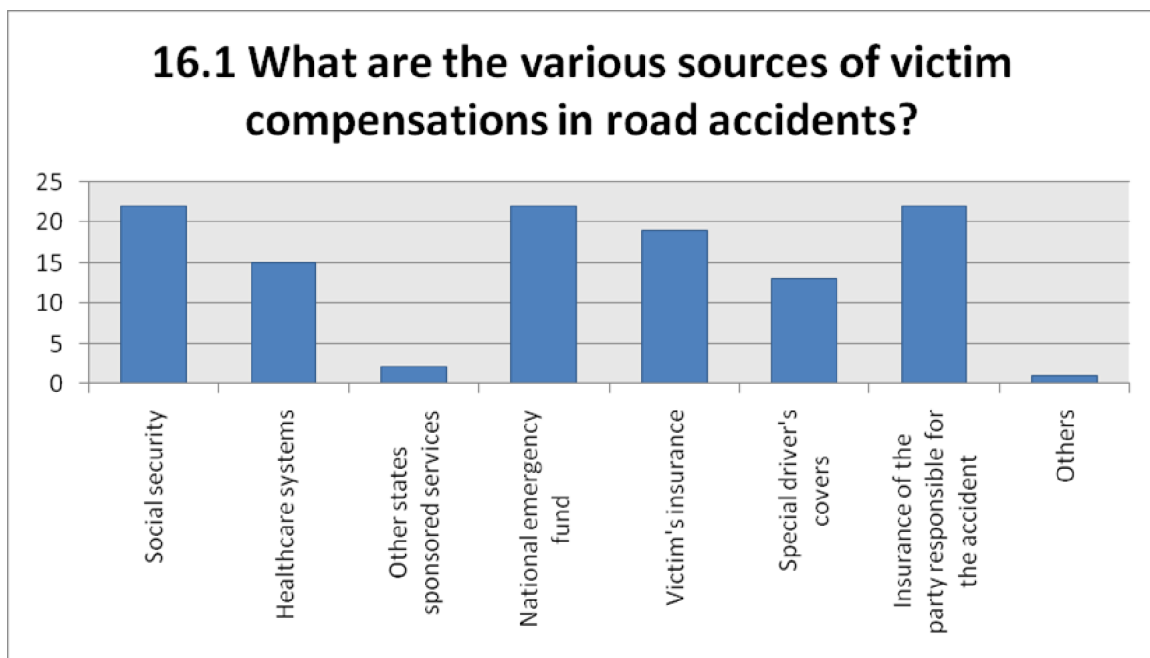
3.5.2 The social security and health care systems - sources of personal injury compensation

In all European countries, the social security and health care systems are one of the most important sources of compensation for losses related to personal injury.

Further, when accidents involve the commission of a crime, state compensation mechanisms often exist. To evaluate the usefulness of such compensation mechanisms for Visiting Victims, it would be necessary to determine the proportion of road traffic accidents that involve a crime.

Graph 25 below shows the importance of social security and health care systems as sources of compensation for victims.

Graph 25



* Multiple answers possible (Y-axis = number of answers)

Source: *Questionnaire and Surveys*

There are Member countries in which social security and health care play a greater role as a source of compensation than in others.

In countries that have a no-fault system such as **Finland, Sweden and Denmark**, the social security and health care systems play a major role. In other countries, systems are more constrained and mainly limited to addressing economic losses. Countries may draw a

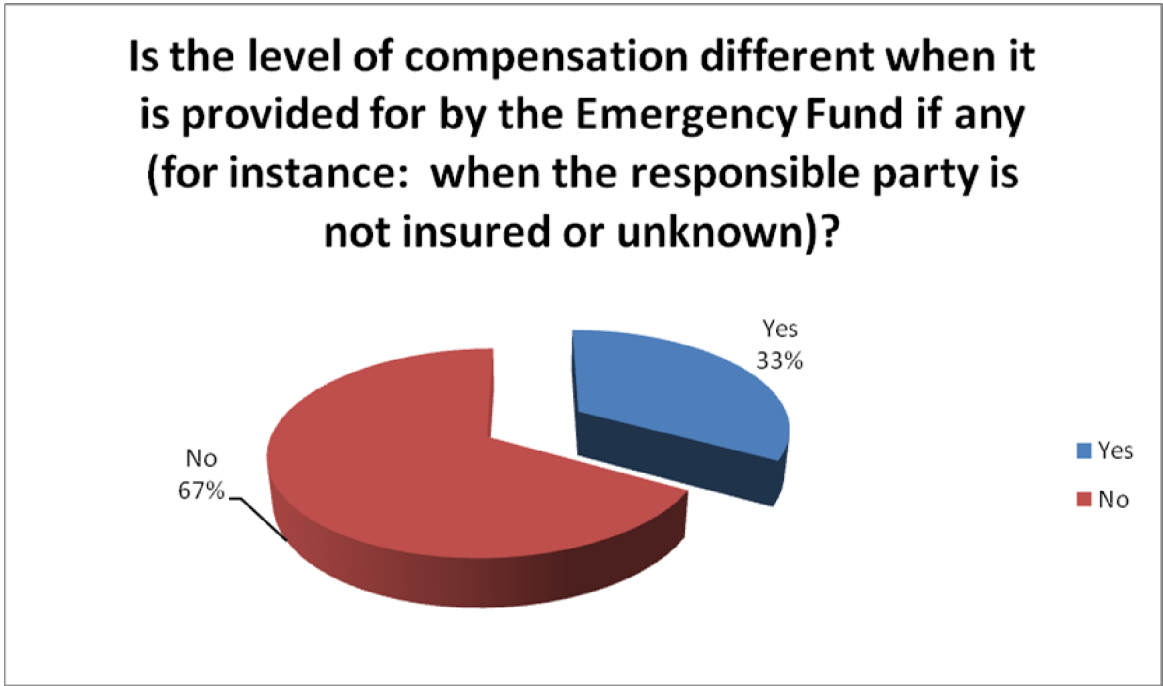
distinction between national citizens and foreign victims; for example, in **Latvia**, the victim of a road traffic accident may only have recourse to the social security system if they have been making social security payments thereby excluding most, if not all, Visiting Victims.

3.5.3 Guarantee Funds

Guarantee funds now exist in every Member State. They provide compensation to a victim when the vehicle involved in an accident is uninsured or when the driver of the vehicle is unidentified or uninsured.

Although guarantee funds exist and are supposed to compensate fully and fairly, Graph 26 shows that levels of compensation provided for by the funds are sometimes different from those that would normally be expected.

Graph 26



Source: Questionnaire and Survey

However, there are no special funds or emergency funds that deal with the specific issues that a Visiting Victim may encounter in another Member State. In some countries, victims

may have a right of action against the compensation fund (e.g. **France, Slovenia, Lithuania and Spain**¹⁵¹).

One area in which jurisdictions with compensation funds differ is the access provided to foreign victims. Some jurisdictions allow victims from other Member States access to compensation from the fund (e.g. **Spain and Lithuania**) while others exclude foreign victims from such compensation (e.g. **Italy**).

In **Slovakia**, property damage is only compensated by the guarantee fund where the accident has also caused personal injury.

For the most part, the compensation provided by guarantee funds is set at the same level as that provided under third party liability.

3.5.4 Private insurance

3.5.4.1 Compulsory third party liability insurance

In most European Union Member States, a system of compulsory third party liability insurance for motor vehicle owners operates, under which the liable party's insurer will provide compensation for damage resulting from an accident.

Where such a system exists, the victim usually applies directly to the insurer of the liable party for compensation and the insurer is required to respond within a specified timeframe (e.g. **France**¹⁵², **Luxembourg, Hungary and Slovenia**¹⁵³).

In some Member States the victim may also claim directly from their own insurer (e.g. **Italy**).

Differences exist between Member States with respect to which types of loss the compulsory third party insurance will cover. Moreover, limits are normally imposed on the amount of cover.

¹⁵¹ Spain Court Case 11June 2007 Sentence N° 102 :Juzgado de primera instancia e instrucción nº 2 de cuenca juzgado de lo mercantil

¹⁵² Three months following our Country Expert for France, Isabelle TINEL.

¹⁵³ Three months following our Country Expert for Slovenia, Nataša Pipan Nahtigal.

Typically, the victim obtains the insurance details of the liable party after an accident and then applies to the insurer directly. In some countries, the insurance details can be obtained from a state agency upon provision of the car's registration number (e.g. **Poland**).

Once an application is made to the insurance company, the company is normally mandated to reply within a specific time frame. When an insurance company rejects a claim, an explanation is usually required (e.g. **France** and **Luxembourg**).

The insurance company is usually charged with obtaining all relevant information (e.g. **Poland** and **France**) and may require the victim to undergo a medical examination (e.g. **Hungary**).

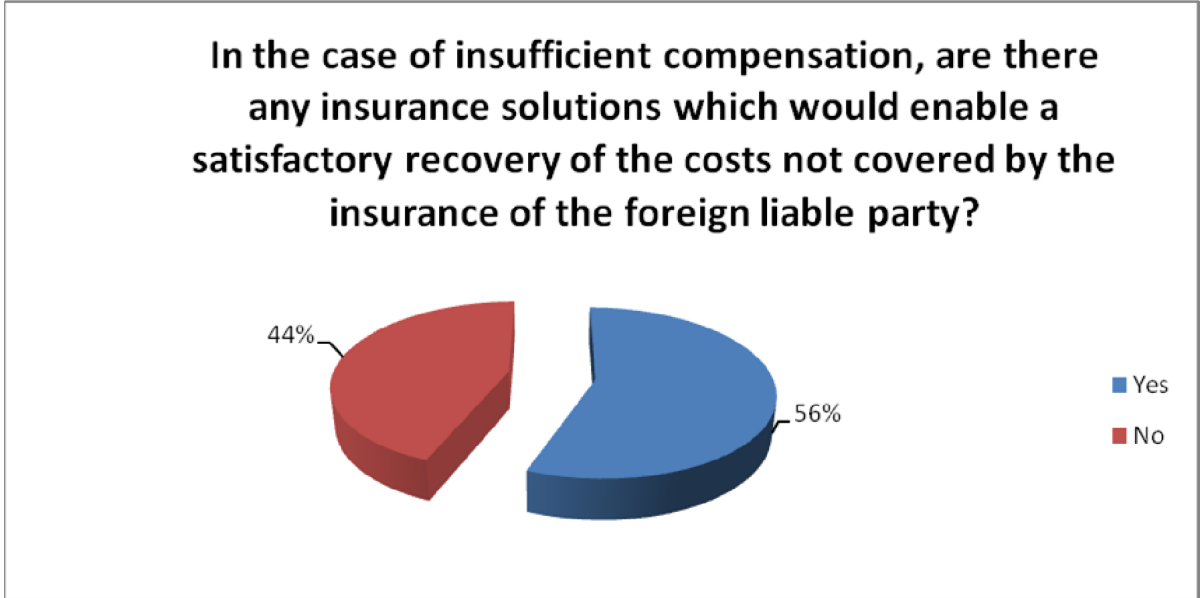
Most countries specify minimum amounts for insurance cover. However, a distinction may be drawn between those countries that fix maximum amounts of compensation for personal injury and property damage arising from road traffic accidents (e.g. **Czech Republic** and **Lithuania**) and those that do not (e.g. **Latvia** and **Malta**), in which case the maximum amount of cover is set by the particular policy.

3.5.4.2 Efficiency of the system

Insurance companies allow the purchase of personal injury or property damage protection as an optional coverage. Sometimes, driver cover is even automatically included in the basic third party liability insurance contract (ie. **France**). Should the insured be the victim of a road traffic accident, the policy would pay benefits to the injured without regard to who caused the accident.

In a majority of cases it appears that insurance products can satisfactorily complement compensation.

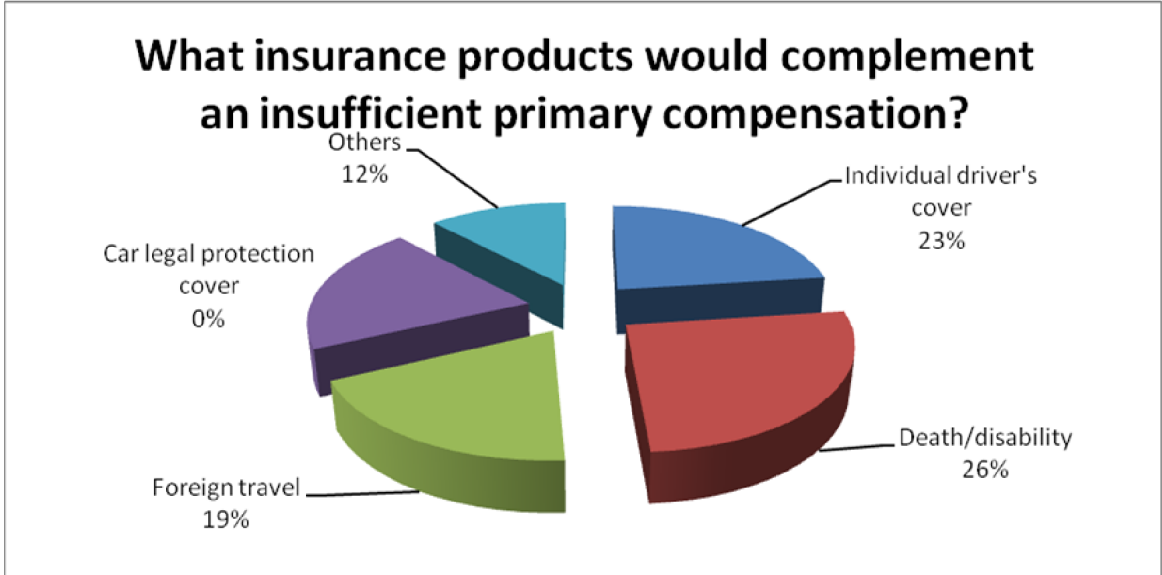
Graph 27



Source: Questionnaire and Survey

There are a number of products that could serve that purpose, as shown in the graph below.

Graph 28

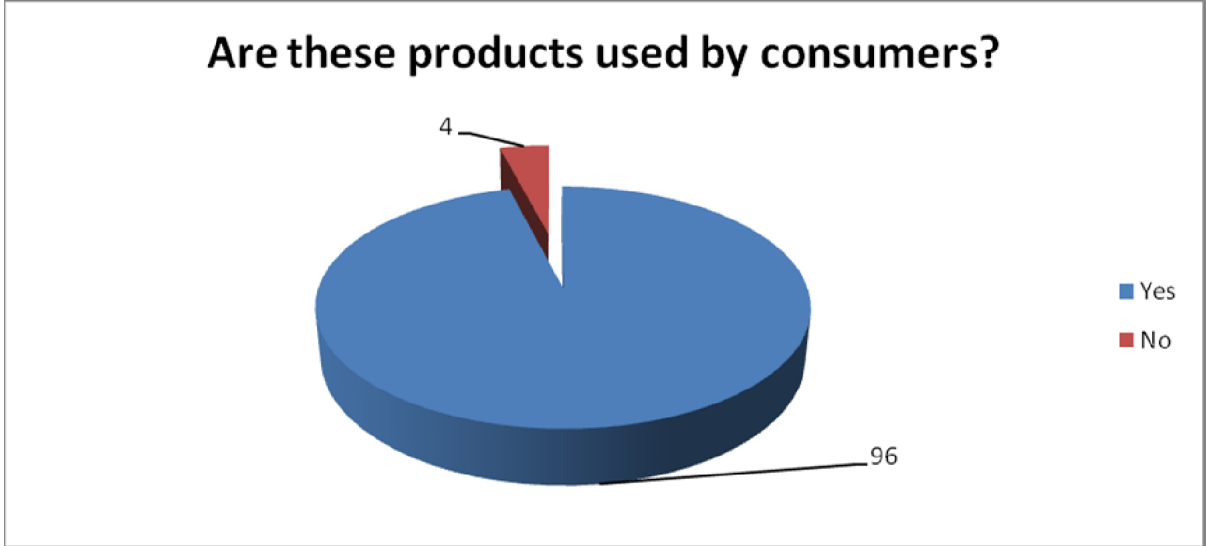


Source: Questionnaire and Surveys

Compensation from private insurance does not prevent recourse to other sources of compensation. Its main effect is that victims covered by private insurance are not required to seek compensation by way of litigation.

Many people use supplementary private insurance products to ensure the fullest compensation possible.

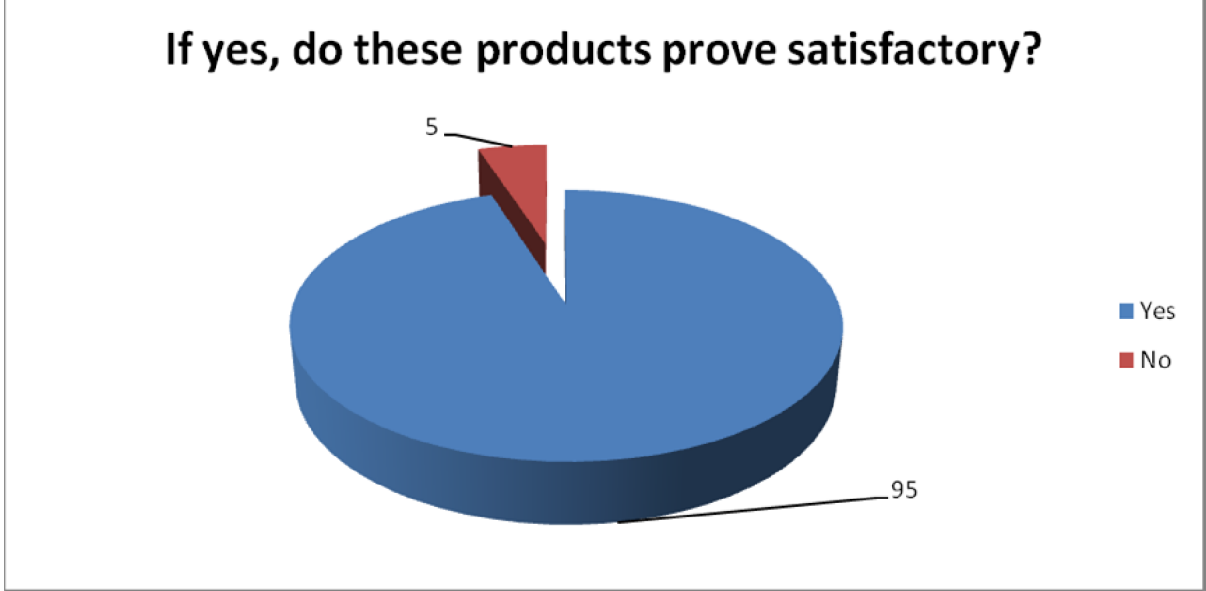
Graph 29



Source: Questionnaire and Surveys

The products provided through insurance prove almost unanimously satisfactory.

Graph 30



Source: Questionnaire and Survey

This is why as shown under Graph 30 below the Victim's own insurance is one of the most important sources of compensation.

3.5.5 Proceedings in Courts

3.5.5.1 The right to claim compensation in courts

In most jurisdictions, the victim will have a choice to make as to whether they wish to apply to the liable party's insurer or seek compensation from the liable party directly through the court system (e.g. **Slovakia, Lithuania, Luxembourg and the Czech Republic**).

In some jurisdictions, recourse to the courts is secondary to claiming directly from insurance companies. For example, in some countries, a victim may apply to the court for any part of compensation not covered by the liable party's insurance (e.g. **Latvia**) or where the insurer does not present a compensation offer within the specified time frame (**Spain**).

Ireland has developed its own particular system that governs a victim's access to the court system in claims relating to personal injury, including death, and property damage arising from motor vehicle accidents:

- A victim, or their representative, must apply to the Personal Injuries Accident Board (PIAB) for assessment prior to entering into proceedings in the court system.
- The PIAB then assesses the injuries and sends a copy of this assessment to the victim and the alleged wrongdoer. If it is accepted, the PIAB issues the wrongdoer with an order to pay. If it is rejected by the individual identified as being liable, the claim proceeds to the courts.
- If the claim is not dealt with satisfactorily by the PIAB, authorisation is given to proceed to the court system.
- Where the claim relates to property damage only, the claim may go directly to the court system.

In **Spain**, a distinction is drawn between claims involving property damage only or property damage and bodily injuries that did not take more than one day to heal, and claims involving bodily injuries that took more than one day to heal. In the former situation, the

claim must be filed in the civil courts. In the latter, the claim may be filed in the penal courts.

In **Sweden**¹⁵⁴, compensation for personal injury in road traffic accidents is rarely taken to court. This is because a special body, the Swedish Road Traffic Injuries Commission, exists to settle such claims. The Commission hears major compensation cases and determines the compensation payable to the claimant. Under the law, all MTPL insurance companies and TFF are required to maintain and fund the Swedish Road Traffic Injuries Commission, referred to by its Swedish abbreviation “TSN”.

The TSN’s constitution is approved by the Swedish government, which also appoints a legally trained chairman. Deputy Chairmen who are legal practitioners, also serve on the Commission, as well as lay representatives of various interested organizations and insurance companies. The Commission is made up so that external interests, i.e. interests from outside the insurance industry, exercise a majority influence on the way TSN conducts its business. TSN’s pronouncements are of only consultative effect on the parties involved. Even when a pronouncement has been issued, the claimant is entitled to have his or her case heard before a court. In practice, TSN exercises a very strong influence over the nature of the right to compensation. Not all claims are heard by TSN. However, in some instances, the insurance companies are obliged to refer cases to TSN for consideration. They do so (i) where the degree of medical disability is 10 percent or more, (ii) in the determination of specific lump sum or periodic payments and (iii) to determine how much of the costs of representation should be reimbursed when the lawyer representing the Victim is not a lawyer admitted in **Sweden**.

3.5.5.2 Legal fees

When the victim decides to institute legal proceedings, extra fees are incurred that do not apply when other mechanisms for obtaining compensation are used.

The same kinds of costs can be found in all Member States. In order to determine how much victims will need in order to support themselves, determining whether their expenses can be covered by legal aid or reimbursed by the liable party is an important factor.

¹⁵⁴ Following our Country Expert for Sweden, Dr. Roland Dahlman.

3.5.5.2.1 Sources of fees for the victim

The five main sources of costs of justice in the Member States are as follows:

- court fees
- lawyer's fees
- bailiff fees or the costs of enforcement
- experts fees, and
- translation fees

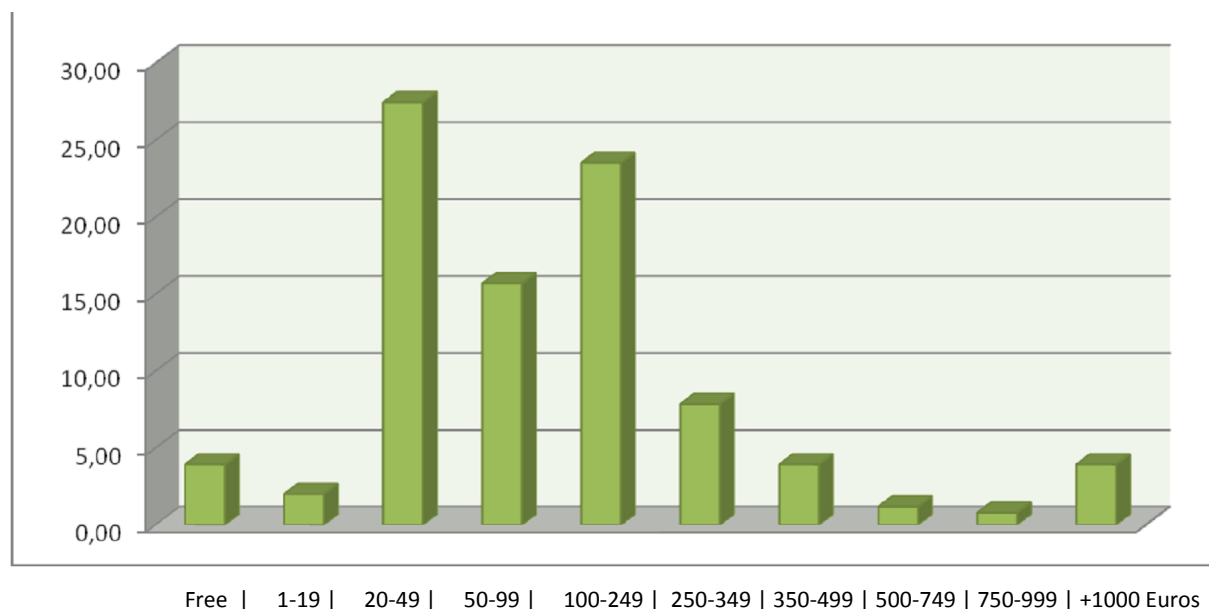
Court fees

Proceedings fees exist in 25 Member States out of 27. **France** and **Luxembourg** are the only two EU States where this notion does not exist.

Even if these fees rarely exceed 1,000 Euros, there are significant differences in amounts charged between one Member State and another.

Graph 31 - Amount of proceeding fees

Y-Axis = number of answers

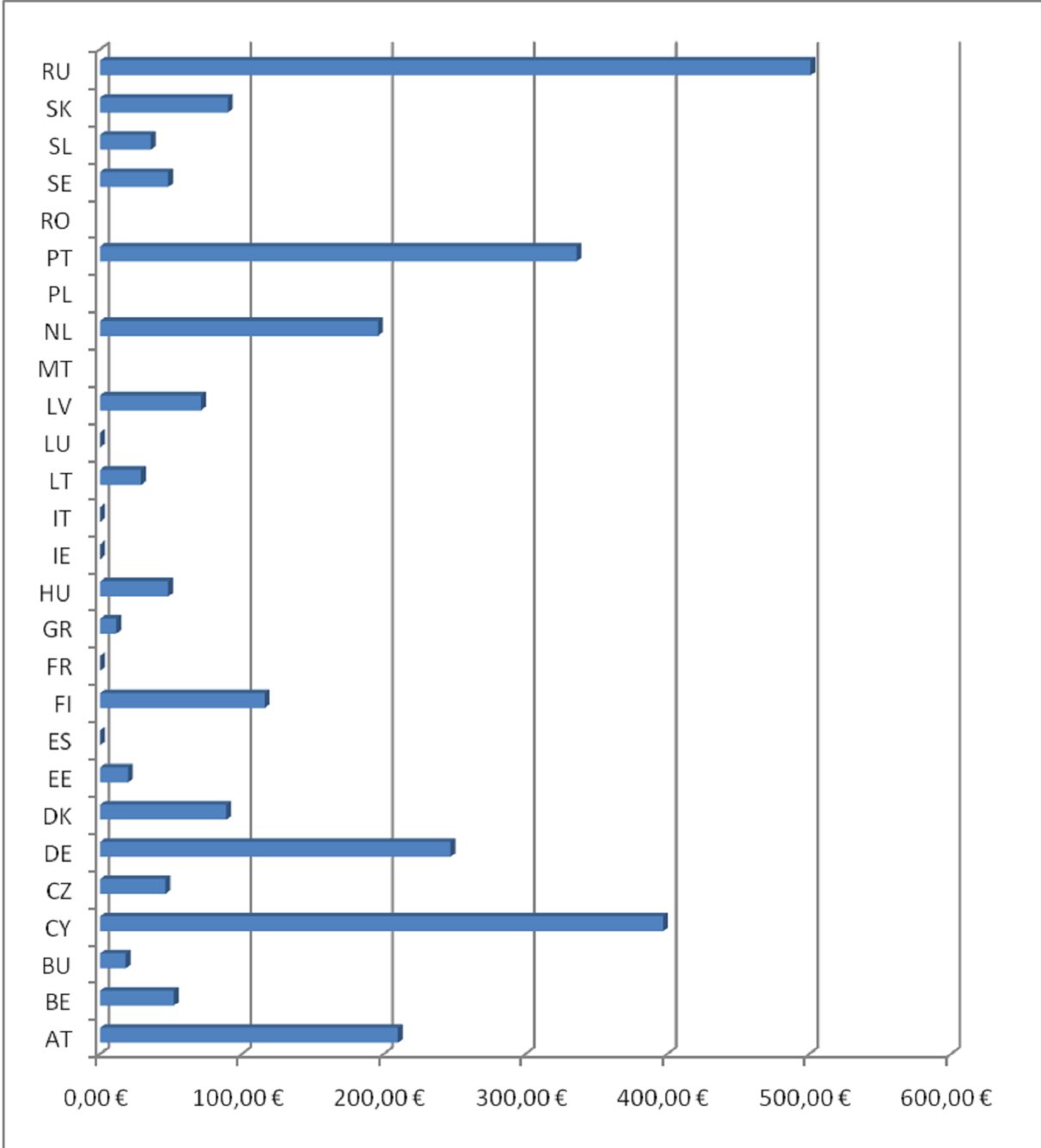


Source: Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union¹⁵⁵

155

http://ec.europa.eu/civiljustice/publications/docs/costs_civil_proceedings/cost_proceedings_final_report_en.pdf

Graph 32 - Amount of proceeding fees per Member State



Source: *Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union*¹⁵⁶

156

http://ec.europa.eu/civiljustice/publications/docs/costs_civil_proceedings/cost_proceedings_final_report_en.pdf

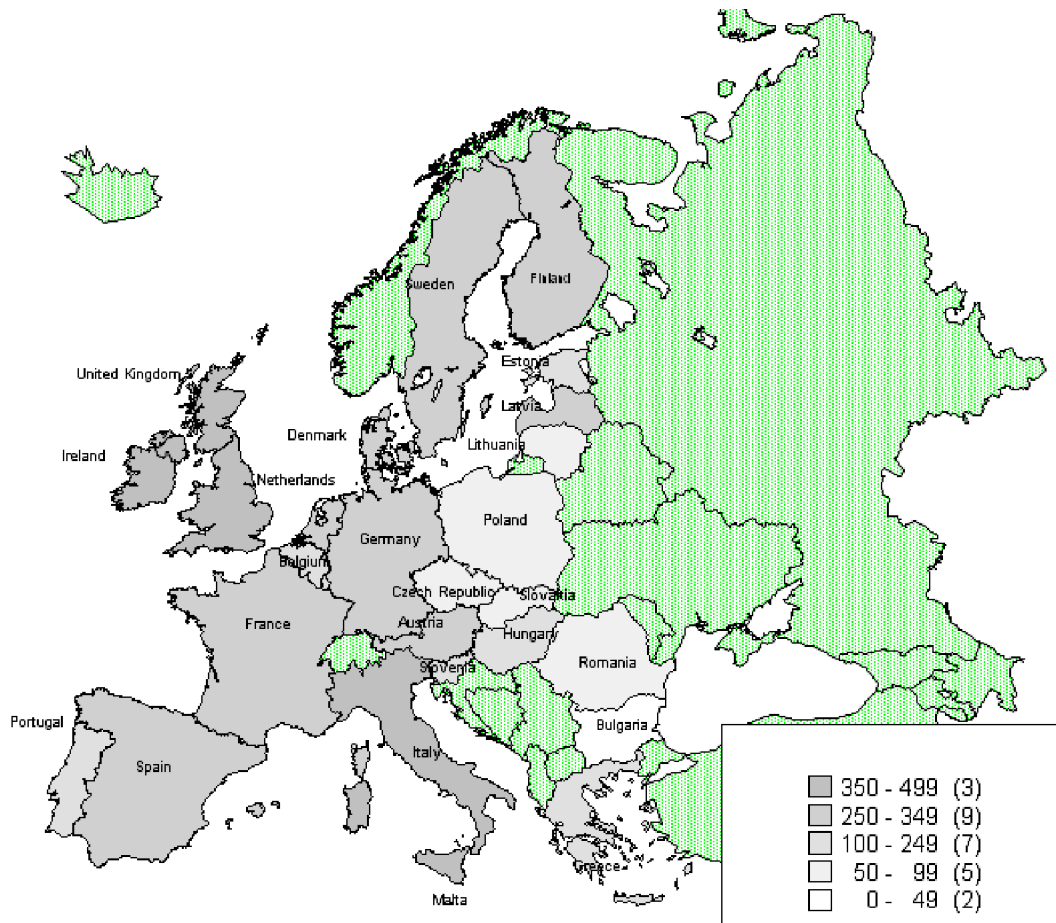
Lawyers' fees

Lawyers' fees are an important part of the costs of justice. Furthermore, since victims of an accident abroad generally have little or no knowledge of legal systems in other Member States, they generally need the services of a lawyer.

Lawyers' fees are difficult to determine since they are fixed free of constraint by individual lawyers in 60% of Member States.

The average fees are as follows:

Map 1 Average level of fees (Amounts in Euros)



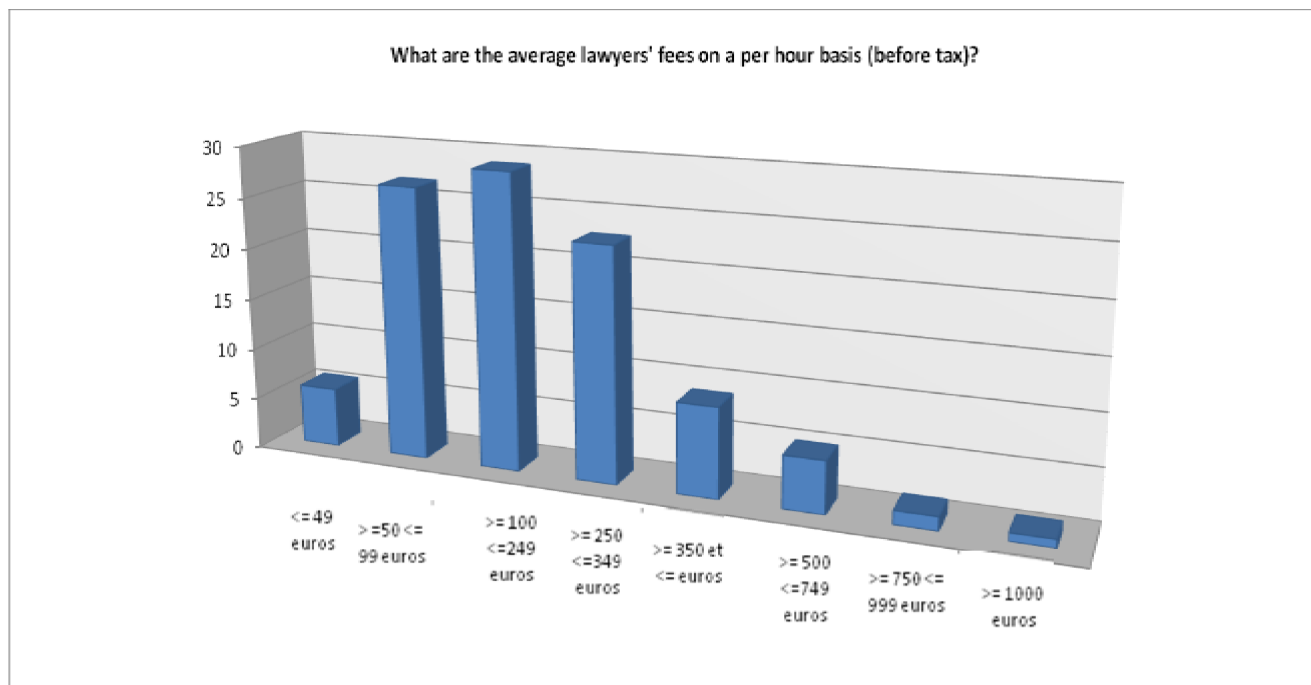
Source: *Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union*¹⁵⁷

Graph 33 - Average lawyers' fees on a per hour basis

Y-axis = percentage

157

http://ec.europa.eu/civiljustice/publications/docs/costs_civil_proceedings/cost_proceedings_final_report_en.pdf



Source: *Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union*¹⁵⁸

Experts' Fees

Expert intervention occurs very frequently in proceedings which involve compensation arising from a road accident. Experts who are mostly required to intervene in this kind of litigation are generally medical and automobile experts.

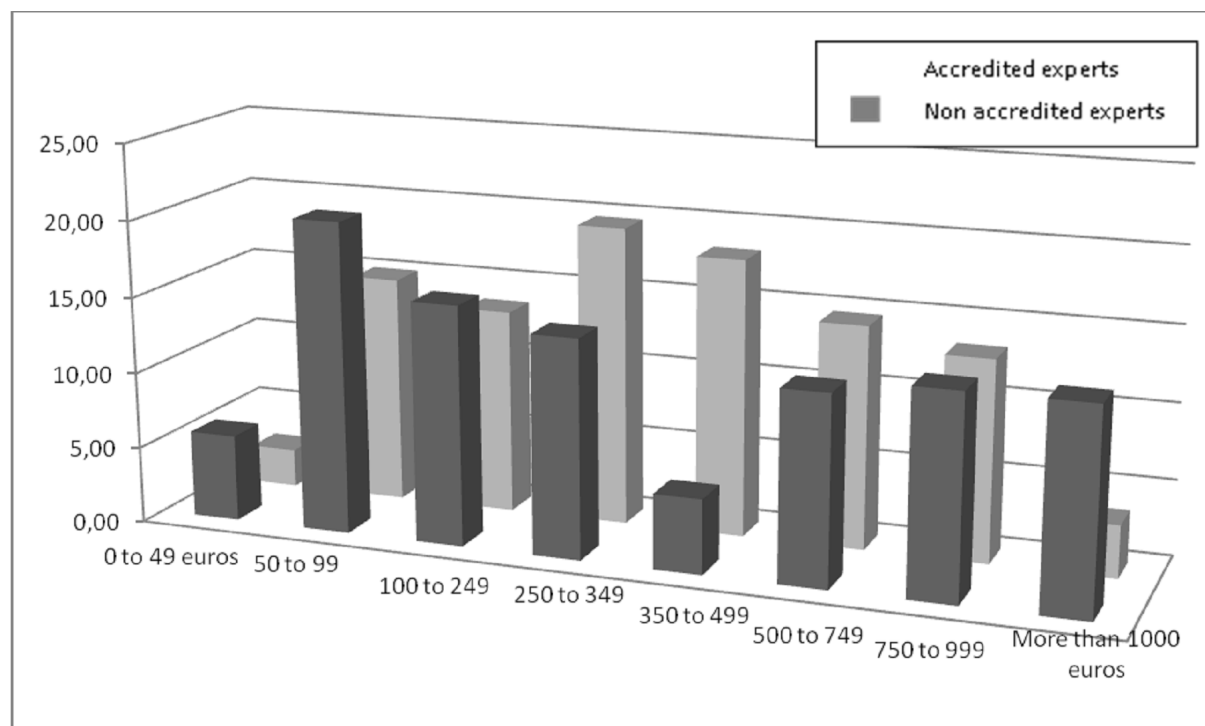
Experts' fees can be an important source of costs for a victim. As can be seen on the following graph, experts' fees above 500 Euros are quite common.

Graph 34

158

http://ec.europa.eu/civiljustice/publications/docs/costs_civil_proceedings/cost_proceedings_final_report_en.pdf

Y-axis = number of answers



Source: Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union¹⁵⁹

Furthermore, access to information concerning experts' fees varies widely between Member States, and methods for calculating such fees are also difficult to ascertain.

These types of fees vary very significantly from one Member State to another. They can range from 150 Euros in **Bulgaria**, for example, to 6,000 Euros in **France**.

The other difficulty is that only 51% of Member State courts accept an expert report produced by an accredited individual from another Member State.

3.5.5.2.2 Mitigation of costs by the mechanisms of legal aid and reimbursement

Reimbursement

The possibility that the party who has paid fees can obtain reimbursement from the losing

159

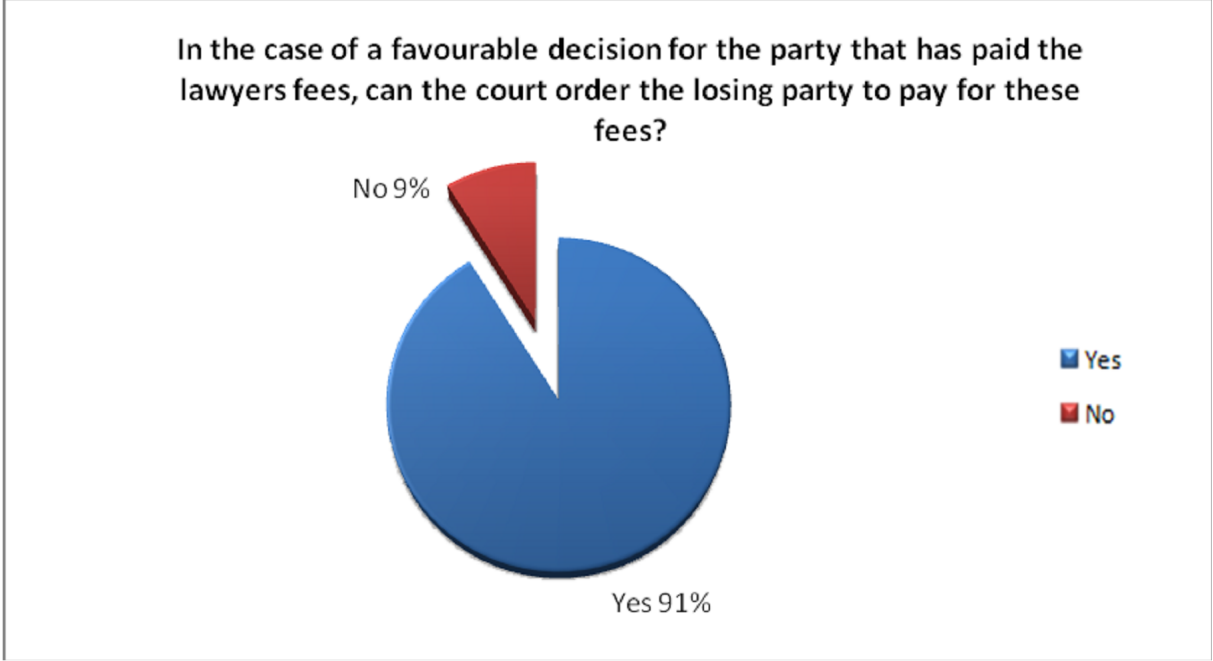
http://ec.europa.eu/civiljustice/publications/docs/costs_civil_proceedings/cost_proceedings_final_report_en.pdf

party is a very important factor in determining the cost of the claim for the victim.

Reimbursement for the party who has obtained a favourable decision is very common in most of the Member States.

Reimbursement of lawyers' fees is accepted practice in 91% of the Member States.

Graph 35 Reimbursement of lawyer's fees



Source: *Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union*¹⁶⁰

Legal aid

Legal aid is also an important factor, which can mitigate the costs of the claim for the victim.

Nevertheless, great disparities exist between Member States as regards granting conditions and the extent of costs covered. These differences remain despite the adoption of a

160

http://ec.europa.eu/civiljustice/publications/docs/costs_civil_proceedings/cost_proceedings_final_report_en.pdf

Directive on 27th January, 2003 (directive 2003/8/CE) which imposes minimum standards regarding legal aid in cross-border litigations.

Furthermore, the right to legal aid is automatic in only 55% of Member States.

3.6 Personal Injury

In compensating an injured person, some parameters are increasingly taken into consideration in Member States. Where liability rules are concerned, generally speaking the level of compensation depends on the degree of negligence attributed to the injured person. The more the injured person's negligence contributed to the accident, the less that individual will be compensated. The level at which the Victim's own negligence will be taken into account depends on which Member State is deciding the case. This creates yet another level of difference between Member States.

Medical treatments are generally provided under social security programs.

A drop in the frequency of car accidents has been observed in the EU but this has been paralleled by the rising expenses of medical treatment.

Compensation is also increasingly awarded in the form of annuities rather than as a single lump sum¹⁶¹.

Non-economic losses are generally determined by the injured person's situation (injuries, disabilities, suffering etc). In most countries, compensation is awarded according to the special circumstances of the case (in the **Czech Republic**, the **Netherlands**, and **Germany** for example), and the victim's actual situation.

3.7 Economic losses for personal injury

Material injury is the damage caused to property rather than the physical harm caused to the victim of an accident.

¹⁶¹ *Second report of the Special Working group on Personal Injury Compensation*, Department of enterprise, trade & employment, Ireland, 1996, p93

In most Member States, the same categories of material damage are largely universal.

The most noticeable difference between all Member States in this regard centres on the conditions that legislation and jurisprudence have set for the victim to be entitled to compensation.

Furthermore, while in some Member States particular types of compensation are automatically covered by third party Liability Insurance, in other States this may not be the case. This difference can lead to difficulties for the victim because compensation is easier to secure when obtained directly from the insurer and there is no need to lodge a claim for it.

The same types of compensation can be found in nearly all the Member States:

- Funeral expenses;
- Loss of property (damage to a car and related damage, as well as damage to belongings);
- Increase in need: this category includes all the arrangements needed in the environment of the victim, in case of a high rate of incapacity (arrangements necessary for the house of the victim, and for their transport). This category refers to the period when the health condition of the victim is stabilized.
- Loss of income for the third party
- Legal costs and expert fees
- Loss of income due to temporary/permanent incapacity to work.

Nevertheless, the conditions the victim has to comply with may differ from one Member State to another. This may lead to under-compensation, because even if the right to a particular type of compensation is recognized, the victim may not comply fully with the criteria that prevail in the country where the accident occurs. In contrast the appropriate level of compensation would have been granted in the Member State in which the victim resides. Clear inequalities among Member States are revealed by such comparisons.

Generally speaking, the aim of awarding compensation is to place the injured person in the position he or she would occupy if the accident had never happened.

3.7.1 Loss of income due to temporary/permanent incapacity to work

The question of the loss of income caused by incapacity is a very complex one.

This category is called “loss of social status” in some Member States. It pertains in **Italy**, where “existential” damage equates to the loss of social status, and is considered a personal injury.

In some Member States, determinations of the rate of incapacity can only be effected within the State, not in another Member State. This can lead to difficulties for the Visiting Victim. This is the case in **Sweden**, for example, where no assessment of incapacity made outside its borders has any relevance to the settlement of claims within **Sweden**.

Loss of income due to incapacity to work is compensated in a different way in **Sweden**, whether the incapacity is temporary or permanent.

Temporary incapacity is usually compensated in the same manner in all Member States.

The income of the victim is taken into account, and he or she can obtain a compensation based on this amount except in **Bulgaria, Slovenia, Poland, and France**¹⁶². For instance in **Luxembourg**, judges usually take into account the actual situation of the victim on the basis of pay slips, employment agreements, or any other document giving evidence of the victim’s loss of income. The situation of the victim is therefore taken into consideration with respect to his or her state of residence when considering compensation for pecuniary damage.

In **Malta**, compensation for actual loss of earnings would consist of full compensation of the victim’s earnings. With regards to compensation for loss of future earnings due to permanent, total or partial disability, the Court also uses the actual income of the victim for the purposes of calculating the amount of compensation due.

In most countries, housewives are entitled to claim compensation even if they do not have any material source of income. This compensation is based on the incapacity of the housewife to carry out household activities and is generally based on the cost of domestic

¹⁶² Following our Country Expert for France, Isabelle Tinel.

help (**Austria, the Netherlands**) or on the average income of a housemaid (**France**¹⁶³, **Italy**). In **Italy**, for instance, the right to claim compensation lies in constitutional principles. The choice to work for one's own family contributes to the improvement of society by consolidating families¹⁶⁴.

In **Belgium**, the number of children and the participation of each adult of the family in the housework are taken into account. Thus, a housewife with no children receives a sum of 17.35 Euros per day and with one child a sum of 24.79 Euros per day (plus 4.96 Euros for each additional child)¹⁶⁵.

There often also exists a basis for reviewing judicial decisions when new elements or facts should lead to an increase of the amount of compensation. For example, in the case *Lopes v. Walker* [1999] IESC 57 issued by the Supreme Court in **Ireland**, the Judge assessed that the amounts awarded were too low and that they had to be increased because the victim had been permanently deprived of his ability to work in his normal employment.

Where permanent incapacity is a factor, the problem is more complex and can lead to substantial differences in compensatory amounts awarded in Member States.

3.7.2 The temporary incapacity to work generally compensated on the basis of the actual earnings

When the incapacity to work is temporary, the compensation is, in most Member States, based on the income the victim would have earned during the relevant period. The injured party must present all documentary evidence of his or her earnings. Illegitimate earnings coming from unlawful activities are generally not taken into account in determining compensation levels. The period of temporary loss of earnings ends when the victim is able to work at full capacity again (e.g. **the Netherlands**).

In **Luxembourg**, compensation is calculated on the basis of a 'forfait' by providing for a flat fixed amount to the victim.

¹⁶³ Following our Country Expert for France, Isabelle Tinel.

¹⁶⁴ Cass., 11 December 2000, no. 15580 [2001] *Danno e resp.*, 2001, p. 587, with comments by Maninetti

¹⁶⁵ Following our Country Expert for Belgium, Yves Brulard.

In **Spain**, the method of calculation is distinct from those used in other Member States. Temporary disability is calculated by multiplying the number of days sick leave required after an accident by the compensation that corresponds according to the type of sick leave (day of hospitalization, day of sick leave “impeditivo”, day of sick leave “no impeditiva”), and adding to this an amount which takes into consideration the specifics of the case.

The day of sick leave “impeditivo” is when the victim either cannot work at all or is unable to accomplish his or her usual tasks (The “impeditivo” payment can also be awarded to housewives and retirees). Sick leave for “no impeditive”, on the other hand concerns injuries that only require rehabilitation treatment and for which there is no incapacity to perform usual tasks.

The resulting amounts will increase based on the annual disposable income of the victim, applying correction factors established by law. It is necessary to prove the disposable income of the victim when establishing an appropriate level of compensation.

In **Sweden**, temporary incapacity is called a “period of medical incapacity”. Loss of income is calculated by making deductions for the loss of income compensation received in the form of sick pay, occupational injury compensation or other comparable social insurance benefit. Compensation to cover any period of medical emergency is settled by the vehicle’s insurer without involvement of the TSN (the Swedish Road Injury Commission). The TSN will be requested to state an opinion if there is any dissatisfaction with the sum awarded.

In **Belgium**, loss of earnings due to temporary incapacity to work is compensated according to the actual income of the injured person.

In **Denmark**, compensation is awarded from the date of the accident until the victim’s return to work, or until the time earnings are so reduced that the victim is entitled to damages for loss or impairment of his or her earning capacity. This includes full income, bonuses and allowances for an employee, the costs of hiring a substitute to temporarily fill a position and reduction of earnings where a victim is a self-employed.

In **France**, the “incapacité temporaire totale”¹⁶⁶ (temporary loss of earnings) gives right to compensation for loss of earnings resulting from loss of time¹⁶⁷. As in **Luxembourg**, the employer who has continued to pay the injured person could recover such losses from the liable party.

Hungarian law stipulates that the amount of lost earnings minus social security benefits must be paid to a victim as an annuity. All benefits an injured employee is entitled to before an accident must be taken into consideration when awarding compensation.

Where it is not possible to determine the true extent of lost earnings, the **Italian** court substitutes a figure based on an income no lower than three times the minimum yearly social pension. There are two levels of compensation, total temporary disability, which is compensated at 75 Euros per day, and partial temporary disability which is calculated by experts taking this amount as a starting point, and adding certain allowable percentages in order to determine the amount of compensation payable per day¹⁶⁸.

Slovakia’s compensation system reduces the amount of compensation after a few days of incapacity. It is set at 55 percent of the daily assessment base determined pursuant to the victim’s income from the first day of the incapacity to work until the third day. It then reduces to 25 percent of the daily assessment base commencing from the fourth day of the incapacity to work¹⁶⁹.

3.7.3 Different types of compensation regarding permanent incapacity to work

Permanent incapacity to work is treated differently from one Member State to another.

3.7.3.1 Compensation based on the income of the victim before the accident

The situation of the victim before the accident is only taken into account in some Member States¹⁷⁰.

¹⁶⁶ Following our Country Expert for France, Isabelle TINEL.

¹⁶⁷ Soc. 28 March 1984, Bull. civ. V, n° 115, p. 89; Civ. 2e, 7 February 1979, Bull. civ. II, n° 41

¹⁶⁸ *Bodily Injuries In European Comparative Law*, J.G. Garcia, A. E. Santo, A. Giorgetti

¹⁶⁹ Following our Country Expert for Slovakia, Peter Bartosik.

¹⁷⁰ See CEA, *L’indemnisation du dommage corporel en Europe*, AU 4127 (06/04), Octobre 2004.

In the **Netherlands**, the Law forecasts compensation for the victim's loss of earnings: an injured person's pecuniary losses after an accident must be in line with those which could reasonably have been envisaged had the accident not occurred. Calculation of loss of earnings may include an abstract element in that a reasonable amount of this loss will not be fully known until some point in the future, and could depend on factors impossible to account for when setting compensation for an accident. Often experts or actuaries will calculate the loss of earnings. The basis of compensation is the injured person's net income on the date of the accident. In **Finland**, the calculation of compensation is also based on the loss of future earnings.

In **Latvia** and **Hungary** in cases of permanent inability to work, loss of income is compensated for by deducting all pensions received from the public funds from their average incomes¹⁷¹; this is to ensure that the person is not over-compensated. The compensation is paid on a monthly if not agreed otherwise.

Estonian, compulsory Third Party Liability insurers use the average income of the last 12 months as a basis for compensation calculation. There are no actual sums or calculation formulas: income is compensated based on evidence provided by doctors who are able to specify how long a period of disability lasted or the extent of permanent impairment, for example.

Portugal's accident compensation is represented by a capital lump sum which takes into consideration future losses a victim may suffer and the degree of disability.

The **Danish** system dictates that when assessing a victim's permanent disability, it is necessary to obtain expert opinion on the degree of reduced earning capacity from the National Board of Industrial Injuries. In this Member State calculation of damages for permanent incapacity to work is based on three factors: the percentage of loss of earning capacity, annual income, and a capital factor (depending on the age of the person). This calculation does not take into consideration other sources of earnings, such as disability pensions.

¹⁷¹ Following our Country Expert for Latvia, Valters Gencs and following our Country Experts for Hungary, Dr. Csaba Pataky and Dr. Tibor Pataky.

In **Malta**, calculation of compensation in cases of permanent disability can be compared to the one applied in **Denmark**. The court must assess the percentage of disability according to the opinion of a medical expert, the capital factor (depending on the age of the person), and annual income. For instance, a case in which a 30 year old victim had an income of 372.70 Euros per month before an accident which caused a 12% disability resulted in the court awarding him compensation of 69,769.39 Euros¹⁷².

3.7.3.2 Compensation based on a general tariff

In some States, the percentage of incapacity leads to compensation fixed according to a sum which corresponds to each point of incapacity determined. In such cases, the sum fixed for each point of incapacity is not determined according to the income of the victim but is the same for each victim.

It seems to be the case that in the **Czech Republic**, compensation is also awarded for what might usefully be called damage to an individual's social capacity. This compensation is called Future Social Handicap and is accompanied in each case with a medical report.

In **Sweden**, if the degree of medical incapacity is 10% or more, insurance companies are obliged to refer the case to the TNS (the Swedish Road Injuries commission) to establish the amount of compensation payable during the period of disability.

It is very interesting to note that in **Sweden**, a vehicle driver who sustains an injury may have the amount of his compensation reduced if found guilty of an infraction or partly responsible for gross negligence or intent. Major medical costs are allowed and compensation for loss of income is adjusted to 90% of an uninjured person's estimated income.

In **France**¹⁷³, the permanent partial disability is evaluated on a percentage scale from 0 to 100 according to a medical scale recognised by courts and insurers. This system is also applied in Luxembourg and Italy. The award is evaluated according to the age of the victim and the seriousness of the disability.

¹⁷² Court of Appeal decision Annunziata sive Nancy Caruana v. Odette Camilleri, of 27th February, 2004

¹⁷³ Paris Court of Appeal 17^e ch, 20 October 2003.

3.7.3.3 The dual system in Belgium

In **Belgium**, compensation can be based on two methods, which may be mixed. It is calculated according to the past and future losses.

In both cases, a percentage of incapacity is fixed by an expert.

The first of these methods concerns high levels of disability and is capitalisation based. It consists in multiplying the percentage of disability by the previous income of the victim. The result will be capitalised by taking into consideration the victim's age. The formula for calculating compensation takes into consideration average income generated over the previous twelve months, the percentage of incapacity and a coefficient for duration of gainful employment¹⁷⁴.

The second method is based on a lump sum for each point of disability percentage. This method is generally used in cases of lower levels of disability. For instance a person of 35 years of age or less is entitled to receive a lump sum compensation of 900 Euros per percentage of disability¹⁷⁵.

3.7.3.4 Multiple criteria taken into account in Spain

In **Spain**, a victim has the right to be compensated for clinical, functional and anatomical after-effects. The compensation will be based on age, seriousness of injuries, familial status of the victim and annual disposable income. The compensation amount is settled by means of the allocation of points to each injury¹⁷⁶. Specific tables establish the maximum and minimum scores per type of after-effect. Normally a doctor who treats a victim's injuries will only determine what the after-effects are without assessing their extent. The insurer will then send the victim to their own medical experts who will write a report and allocate points according to the extent of injury.

3.7.4 Funeral expenses

Funeral expenses are reimbursed to the victim's relatives in all Member States except Italy.

¹⁷⁴ *Indemnity law in Germany, Belgium and the Netherlands*, Holger Backu, InterEurope AG European service law, 2007, p11

¹⁷⁵ Ibid.

¹⁷⁶ Following our Country Expert for Spain, Emilie Pavageau.

Nevertheless, it should be noted that in some Member States (in **Spain** for example), funeral expenses are not covered if the accident is exclusively the fault of the victim.

Amounts of compensation vary from one Member State to another. In most Member States, all expenses are covered if reasonable.

For instance, in **Bulgaria**, funeral expenses are compensated at 5,000 Euros by third party insurance¹⁷⁷.

In **Denmark**, funeral expenses are compensated up to 3,000 Euros.

In **Latvia**, funeral expenses are compensated up to eight times minimum wages by third party insurance (2,049 Euros)¹⁷⁸.

In **Slovakia**, funeral expenses include the costs of the funeral service and cremation, cemetery fees, the price of the gravestone and expenses for maintenance of the tomb. They are compensated up to an amount of 1,784 Euros. Travel expenses and the cost of a sable (funeral robe) are also compensated up to an amount of 1,784 Euros.

In **Sweden** funeral expenses are covered under the heading “compensation in the event of death”. It has to be noted that, here, funeral expenses are based on a large number of types of costs. Swedish law takes into account special funeral expenses for the Visiting Victim, and funeral expenses must be reasonable and based on customs and the Victim’s religion¹⁷⁹.

Thus, Compensation is paid for normal burial and gravestone costs. Reasonable compensation may be considered for immediate family’s travelling costs. Certain expenditure on mourning may also be compensated.

¹⁷⁷ Following our Country Expert for Bulgaria, Emiliya Atanasova.

¹⁷⁸ Following our Country Expert for Latvia, Valter Gencs.

¹⁷⁹ Following our Country Expert for Sweden, Dr. Roland Dahlman.

3.8 Member States non economic losses in personal injury

3.8.1 Basic principles

In general the different compensation systems in the EU allow recovery for physical injuries. Where a person has been physically injured, s/he may obtain compensation for that physical injury, and additional damages for pain, suffering and mental anguish resulting from that physical injury¹⁸⁰.

However where a person has not been physically injured, the different systems do not usually allow recovery of damages for suffering, mental anguish, stress, anxiety or other nervous conditions.

All European countries support the idea that damages for non-economic losses are recoverable. Indeed, such recovery is a fundamental characteristic of European redress systems for personal injury victims. Although, it should be noted that most jurisdictions still impose some restrictions on compensation for non-economic loss, especially in relation to secondary victims.

Two different approaches to non-economic loss compensation have gradually emerged. First, those countries that take a liberal and extensive approach to such compensation in which no general limitations on recovery of non-economic damages apply (**France, Belgium and Luxembourg**). Second, those countries that have adopted a more restrictive approach, e.g. by imposing limitations on recovery in some areas of liability or by establishing special requirements (**Germany, Italy, Austria, Denmark, England and Wales, Finland, Ireland, the Netherlands, Portugal and Sweden**).

It should be noted that the distinction between these two groups of countries is much less marked and tangible than in the past. With the exception of **Denmark and Finland**, most countries in the second group have now moved towards a much more liberal approach in the compensation of non-economic losses, at least in relation to primary victims.

¹⁸⁰ See Personal Injury Compensation in Europe, Peopil research Group, Kluwer, 2003.

3.8.2 Heads of recoverable non-economic losses: compensation under one single head of non-economic damage and compensation based on different sub-categories of non-economic loss

It is possible to distinguish at least two different approaches in the way that countries classify and award non-economic losses.

Approach	Characterisation
Single category	A single general head of damages covering all non-economic losses. No distinction between temporary and permanent impairment or between different heads of non-economic loss.
Multiple Categories	Non-economic losses can be compensated under separate and different categories (although an overall sum may be awarded in practice). Awards depend on temporary or permanent non-economic loss.

These two different approaches are widely spread and this is why it is difficult to evaluate compensation levels on a per category basis.

In most countries (**Finland, Austria, Denmark, Belgium**, etc.), there is no clear distinction between “pain and suffering” and “physical damage”.

In **Lithuania**, non-pecuniary losses include a person’s suffering, emotional distress, inconvenience, mental shock, emotional depression, humiliation, deterioration of reputation, diminution of possibilities to associate with others, as well as physical pain, aesthetic damage and bodily harm.

In **Ireland**, non-pecuniary losses cover physical pain and suffering, nervous shock, mental distress, loss of faculty, disfigurement, inconvenience and discomfort, and loss of enjoyment of life. Compensation is awarded by the court on the basis of what appears fair and reasonable in the circumstances of the case. The court must also take into consideration previous judgments in similar cases.¹⁸¹

¹⁸¹ *Second report of the special working group on Personal Injury Compensation*, Department of Enterprise, Trade and Employment, 1996

Most countries have experienced an increase in the amounts awarded for non-economic losses in cases of personal injury¹⁸².

3.8.3 General compensation for medical expenses incurred by the victim

3.8.3.1 Bodily Harm/Injury to physical integrity

Bodily harm, including death, causing temporary or permanent disability are considered to justify compensation in most jurisdictions (e.g. **Bulgaria, Ireland, Slovakia, Malta, France, Spain, the Czech Republic, Latvia, Luxembourg, Poland, Italy**, etc.).

Generally, only one category of injury includes both physical and mental integrity. There is no separation between the loss of physical integrity and psychological integrity. In **Italy**, this is called “danno biologico”, in **Belgium**, “dommage corporel”.

In most jurisdictions¹⁸³, there exists a scale of disability according to which a certain amount of compensation is awarded. (One exception to this is **Germany**, where there is no points scale for qualifying injuries as is the case in **Belgium, France, Poland or Spain**.) In each case an expert must examine an injury that is to be considered for compensation. This same person assesses the gravity of the injury, which may of course also have more or less serious implications depending on the professional occupation of the injured person. The loss of a leg for a bus driver might be more significant in terms of earning capacity than would a similar injury for a secretary, for example. In **France**, physical damage must be clear and evident. In the **UK** there is an allowance, the “Disability Living Allowance”, awarded according to the implications lack of mobility may have for an injured person. In **Germany**, there is no express right to full compensation, but merely to reasonable compensation, unlike in **Austria** where there is no limit to the amount of compensation that can be awarded.

While in most countries like **Italy** and **Luxembourg** there is a difference between temporary and permanent impairment, this is not the case in **Greece**. Non-pecuniary damages are recognized in **Greece** to a limited extent, but neurosis and psychosis are

¹⁸² Comande, Giovanni, "Towards a Global Model for Adjudicating Personal Injury Damages: Bridging Europe and the United States". Temple International & Comparative Law Journal, Vol. 19, No. 2, January 2006 Available at SSRN: <http://ssrn.com/abstract=878131>

¹⁸³ Personal Injury Compensation in Europe, Peopil research Group, Kluwer, 2003, 586pp

scarcely ever assessed as bodily harm when they may be attributed to a victim's involvement in an accident.

3.8.3.2 Aesthetic Damage

Most countries take aesthetic damage into account for compensation purposes (e.g. **France, Luxembourg, Estonia**). The main factors taken into account are the degree to which a scar is visible, the age and sex of the plaintiff, and their professional and social backgrounds¹⁸⁴.

In most countries, aesthetic damage is considered when assessing the quantum of non-economic damages, but, with the exception of **Belgium, Estonia, France, Luxembourg, Spain and Sweden**; it does not, in practice, constitute a special, separate category of damages (**Austria, England and Wales, Denmark, Finland, Germany, Greece, Ireland, Italy, the Netherlands, Portugal**).

In the majority of jurisdictions, victims suffering reparable aesthetic damage have a choice as to whether they will undergo corrective surgery to reduce or repair such damage, in which case they will be compensated for the cost of the surgery and any non-economic loss arising from any damage expected to remain after the operation, or to simply be compensated for the non-economic losses arising irrespective of the availability of surgery to correct such damage.

In other jurisdictions, the decision of a victim not to undergo surgery is a factor that may be taken into consideration by the court thereby reducing the award of damages unless the victim can provide justification for their decision (e.g. **Greece and Portugal**).

In some countries aesthetic damage is only taken into account as a pecuniary loss in relation to a professional career.

Disfigurement may also be taken into account as an economic loss when it reduces the victim's chance of gaining a better professional position or otherwise impacts on the victim's career, e.g. if they are a model (e.g. **Austria, France, England and Wales, Italy and The Netherlands**).

¹⁸⁴ See Personal Injury Compensation in Europe, Peopil research Group, Kluwer, 2003.

In some jurisdictions, the degree and extent of aesthetic damage is generally assessed by medical experts or by reference to specific scales (**Belgium, France, Italy and Spain**).

Whereas Aesthetic damage is a specific category in **Luxembourg** and in **Austria**¹⁸⁵, this is not the case in the **Netherlands** or in **England**.

In **Belgium**, aesthetic damage caused in an accident is compensated on a 7 point scale, minimal damage being from 247.89 Euros for the first grade (“minimal”) to 24,789.35 Euros for the seventh grade (“catastrophic”)¹⁸⁶.

In **Spain**, compensation for aesthetic injury can be added to other categories of compensation. It is necessary to make it clear that in such cases not only is a value placed upon scarring; any physical effects such as walking with a limp implies important aesthetic injury in addition to other after-effects. Such an effect can be classified as light (1-6 points), moderate (7-12 points), medium (13-18 points), important (19-24 points), quite important (25-30) and most important (31-50 points). Such compensations can also be increased by applying appropriate correction factors, based on the annual disposable income of the victim.

In **France**¹⁸⁷, **Spain, Italy and Belgium**, disfiguration damage is represented by all static and dynamic injuries causally related to the accident and persisting after the victim’s condition has stabilized. The “préjudice esthétique” in **France**¹⁸⁸ is a separate injury, assessed on a scale from 0 to 7 without taking into account age and sex¹⁸⁹. Similarly, in **Finland**, the guidelines for assessing aesthetic damage comprise a table fixed by the Traffic Accident Board (‘Liikennevahinkolautakunta’) with five different brackets used to establish the severity of the disfigurement (from 4,000 Euros to 100,000 Euros compensation)¹⁹⁰.

¹⁸⁵ Art. 1326 AGBG

¹⁸⁶ Personal Injury Compensation in Europe, Peopil research Group, Kluwer, 2003, page 70

¹⁸⁷ Following our Country Expert for France, Isabelle TINEL.

¹⁸⁸ Following our Country Expert for France, Isabelle TINEL.

¹⁸⁹ Personal Injury Compensation in Europe, Peopil research Group, Kluwer, 2003, page 171

¹⁹⁰ Personal Injury Compensation in Europe, Peopil research Group, Kluwer, 2003, page 154

3.8.3.3 Sexual Damage

Sexual damage, which covers such things as impairment of reproductive function, loss or reduction of sexual activity and loss of a chance to marry or found a family, does not constitute a special, separate category (this is the case in **Austria, England and Wales, Finland, Germany, Greece, Ireland, Italy, The Netherlands, Portugal, Scotland and Sweden**). However, in **Belgium**¹⁹¹, **France**¹⁹² and **Luxembourg**, it is considered as a special type of injury and can be compensated for separately. It is usually compensated under the general category of non-pecuniary loss. Sexual damage is generally assessed according to a table. In **Denmark**, for example, impotence resulting from an accident is considered to equate to a 15% degree of permanent disability¹⁹³.

In **Belgium** and **Luxembourg**, sexual disability can be defined as a victim's incapacity to lead a "normal" sexual life. In **France**, a victim of sexual damage can be compensated either as loss of amenity¹⁹⁴ or as loss of sexual function¹⁹⁵. It is not clear whether these are alternatives or whether these two losses could be cumulative.

Compensating the secondary victim (husband or wife of the injured party) is not taken into account by Member States' legislation. However, in **Italy** in the decision *Santarelli v. Santandrea e Lucidi*¹⁹⁶, a husband was considered injured because of the diminution in his quality of life following his wife's accident. This is also recognized in **Greece** to a certain extent but without referring specifically to the idea that this constitutes "sexual damage"¹⁹⁷.

¹⁹¹ See CEA, *L'indemnisation du dommage corporel en Europe*, AU 4127 (06/04), Octobre 2004.

¹⁹² Paris Court of Appeal 17^e ch, 20 october 2003

¹⁹³ Personal Injury Compensation in Europe, Peopil research Group, Kluwer, 2003, page 92

¹⁹⁴ Cour de Cassation, 5 January 1994, RCA 1994, n 177.

¹⁹⁵ Personal Injury Compensation in Europe, Peopil research Group, Kluwer, 2003, page 171. Bourri 6Quenillet, M., *Le prejudice sexuel: preuve, nature juridique et indemnisation*, JCP 1996.I.3986.

¹⁹⁶ , Cass., 11 November 1986, no. 6607 [1987, I] Foro it., p. 833, with comments by Princigalli, A.M., [1987, I,1] Giur. it., 1987, p.2043, with comments by Patti, S., [1987,I] Giust. civ., p. 573, with comments by Alpa, G.

¹⁹⁷ Following our Country Expert for Greece, Vassiliki Panagiotidou.

3.8.3.4 Mental Injury

In most jurisdictions, mental injury is compensated under the heading of non-pecuniary loss. However, various jurisdictions differ in their approach to such compensation. Some draw no distinction between ordinary and extraordinary mental distress (**Belgium, France, Luxembourg, Spain**) while others impose a requirement that the mental injury be a recognised psychiatric illness (**Austria, Denmark, England and Wales, Finland, Germany, Ireland, Italy, the Netherlands and Scotland**). Thus in **Denmark** the following requirements are necessary to benefit from compensation of mental injury: 1) mental injury must be consequent upon a personal injury; 2) the victim must be unfit for working activities; 3) the injured person must have received medical treatment¹⁹⁸.

In **Germany**, symptoms of shock and anxiety resulting from an injury are considered a normal life contingency, and not conditions which qualify for compensation¹⁹⁹.

In **Italy**, the “danno morale” (mental injury) is compensated according to what mental state the victim normally exhibits in everyday life. There is a distinction drawn between a moral disorder and a psychiatric disorder in **Italy**²⁰⁰.

In **Estonia**, compensation payments have been made for both loss of memory and emotional instability suffered after an accident²⁰¹. Stress following the accident is even taken into consideration²⁰².

In **Greece**, compensation is awarded in specific conditions and in a restricted manner. Anxiety is, for instance, subject to compensation if it is considered as a chronic condition²⁰³.

In the European Union, compensation is generally awarded according to point scales of disability. In **Denmark**, permanent mental injury is compensated according to its severity:

¹⁹⁸ Personal Injury Compensation in Europe, Peopil research Group, Kluwer, 2003, page 527

¹⁹⁹ Ibid, page 205

²⁰⁰ Ibid, page 267

²⁰¹ Following our Country Expert for Estonia, Ants Mailend.

²⁰² Ibid.

²⁰³ Ibid, page 229

dementia from 20 to 100%, post-traumatic syndrome from 5 to 15%, psychological trauma after violence from 10 to 25%²⁰⁴.

If a victim in **Lithuania** suffers property damage but no health injury (or death) and the accident is not considered a crime, they are not entitled to claim non-pecuniary damages from an insurer or liable person. Further, non-pecuniary damages have to be precisely recognized by the law to be awarded²⁰⁵.

In **Belgium** compensation for mental pain and suffering covers damage that can be a direct result of an accident (psychological damage, loss of life expectancy), or a result of distress suffered through involvement in a life-threatening accident or due to injuries or death among relatives caused by an accident.

Further, in **Belgium** psychological and psychiatric damage are not distinguished and can both be compensated, whereas in Italy psychological and psychiatric damage are compensated differently. Psychiatric damage implies a higher level of compensation in these cases.

In **Austria** mental pain and suffering can also result from material damage such as damage resulting from a spoiled holiday or loss of a pet (see also Art. 1325 ABGB in Austrian Law). Any mental impairment is considered as a personal injury in **Austria**. Compensation is calculated according to the severity, duration and impact of injury on the life of the victim. Sustained shock and anxiety are considered under the Austrian law as subject to compensation²⁰⁶.

To conclude on this point, the scope of compensation for mental disturbance and loss of quality of life not caused by bodily injury to the victim is one of the areas where there are big differences between the various European legal systems. This is because these are policy related issues.

All Member States face the same policy imperatives but not all address them in the same manner. That is, they must ensure that claims do not reach an unmanageable level and

²⁰⁴ Ibid, page 93

²⁰⁵ Following our Country Expert for Lithuania, Valentinas Mikelenas.

²⁰⁶ Ibid, page 44

they must avoid the need for adjudicators to evaluate the multitude of psychological reactions to stress that can be manifested by accident victims.

It is possible to distinguish between three different groups of jurisdictions on the basis of their approach to compensation of mental injuries:

Approach	Characterisation
Non-restrictive	<p>No special requirements of severity of mental consequences for compensation purposes provided there is an accident.</p> <p>Medical experts may be required to assess the degree of severity of the mental consequences and their permanency level.</p>
Restrictive	<p>Most psychiatric distresses can be compensated on a stand-alone basis as a mental injury.</p> <p>Ordinary mental distress is generally not recoverable unless closely connected to a bodily injury</p> <p>Medical experts and scientific guidelines or diagnostic tools are used.</p> <p>Important number of exceptions: death of a close relative, pet.</p>
Very-Restrictive	<p>Limited list of recognized psychiatric distresses can be compensated on a stand-alone basis as a mental injury. All psychiatric distresses not specifically listed are excluded.</p> <p>Condition should not be an unreasonable or exaggerated reaction to an accident.</p> <p>Ordinary mental distress is generally not recoverable unless closely connected to a bodily injury</p> <p>Medical experts and scientific guidelines or diagnostic tools are used.</p> <p>Exceptions: death of a very close relative.</p>

3.8.3.5 Pain and Suffering (Pretium Doloris/Moral Damage)

Damages related to pain and suffering are often called a *solatium* claim.

Most Member States, even those that follow a single category approach, distinguish conceptually between pain and suffering, loss of amenities and reduction of physical/mental integrity (the so-called ‘injury itself’).

While monetary values for the injury itself tend to be the same for all types of victims, pain and suffering and loss of amenity generally depend on the particular circumstances of the case.

In **France**, this distinction is less clear since pain and suffering itself is subject to medical experts' evaluation in accordance with a specific medical scale as outlined below.

The distinction between pain and suffering and reduction of integrity tends to be less clear where the victim has suffered a mental injury only, in which case most jurisdictions impose restrictions on the recoverability of losses for pain and suffering.

Most countries compensate pain and suffering²⁰⁷. It is noteworthy that **Malta** is the only Member State which does not take pain and suffering into account because moral damage is never compensated by courts. In **Romania**, until recently²⁰⁸ moral damage was not compensated and levels of compensation for these conditions remain low in comparison with other Member States²⁰⁹.

The main difficulty arising in the process of compensating this category of non-economic losses is the impossibility of calculating precisely the value of the suffering of a particular person²¹⁰. In **Slovakia**, for instance, a "fictive compensation" is created as pain and suffering cannot be evaluated in money.

In **Lithuania**, it is recognized that the principle of *restitutio in integrum* cannot be applied strictly to this category. Each case is particular depending on the gravity of the injury, the age of the injured person, the sex of the victim and so on.

²⁰⁷ Comande, Giovanni, "Towards a Global Model for Adjudicating Personal Injury Damages: Bridging Europe and the United States". Temple International & Comparative Law Journal, Vol. 19, No. 2, January 2006 Available at SSRN: <http://ssrn.com/abstract=878131>

²⁰⁸ Romania court case: 26th day of September, 2007 Court of Appeal TIMISOARA, ROMANIA DATCU CONSTANTA and DATCU PAVEL/ HDI HANNOVER (AUSTRIAN INSURER): Case was pending before 7 (seven) Courts, 1st Instance Court, 2nd, 3rd, Supreme Court.

²⁰⁹ *Full Compensation Of Victims Of Cross-Border Road Traffic Accidents In The Eu: The Economic Impact Of Selected Options*, Andrea Renda and Lorna Schrefler, Centre for European Policy Studies, Brussels, study requested by The European Parliament's Committee on Legal Affairs, 2007, p29.

²¹⁰ Report on the 6th Traffic Law Days in Trier, Prof. Dr. Christian Huber, Trier 2005, page 6.

This form of compensation is generally decided upon and distributed according to “what is estimated fair by the Judge”. This is notably the case in the **Bulgarian** system²¹¹.

‘Pain and suffering’ is a general category which can include loss of earnings (**Austria**), physical discomfort (**Belgium**), or/and violation of personal rights (**Czech Republic**).

‘Pain and suffering’ is generally compensated in a single lump sum payment which includes compensation for all physical and mental injury, loss of the pleasures of life and all the disadvantages a victim experiences as a result of an incident²¹².

In **Denmark**, the lump sum ranges from 24 to 8,050 Euros per day of illness.

In **Finland**, it is from 168 to 13,455 Euros per day. In **Slovakia**, it is from 13.37 to 122,817 Euros per day (includes both pain and suffering and prejudice to social status)²¹³.

In most countries, experts must assess the case and the extent of all injuries and pains suffered to determine the level of compensation to be awarded. The intensity of pain and suffering will be generally classified according to a scale.

A person’s social status is not generally taken into account when awarding compensation. However, in **Portugal**, criteria for fixing compensation are based on the personal, family and occupational situations of the victim.

Pain and suffering is generally a very extensive category.

In **Belgium**²¹⁴, it includes:

- physical pain suffered by the victim (‘pretium doloris’),
- a broad category of mental pain and suffering :
 - o psychological damage, loss of life expectancy,
 - o mental anguish, loss of affection due to the death of a relative,

²¹¹ InterEurope AG European Law Service, INDEMNITY LAW IN BULGARIA, Report by Diana Dimitrova, Athens, 14 May 2007.

²¹² Personal Injury Compensation in Europe, Peopil research Group, Kluwer, 2003, pages 453-532.

²¹³ Following our Country Expert for Finland, Professor Juha Karhu and following our Country Expert for Slovakia, Peter Bartosik.

²¹⁴ Following our Country Expert for Belgium, Yves Brulard.

- suffering from the breach of a contractual obligation (for example damage for a spoiled holiday),
 - suffering from damage to property (such as the loss of a pet), and
 - suffering from damage to the environment.
- every kind of loss in the social and sexual sphere such as loss of sexual function, aesthetic damage etc.

In **France**²¹⁵, suffering endured or pain and suffering damage regroup physical, psychological or moral suffering incurred by the victim of the accident up to the date of “stabilization” of the injuries. The physician quantifies them on a scale from 1 up to 7 degrees.

In **Germany** or **Belgium**, a breach of contract is recognized as pain and suffering.

Courts of the **Czech Republic** can compensate any violation of personal and civil rights, for instance right to family life and private life. As for damage to health, the damaged party’s pain is compensated.

Damage due to pain is considered as *pretium doloris* in **Luxembourg** and taken into account. In addition, aesthetic damage, loss of leisure and moral damage are included in this and evaluated by courts. Aesthetic damage is also considered as pain and suffering in **Portugal, Italy, Belgium** or **France**.

In **the Netherlands**, pain and suffering are considered as non-pecuniary losses and the victim qualifies for compensation for these.

Moral damage in **Italy** is taken into account under the heading *pretium doloris* together with physical discomfort and emotional trauma.

In **Ireland** and **Italy**, pain and suffering may be compensated to a lesser extent if the injured person is in a vegetative state or in a state of coma because it is argued that she or he is not suffering, nor aware of her or his state. However, in Italy, cases have brought the court to admit that even in a vegetative state ‘the plaintiff should be considered as any

²¹⁵ Following our Country Expert for France, Isabelle TINEL.

other individual, capable of perceiving pain and suffering, even if in a very peculiar form²¹⁶.

In the **UK**, a victim's awareness of pain and the extent of his or her suffering in terms of fear, frustration, anxiety and the like must be considered in order to assess the amount of compensation payable.

A victim from the **UK** will be compensated in the **Czech Republic** in substantially lower amounts when claiming there for pain and suffering.

Some countries take into consideration the length of "pain and suffering", e.g. a young person is likely to suffer from an injury over many more years than an aged person.

Some countries compensate secondary victims for pain and suffering, e.g. where they have endured pain and suffering as a result of the death of a loved one (e.g. **Luxembourg**, and **Portugal**, where you must be linked up to the 4th degree of kinship with the victim to get compensated).

As an example, a 2002 Court judgment in **the Netherlands** awarded full compensation for pain and suffering in respect of non-pecuniary psychiatric injury to a mother who lost her child when he/she was hit by a bus²¹⁷. The court did not however award compensation for her pain and suffering in respect of loss in the form of emotional distress. The Dutch legislature is currently attempting to allow compensation for emotional distress as a result of the loss of one's closest relatives.

Taking pain and suffering into consideration can also imply that some organizations could assist victims in returning to a normal way of life and overcoming pain. For instance, the National Council for Assistance to Victims, a French organization, is helping some victims to obtain better quality assistance with legal and psychological issues²¹⁸.

²¹⁶ Cass., 6 October, 1994, no. 8177 [1995, I] Foro it., p. 1852. See also Trib. Genova, 9 July 1992 [1994, I, 2] Giur. it.p. 391, with comments by Pinori, A.

²¹⁷ HOGE RAAD 22.02.2002, Nederlandse Jurisprudentie 2002, no. 240.

²¹⁸ *Case Management: a global approach to victims*, Marketing unit, SCOR Group Development Department, January 2003, p10

3.8.3.6 Loss of a chance

Loss of a chance can be characterised as the impossibility due to accident of attending a meeting, participating in a competition or examination or other event from which the victim had an opportunity to obtain new business or other economically valuable advantages. This aspect of the issue appeared first in **France**, and is developing in all Member States. Loss of a chance is still not officially recognized in some jurisdictions, but it is a specific category of compensation in **Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Estonia, France²¹⁹, Italy** (where it is considered an existential damage), **Ireland, Luxembourg, Malta, the Netherlands** (where it is slowly developing), **Poland, Romania, Slovakia, Slovenia and the United Kingdom**. It is not officially recognized but can still be claimed in **Finland, Germany, Greece, Latvia, Lithuania, Portugal, Spain and Sweden**. Courts in **Denmark** would most likely be reluctant to admit loss of a chance as a loss to be compensated because of the fact that the injury would have to be the immediate cause of the alleged loss²²⁰.

There are several cases. In some jurisdictions (**Austria, Belgium or Italy**) the lost benefit is fully awarded, in others, the loss is partly compensated (**England**)²²¹.

The plaintiff must prove that he/she failed to get a chance of benefiting from a better future because of the injury suffered. In **Luxembourg and Cyprus**, the loss of a chance can be compensated in very restricted circumstances and then only if the chance was real and serious. In **Austria**, the injured person must prove that she suffered loss and that the guilty party can be blamed for that loss.

Under **Belgian** rules, the concept of “loss of a chance” can be compensated in the case of “a particular event that would have happened had the accident not occurred”²²². The compensation should in this case be an appropriate fraction of the amount the injured person would have received if the accident had not happened.

In **England**, there are two possibilities arising from the cases. One line of authority suggests that the injured person would definitely have benefited from the promotion that she or he could not obtain because of her or his accident. The other line takes into account

²¹⁹ Following our Country Expert for France, Isabelle TINEL.

²²⁰ Personal Injury Compensation in Europe, Peopil research Group, Kluwer, 2003, page 81

²²¹ Personal Injury Compensation in Europe, Peopil research Group, Kluwer, 2003, 586pp

²²² Court of Cassation 28 October 1942, in Arr. Verbr. 1942, p. 129; in Pas. 1942, p. 261.

the percentage of chance of the injured person to benefit from the promotion. From this calculation, a certain amount of compensation is awarded²²³.

3.8.3.7 Social status

In some countries, this type of loss is recognized, in particular in **Belgium, Bulgaria, The Czech Republic, Greece, Italy, Lithuania, Luxembourg, The Netherlands, Romania** and the **UK**. It is not recognized in **Cyprus, Denmark, Finland, Germany, Estonia, Hungary, Ireland, Latvia, Malta, Poland, Sweden, Slovakia, or Slovenia**.

It was previously the case in **Finland** that prejudice to social status could affect the amount of funeral costs awarded, i.e. people of higher social status could be buried with a more elaborate funeral. Nowadays, this entitlement is no longer a category of non-pecuniary loss. In **Germany**, any consideration of prejudice to social status is not taken into account when assessing non-economic damage; pain and suffering are deemed the same for poor or rich people. However the breach of a personality right is a specific category of compensation in **Germany**²²⁴.

In **Italy**, the loss of social status is part of the “existential damage”, damage relating to a victim’s relationships such as loss of a chance. The compensation is usually difficult to evaluate and is generally determined for each case by the Court.

In **Slovakia**, loss of social status is assessed in cases of chronic forms of disease. Compensation for chronic illness is calculated according to a scale measuring restriction or the loss of opportunity for a victim to fulfil their potential in life and society, where loss is suffered as the result of an accident. In **Slovakia**, the court must take particular account of the circumstances under which damage occurred together with the relations of the victim and the personal and property relations and status of the individual who caused the damage. However, compensation is not awarded here if damage is caused intentionally.

In **France**, permanent partial disability « IPP » is recognized by the law. It consists in an evaluation of the degree, expressed as a percentage on a scale from 0 to 100, to which the victim has suffered physical, psycho-sensory or intellectual potential impairment once their condition is stable. IPP can only be estimated when the victim’s condition has “stabilized”. Compensation depends on the IPP rate and the victim’s age. For example, a

²²³ Personal Injury Compensation in Europe, Peopil research Group, Kluwer, 2003, page 115

²²⁴ Personal Injury Compensation in Europe, Peopil research Group, Kluwer, 2003, page 196

57-year-old man with a 40% IPP rate compensation will reach 80,000 Euros when a 37-year-old man with a 20% IPP rate will receive 37,000 Euros.

3.8.3.8 Physical discomfort

In **Belgium, Slovenia and Sweden**, the category “other causes of moral damage” can lead to compensation of a victim who has suffered physical damage but has not lost his or her capacity to work. It can be, for example, compensation for a person who has lost a finger but can still carry out the same work as before the accident although the person experiences some degree of discomfort. In **Slovenia**, this is referred to as “malformation” In **Sweden**, this category is entitled “specific inconveniencies” and refers to persons who have had an accident and been injured but can still work.

In most countries, physical discomfort does not constitute a specific category of compensation; it is included in the general category of physical damage.

In **the Netherlands**, the category “damage to clothes” can lead to compensation.

3.8.3.9 Loss of ability to attend to the ordinary activities carried out before the accident

Some Member States have a special category for when a victim claims for personal injury before a court. It is considered as a disruption of the victim’s normal way of life.

Most Member States do not recognize this kind of category. It is not a factor in **Bulgaria, Lithuania, Luxembourg, Ireland, Greece, Malta, Slovakia or Finland**. In **Portugal**, this category is relevant if an injured person is in a coma or in a vegetative condition. This type of injury is recognized in **Sweden** but under the umbrella of “special inconveniencies” or as non-pecuniary losses in **the Netherlands**. In **Latvia**, such compensation could be awarded if an appropriate form of self-insurance had been taken out by the driver²²⁵.

This same category is recognized in **Italian, Slovenian and Swedish Courts**, which factor in loss of ability to attend to ordinary activities carried out before the accident.

It is also the case in **Belgium**, where special compensation can be made for vacations spoiled due to an accident. This compensation is also a special category in **Austria, Italy and Luxembourg**. In the **UK**, compensation becomes available as soon as the injured person can prove loss.

²²⁵ Personal Injury Compensation in Europe, Peopil research Group, Kluwer, 2003, 582pp

In **France**, loss of amenity corresponds to the impact of the accident on the victim's leisure activities.

3.8.3.10 Loss of life expectancy

In most countries (**the Netherlands**²²⁶, **Spain, Belgium, England and Wales, France, Germany, Greece, Hungary, Italy, Luxembourg, Portugal, Spain, Sweden**), loss of life expectancy is not considered to be a special category of damage and is compensated under the umbrella of non-pecuniary damage.

In **Slovakia**, loss of life expectancy appears to lead to compensation for those with high social status.

However, in specific cases loss of life expectancy can be recognized as a separate type of damage. For instance in **Italy**, cases of disease due to medical negligence have led to the injured person him or herself being compensated²²⁷.

In **Portugal, France and Luxembourg**, loss of life expectancy (due to serious injury) is a special category of compensation. In one case in 1998 the Portuguese Supreme Court awarded the equivalent of 49,879 Euros for the loss of a 12 year old boy's life²²⁸ for his loss of life expectancy as such. **French** law also expressly refers to the "réduction de l'espérance de vie" when a person is the victim of HIV infection due to blood transfusion²²⁹.

In **Luxembourg**, it is considered that the loss of life expectancy is included in the category "youth damage" when a young person sees his/her life expectancy shortened.

²²⁶ Status explicitly approved of in Hoge Raad 8 July 1992, NJ 1992, 714.

²²⁷ For examples: *Grendene e Sabini v. Milani*, Trib. Monza, 30 gennaio 1998, [1998] Resp. Civ. Prev., p. 696, with comments by Ziviz, P. On this kind of award see Ambrosio, R., & Bona, M., *Il risarcimento dei danni da errata diagnosi di patologia tumorale*, in Cortesina, G., Albera, R., Bonziglia, S., Bona, M., Ambrosio, R., *Aspetti medico-legali e giuridici nel ritardo diagnostico del carcinoma laringeo*, Omega Edizioni, Torino, 2002, pages 93-104

²²⁸ Decision of the Supreme Court of Justice of 26/3/98 - V.J. 25-60, referred to by Eurico Heitor Consciência 'Sobre Acidentes de Viação e Seguro Automóvel', Almedina, 2000, page 96.

²²⁹ Loi n. 91-1406 of 31 December 1991.

3.8.3.11 Appropriate levels of medical expenses

Expenses for medical treatments are by and large fully recoverable.

There are differences in the level of the duty to mitigate expenses. In some countries only public healthcare will be taken into account²³⁰. If the victim chooses private care, the costs will be denied unless justified by necessity or reimbursed based on public healthcare costs.

These expenses must be necessary and/or reasonable; although, most countries make reference to both requirements (**Belgium, Denmark, England and Wales, Finland, France, Germany, Italy, the Netherlands, Scotland, Spain, Sweden**) and the necessity condition is almost everywhere interpreted broadly.

In all EU countries, medical expenses incurred following personal injury are compensated. This covers a broad range of medical treatment, medicines or prostheses²³¹ and includes both past and future medical expenses. Generally, medical damages awarded in courts or by insurers may be reduced if these expenses are regarded as unreasonable. Most countries require proof that medical expenses charged were necessary, and will seek medical experts' advice to check them. **Estonia, Belgium, Portugal and Bulgaria** are countries where such procedures are followed. Medical expenses are covered to the extent that they cover the injuries of the victim.

In **France**, expenses incurred by the victim are reimbursed up to 80% by Social Security, the remaining 20% being paid by the victim's insurance company (article L.174-4 Code de la Sécurité sociale).

In **Spain**, expenses for medical aid, pharmaceuticals and hospitalization in the quantities required are compensated until the recovery of the injured person or stabilization of the injured party's condition. The costs must be justified in due course, taking into consideration the nature of assistance the victim received.

²³⁰ England in particular.

²³¹ See for example, in France: Soc. 28 April 1981, Bull. civ. V, n° 348, p. 261 and Soc. 16 January 1985, Bull. civ. V, n° 33 (artificial limb); (transportation to and from hospital); Crim. 28 January 1969, Bull. crim., n° 52, p. 116, Soc. 11 June 1980, Bull. civ. V, n° 515 (professional rehabilitation); Paris, 1st February 1973 (cost of a guide dog); Soc. 21 November 1984, Bull. civ. V, n° 528, p. 319 (adaptation of the home).

Slovakian law has an extensive definition of medical expenses (reimbursed only if they are not covered by the public health insurance of the injured party). These include all costs responsibly incurred to improve the victim's health, including costs for nutritious food, nursing services if the victim is bed-ridden and the help of a third person in the household. They also include costs connected with visiting the hospitalized person only if those visits are efficient and serve psychotherapeutic purposes²³². **Latvian** law has also a very broad definition of what constitutes legitimate medical expenses. It includes transportation, admission, maintenance, diagnoses, treatment and rehabilitation of the injured person in a medical treatment or medical rehabilitation institution; nursing of the injured person, purchase of medication, therapeutic sustenance, treatment at home (including travel expenses when visiting medical facilities); as well as prosthetics, endoprosthesis and the purchase or rental of technical aids.

- **Nursing care and attendance**

Reasonable expenses for nursing care are usually compensated in all Member States. It should be stated however that in some countries specific multipliers apply to nursing care which may result in under or over compensation of a Visiting Victim. This is the case in **Germany, Belgium, France** and the **UK**²³³. Further, in some countries such as **France**, the right to compensation for nursing care applies even if the care is provided by members of the victim's family. This brings an interesting light to the topic as France may be seen on the one hand as under compensating because of the application small multiplier, but on the other hand as over compensating because the compensation extends to family members who are caring for the victim.

- **Special facilities and accommodation**

Costs for special facilities and accommodation are generally recoverable in Member States if the nature of the injuries warrants it²³⁴.

3.8.3.12 Compensation through Third Party liability insurance

In **Germany**, third party motor insurance provides a coverage of personal injury up to a maximum of 7.5 million Euros.

²³² Following our Country Expert for Slovakia, Peter Bartosik.

²³³ See CEA, *L'indemnisation du dommage corporel en Europe*, AU 4127 (06/04), Octobre 2004.

²³⁴ Personal Injury Compensation in Europe, Peopil Research Group, Kluwer, 2003 pp 570-576.

In **Estonia** in cases of Third Party Liability, medical expenses are not compensated if the expenses are higher than the amount fixed by the relevant law or the market price. Motor Third Party Liability covers expenses for treatment, purchase of medical products and transportation to and from the medical institution providing treatment. But Motor third party liability does not cover nursing costs or medical assistance obtained outside **Estonia** where there was no special need to obtain the service abroad.

3.8.3.13 The nature of the accident

In **Spain** or **Luxembourg**, if an accident is considered to be a work accident, the insurance policy of the worker's company will take care of the medical aid. In **Belgium**, an employer is obliged to take out insurance to cover all medical costs for an injured employee if the accident happens in the workplace or on the way to or from the workplace. In most Member States such as **Greece** or **Denmark**, the employer is liable for all injuries and acts of employees.

In **Italy** if an accident is considered a work accident, the injured party is compensated by their employer on the first day up to 100% of normal wages, and in the following three days by up to 60% of wages. However from the 4th to the 90th day payment is no longer made by the employer but by INAIL for up to 60% of his or her wages²³⁵.

3.8.3.14 The obligation to mitigate costs

The obligation to mitigate costs affects the recoverability of expenses paid for private medical treatment (which is more expensive than public treatment), and the expenses paid for private medical treatment abroad. However, private medical treatment is accepted if it speeds up the recovery of the injured person (e.g. **Ireland**, **Portugal**).

In **Spain**, some Insurance contracts contain agreements whereby the Insurance Company agrees to send the victim to private medical centres, taking care of any medical expenses. In other cases, if the victim decides to go to non-subsidized medical centres they must bear the expense of these services and later claim reimbursement from the liable person or their insurance agency.

²³⁵ Industrial Injuries and Occupational disease - what to do, Opuscolo Inail, 2006

In **Sweden**, the choice between private or public treatment is determined according to an expert's advice on the necessity for appropriate treatment to improve an injured person's health within a reasonable time frame.

In **Italy**, an injured person is free to choose to be treated in a private or public hospital; costs to the victim are reimbursed whatever treatment she or he receives.

In the **UK**, by contrast, the insurer can claim reimbursement by the injured person if she or he chooses expensive private treatment where free public treatment is an option. The Victim is supposed to mitigate his or her expenses. Victims are legally obliged to keep their accident related losses to a minimum. Unnecessary expenses or losses may not be recovered from the faulty party.

In some countries such as **Italy**, **Germany** or **Belgium**, if the victim is treated abroad, medical costs may not be reimbursed if it would have been possible to find the same treatment in an accident victim's country of residence and that treatment would have also been successful. For instance, in **Italy** an injured person who flew from Rome to Zurich to receive a medical treatment for a fractured wrist was not reimbursed for travelling expenses²³⁶. Similarly, if a victim can be cured in the public system and opts for treatment in a private hospital, reimbursement of expenses is unlikely. (cf. **Denmark**²³⁷, **Germany** and **Lithuania**).

3.8.3.15 The success rate of the treatment

In some countries such as **Belgium** and **the Netherlands**, the victim also has a duty to mitigate loss, which means that a victim does not have unlimited discretion to refuse some medical treatments. Factors taken into account are the general success rate of the treatment, expected improvement and the risk and pain involved for the victim. In **the Netherlands**, an injured person can choose from a wide range of treatments.

²³⁶ Giachetti v. Uniass, Rome Tribunal, 22 July 1996

²³⁷ The Danish High Court, in a judgment reported in 'UfR' [Danish weekly law reports] 1998 p. 651 refused to award the injured person damages for the expense of treatment at a private hospital, even though there would have been a delay in waiting for similar treatment at a public hospital, leading to an increase in the injured person's loss of earnings.

In most countries any duty to mitigate loss is not usually expressly recognized, and it does not affect the freedom of the injured person to undergo certain types of medical treatment.

3.8.3.16 The burden of proof

In **France, Denmark or Italy**, it is the victim's responsibility to provide evidence of loss. Following an accident causing bodily harm, a victim is therefore advised to undergo a medical examination by a physician as soon as possible (at a hospital or by seeing a doctor) so that the injuries are formally recorded and all medical certificates drawn up by the physician are retained²³⁸. It is on the basis of this documentation that the insurer establishes the victim's file. If necessary, a victim may be required to see a medical expert for an assessment of their condition.

In **Finland**, it is also the victim's responsibility to prove all losses if compensation is sought.

In order to obtain compensation in most countries (see for example **Germany, Greece, Spain**), a victim must be examined by a medical expert to prove injuries have been sustained. The expert will make a very detailed report of the victim's condition, the extent of any damage, the nature of the medical treatment prescribed for the victim's recovery, the duration of treatment and the intensity of pain suffered. This assessment, even if not binding in court, will bear heavily on the case's outcome.

3.8.3.17 The moment of compensation

Generally, medical expenses are compensated until full recovery of the injured person. In cases of psychiatric disorder or permanent injuries, the injured person receives an amount of compensation that is sufficient to cover the care that must be received to recover.

Future pain and suffering or other medical costs can be taken into consideration in the judgment. For instance in **Ireland**, the injured person will receive an award which includes an estimated sum for future expenses. However, health deterioration as the result of an accident but not foreseeable during the court case is scarcely taken into consideration. In **Denmark** any future expenses such as the regular replacement of a prosthesis or life-long

²³⁸ C. Rousseau, *Choix des experts pour l'évaluation des dommages corporels*, R.F.D.C. 1983, p. 249, C. Fournier et C. Rousseau, *Qualification et formation des experts dommage corporel*, R.F.D.C. 1986, p. 343

prescription of medicines are calculated by capitalising the annual average expense by a capital factor of 10.

In **France**, healthcare costs are covered (medical costs, hospitalization, etc.) until recovery or when the victim's condition has stabilized - i.e. the moment it is considered care is no longer needed to improve the victim's medical condition. When a condition requires it, this care may be accepted beyond the date of stabilization (future costs).

In **Denmark** an injured person is compensated until full recovery or until it is established that an injury has resulted in permanent disability.

It is worth noting that **Italy** and **Spain** have legislation that allows compensation in periodic payments instead of a lump sum payment. However, this payment, which amounts to a form of life annuity, is scarcely ever awarded by a court. The Swedish system is the only one where periodic payments are the norm.

3.8.3.18 Level of compensation linked to the liable party's financial situation

The financial situation of the liable party is not often taken into consideration in Member States, but this is not the case in **Germany**, **Slovakia** or **Estonia**.

In **Estonia**, damages awarded for pain and suffering can be significantly reduced depending on the financial situation of the person liable. For example, in one case involving an accident victim suffering a 4 year period of dysphoria and who required assistance to walk, 30,000 Euros were awarded. This sum was eventually reduced to 12,800 Euros due to the financial situation of the liable party.

In **Slovakia** a court can also reduce the amount of compensation when taking into account the situation of the person who caused the damage.

In **Germany**, the financial situation of the person responsible is also taken into consideration in order to prevent severe hardship for the defendant.

3.8.3.19 The case of the foreign victim

In terms of the **Czech Republic**, it is theoretically possible to argue before the courts there that a foreigner deserves higher compensation for pain and suffering than Czech residents are entitled to claim.

The courts may then consider that the victim would be compensated more fairly in their own country, and may also take into account any future costs due to differences in standards of living. Whether and to what extent such factors would be acted upon in Czech courts is dependent on the discretion exercised by individual judges.

In **Austria**, the **UK**, **Germany**, **Luxembourg**, **Sweden**, **Greece** and **Hungary**, when awarding compensation courts make adjustments in recognition of the standard of living usually experienced by the foreign victim in their country of residence. In **Belgium**, this can produce lower as well as higher levels of compensation in particular cases.

Danish and **Irish** law do not make any distinction between nationals and foreigners in setting compensation. However in practice, the wage level of the injured party in their country of residence is taken into consideration in the calculation of compensation.

In **Italy**, the courts generally do not consider the level of award that the injured foreign victim would have received in their own country of residence because of the principle of “equal treatment” and “reciprocity”. However, some cases have led the Italian court to decrease levels of compensation because victims lived in countries where wage levels were lower than in **Italy**.

In the **Netherlands**, **Portugal**, **Spain**, **Belgium**, **Estonia**, **Lithuania**, **Poland**, **Malta** and **Finland**, no distinction is made between nationals and foreigners in the awarding of compensation.

French courts do not consider the nationality of the injured person or the level of compensation that they might obtain if the case were decided in their home country.

3.8.4 Damages awarded to third parties because of the victim's pain and suffering

In many countries, damage to third parties caused by an accident is taken into account in the total amount of compensation.

It is the case in **Luxembourg** that where the death of a victim is traumatic for a close relative or person, or the sight of pain suffered by the accident victim proves to be destabilising for those closely associated with a severely affected individual, such factors may be taken into account by courts for third parties.

In **Denmark** and **Germany**²³⁹, this kind of compensation is not expressly recognized.

In the **Czech Republic**, in cases of death resulting from an accident, a single lump sum is paid as compensation amounting to 9,970 Euros for a husband, a wife, each child, or each parent, and 7,271 Euros for each sibling. The sum of 9,970 Euros is also applicable to any other close person sharing a household with the deceased person at the time of the event resulting that causes death. The close person definition in these cases without doubt includes unmarried partners. Survivors of accidents have a right to have an allowance or maintenance paid to them. Where a victim is in the position of paying allowances to other individuals prior to being injured, those payments can be considered part of the compensatory settlement, and if necessary taken over by the appropriate agency and paid in the form of cash pensions. The compensation of expenses for maintenance to survivors is granted only if these expenses are not covered by pension insurance allowances granted for the same reason. Compensation is calculated with regard to the average earnings of the deceased person.

In **Portugal**, damages between 4,000 and 12,500 Euros are paid for each relative. In **Austria**, the average amount is between 7,250 and 18,200 Euros²⁴⁰.

Estonia's Supreme Court has stated that non-proprietary damage suffered by relatives of the victim is compensated when they are present in the same room as the deceased at the time of the death, and have endured mental pain because the deceased has experienced serious pain and suffering before death.

In **Lithuania**, close relatives are entitled to receive compensation only in cases where the victim dies, but not in cases of injury.

In **Spain**, certain close relatives have the right to regard compensation as payable for non-material damage. Such compensation is based on the age of the victim, the degree of kinship and the existence or absence of relatives. Moreover, the law here establishes

²³⁹ See CEA, *L'indemnisation du dommage corporel en Europe*, AU 4127 (06/04), Octobre 2004.

²⁴⁰ *Full Compensation Of Victims Of Cross-Border Road Traffic Accidents In The Eu: The Economic Impact Of Selected Options*, Andrea Renda and Lorna Schrefler, Centre for European Policy Studies, Brussels, study requested by The European Parliament's Committee on Legal Affairs, 2007, p9

tables that define which relatives have the right to compensation and the corresponding amount in each case; divorced ex-spouses are not excluded from compensation.

In **Belgium** compensation covers all harm, illness and alteration in the health of close relatives as a result of an accident. However, even if a close relative has not been physically affected, they could receive compensation for pain and suffering where the liable party acts intentionally. Moral compensation depends on the degree of kinship; losing a spouse gives entitlement to 10,000 Euros compensation, and losing a parent up to 7,500 Euros in compensation²⁴¹.

In **Italy**, where the family relationship is constitutionally protected as an inviolable right, pain and suffering due to the death of a close relative is subject to compensation.

Generally speaking, pain experienced by third parties as the result of an accident could be compensated by courts relative to the pain and suffering of the main victim, but most of the time third parties have to be very close relatives of the victim. Commonly relatives are awarded a lump sum that takes into account material and non-material damage. Compensation is generally awarded depending on a certain degree of kinship. Moral damages are generally recognized as payable to very close relatives, e.g. parents, children, spouses, brothers and sisters.

Furthermore, in **France** moral harm can be taken into account to compensate emotional damage due to the loss of a loved one. It is automatically assumed to be payable to a closely related person able to demonstrate a blood tie with the victim but must be proved for others.

²⁴¹ *Indemnity law in Germany, Belgium and the Netherlands*, Holger Backu, InterEurope AG European service law, 2007, p13

3.9 Type of property damage taken into account (by insurance companies/courts in case of third party insurance coverage/in case of supplemental insurance policies)

3.9.1 Compensation for damage caused to the car and related expenses

3.9.1.1 Loss of Property

Most jurisdictions take loss of property and material goods into account when considering the value of a plaintiff's claim. Under this heading, loss of use may be a factor considered by an insurance company or the court (**the Czech Republic**).

Generally speaking, compensation for loss of property is limited to the value of the lost property (see, for example, **Latvia**).

Compensation for personal assets may lead to difficulties in some Member States. In **Estonia** for example, according to the information provided by the Victims Support Fund, there have been problems regarding the assessment of value of items of lesser value by insurers: clothes and other accessories. In most of the Member States, compensation is linked to proof that personal assets were actually in the car at the time of the accident. That is the case in **Spain** where, by way of example, victims can be compensated for loss of or damage to their personal effects. In the **UK**, all possessions that may have been damaged in the accident will be reimbursed. In order to obtain compensation, the victim must prove ownership of personal effects and damage caused to these items as a result of an accident.

3.9.1.2 Damage to property

Loss in value of the victim's car is covered in all Member States.

Expenses related to the loss of a car are covered in most Member States.

The following expenses are also covered in most Member States:

- towing expenses
- car rental
- experts' fees

Towing expenses are covered in 74% of Member States (20 out of 27).

Experts' fees are covered in nearly 90% of Member States (24 out of 27).

Car rental is covered in about 80% of Member States (22 out of 27)²⁴².

Accommodation costs arising from an accident is covered in two thirds of Member States (16 out of 27).

In **Spain**, for example, courts have also forced insurers to compensate victims for expenses linked to car rental. The court has stressed that a person is entitled to rent a car of similar value to his or her own car. **Dutch** and **Cypriot** jurisdictions apply the same principle as Spain. In the Netherlands, car hire is compensated up to 75% of the total cost so that the injured party may have continued access to a means of transportation.

In **France**, renting a car is compensated in very exceptional circumstances, e.g. when the victim can justify a professional daily requirement (journeys between the workplace and a victim's home are not included). In **Hungary**, the level of compensation for loss of transportation largely depends on the insurance company's good will.

The cost of repairing damage to property is taken into consideration in most jurisdictions when calculating the amount of compensation due to the victim of a road traffic accident. Some countries impose a requirement of reasonableness on the costs of repair (e.g. **Estonia** and **France**). In **Spain**, an insurer can refuse to pay repair costs in excess of the resale value of a car damaged in a road traffic accident. In **Ireland**, if the car is seriously damaged, the victim does not carry out the necessary repairs and as a consequence the value of the car decreases, the victim will not be entitled to receive a complementary compensation. If the victim has to take a loan to finance the repair, he/she will be entitled to reclaim interests charged by the bank.

In respect of repairs carried out abroad, a plaintiff seeking compensation in **Estonia** must demonstrate that the necessary repairs could not be carried out in **Estonia**.

In some Member States, compensation depends on whether the car can be repaired or not.

In **the Netherlands**, if the costs of repair exceed the current value of the vehicle on the date of the accident (a so-called total loss in economic terms), this value minus that of the wreck will be compensated.

²⁴² Following our Country Expert for Latvia, Valter Gencs.

If the vehicle is seriously damaged but can be repaired, the aggrieved party may claim compensation for a decrease in his or her vehicle's value. This measure is only available for drivers of cars that are no older than three years at the date of the accident. So this category is called "Decline in the value of the motor vehicle" in **Dutch Law**. This decline of value is usually calculated using a system of estimates worked out and accepted by Dutch motor vehicle insurers.

This method of compensation is also used in **Spain**. Thus, if the value of the repair is greater than the "value of sale" of the vehicle at the moment immediately prior to the accident, Insurance Companies will refuse to pay for repairs, citing as an excuse the existence of a "total wreck". In these cases they will offer only the equivalent monetary value of the vehicle's worth at the time of the accident to the owner of the vehicle. Nevertheless, the courts generally accept repair of a vehicle as long as it does not exceed 25% or 30% of a vehicle's monetary value. Repair costs can of course reach as much as 50% or even 100% of a car's value if the injured party has already repaired the vehicle prior to the level of compensation being settled. Nevertheless, the monetary value will only be increased by 20% or 30% if repairs are deemed to be out of proportion with the damage caused during the accident in question.

This principle is related to another, which is used in most Member States: the principle of reasonableness of repair. Under this principle, compensation can be obtained only if the repair was reasonable.

In some Member States, if a car has a higher value after repair, the difference between its value before the accident and after the repair is deducted from the compensation. This is the case for example in **Slovakia**.

In **Slovakia**, compensation for damage to property includes expenses required for the removal of the collision damage, as well as expenses for assessment of the extent of the damage. It also includes the values of unused fuel, invoices confirming the payment of road-tolls, the costs of removing a vehicle from accident site (towing) or reasonable expenses for lease of a new vehicle. When assessing an appropriate level of compensation, the courts must take into consideration the increased value of a victim's property after repair, and avoid any unjust enrichment of the victim.

The amount of damage to a vehicle is calculated on the basis of its value at the time when the damage occurs.

There is no statutory ceiling for damage to property for a policy holder. The limit of compensation awarded by the insurance company is set by insurance contract in accordance with the Act on Compulsory Contractual Insurance.

In **Italy**, property damage is determined by the expenses incurred as a result of the damage due to the accident (accruing damage) and by reduction in the victims' income because of damage or disablement due to the accident as provided by article 137 (property damage) of the Insurance Code.

3.9.1.3 Consequential Loss

Various factors consequent upon damage or loss of property are taken into consideration by insurance companies and courts when assessing claims for compensation in respect of road traffic accidents.

Most jurisdictions take into consideration the loss of profit or income that results from loss of or damage to property (e.g. **the Czech Republic, Cyprus, Poland, Italy, Slovakia and Malta**). In **Slovakia**, loss of profit is the harm incurred by a victim, which consists in the fact that the victim's material assets have not increased. Since 2001, "net material loss" is no longer compensated by third party liability insurance (e.g. the price of the expired flight tickets purchased by an entrepreneur whose vehicle has been damaged on the way to an important business meeting). In **Luxembourg**, a person may be able to claim the loss of the income the victim of a road traffic accident would have contributed to the household. In relation to motor vehicle accidents, there is a distinction between those countries in which the costs of renting a car are recoverable (**Slovakia, Estonia, France and the Czech Republic**) and those in which they are not (e.g. **Latvia**).

Generally speaking, legal expenses and experts' fees are recoverable.

Accommodation costs required because a victim's car is immobilized are recognized and can be compensated in most countries. They can be claimed in **Austria, Cyprus, the Czech Republic, Denmark, Greece, Finland, France, Hungary, Ireland, Lithuania, Luxembourg, Malta, Portugal, Sweden, Slovenia, Slovakia, and the UK**. Generally, these expenses must not be excessive.

In the **Netherlands**, consequential loss resulting from an accident is a very broad category. It includes damage to clothes, the cost of vehicle repair, car hire²⁴³, the decreased value of the motor vehicle, loss of adjustment fee, and non-legal expenses.

Loss of use is not recognized in **Slovakia, Romania, Austria and Belgium**. In other countries, it is considered as part of the decline in the value of a motor vehicle. It is compensated according to the circumstances of an accident in the **Czech Republic**. In **Spain**, the victim can claim for loss of use. In cases where their vehicle is immobilized because of repairs, a victim can be compensated only if the vehicle is a business or an industrial one. Compensation here is normally limited to the cost of using public transport. Loss of value of damaged cars is not recognized. In **Finland**, loss of use is compensated through standardized norms (a fixed amount per day), or on the basis of individual real expenses (evidenced by paid bills). In **France**, it is granted by an expert if the vehicle is of very recent manufacture or top of the range, and if the damage involves the structure of a vehicle or its safety features. In the **Netherlands**, compensation only applies to passenger cars no older than three years. Any decline in value is often calculated using a system of estimates worked out and accepted by Dutch motor vehicle insurers.

3.9.1.4 Experts' fees and legal costs

Differences can be noted between Member States in terms of the compensation paid for experts' fees incurred as the result of an accident. While most judicial costs are reimbursable, the compensation of extrajudicial expenses varies greatly between Member States²⁴⁴.

In some Member States, experts' fees and legal costs are covered by the insurer. In **Spain**, the average amount cover is about 3,000 Euros depending on the premium cost and terms of the insurance product taken out by the injured party.

That is, for example, the case in **Slovakia** in some circumstances. In case an insurer does not fulfil his or her obligations with respect to the satisfactory settlement of the victim's claim in accordance with the Act on Compulsory Contractual Insurance, reasonable expenses of any resulting legal representation are subject to the general statutory limit

²⁴³ 75% of the amount of the car rental bill

²⁴⁴ Report on the 6th Traffic Law Days in Trier, Prof. Dr. Christian Huber, Trier 2005, page 89

applicable for the damage to property (currently 165,969 Euros). The insurer must also reimburse the victim's legal expenses incurred in criminal proceedings if such proceedings are efficiently carried out in order to establish a legal basis for compensation or assess the true amount of damage caused to the victim.

The insurer may also cover a victim's expenses accrued in out-of-court proceedings. However, this applies only exceptionally, and only such expenses as are reasonable may be recovered.

General insurance conditions of respective insurers specify the conditions of reimbursement of expenses from third party liability insurance where these expenses are generated by legal representation.

In some other Member States, expert fees and legal costs are excluded from Third Party Liability Insurance. That is the case in Latvia for example.

It is to be noted that in some Member States, compensation of this type of fee is subject to some conditions. Thus, in the **Czech Republic**, experts' fees are compensated according to the circumstances of the case, especially when experts' statements are requested by the insurance companies. Legal costs are compensated in case of property claims which are not compensated within three months of the claim without any explanation from the insurance company, or when compensation of these property claims is unjustifiably reduced.

3.9.1.5 Compensation related to the car driver's fault

In a few Member States, compensation is linked to the presumption that one of the drivers of the vehicles involved in the accident is at fault.

In **Spain**, for example, the owner of a vehicle has the right to carry out repairs or be compensated even if he or she was not the driver of the vehicle.

In **Romania**, to obtain compensation, the Victim, if she or he was driving one of the vehicles, has to prove that the damage is a direct consequence of the accident and that

he/she is not liable for it. He/she will not receive any compensation if it is not possible to prove third party responsibility²⁴⁵.

3.9.2 Loss of income for third parties

In most Member States, third parties who are financially dependent on the deceased person have a right to compensation for the deceased's loss of income²⁴⁶.

Nevertheless, this right is not always recognised by legislation when the victim has an incapacity rate so high that he cannot work anymore.

In **Estonia** civil Law does not foresee the possibility of compensating damage suffered by the relatives of the victim when the victim suffers bodily harm but does not die. This can lead to serious difficulties when the victim needs constant care and when relatives suffer additional proprietary damage due to the victim's condition.

In **Denmark**, loss of support resulting from the death of a relative is compensated through an award to the living relative of 30% of damages recoverable by the deceased. Calculation of this type of compensation is highly standardised.

Compensation for the loss of support does not always meet the needs of the beneficiary. For instance, in **Greece** loss of support due to the death of a father or a spouse is covered by a pension granted either by the Social Security Fund or the State, but the level of this pension is marginal and generally insufficient.

²⁴⁵ *Full Compensation Of Victims Of Cross-Border Road Traffic Accidents In The Eu: The Economic Impact Of Selected Options*, Andrea Renda and Lorna Schrefler, Centre for European Policy Studies, Brussels, study requested by The European Parliament's Committee on Legal Affairs, 2007, p29

²⁴⁶ See also CEA, *L'indemnisation du dommage corporel en Europe*, AU 4127 (06/04), Octobre 2004.

3.10 Compensation levels (general and per type of personal injury/damage to property and in case of multiple victims by insurance companies/courts in case of third party insurance coverage/in case of supplemental insurance policies)

All Member States make reference to the principle of *restitutio in integrum* ('full and fair compensation') by which damages must be awarded in a measure that is capable of restoring the victims as close as possible to the position they would have been in but for the violation of their rights. However, it is clear that the application of this principle and actual compensation levels vary from State to State.

Most countries with compulsory insurance schemes provide for minimum amounts of cover in respect of both personal injury and property damage.

Further, there is a distinction between those countries that provide for fixed upper limits to compensation (e.g. **Latvia** and **the Czech Republic**) and those that do not (e.g. **Malta**). It should be noted, however, that there is discretion on the part of the Czech courts to raise compensation above the maximum levels prescribed by the points system.

3.11 Number of claims for compensation per annum (from 2002 to 2006)

Where data is available, the number of claims for compensation varies greatly between Member States. The reason for this divergence is at present unclear, but certainly relates to factors such as the number of accidents and the claims culture that prevails in any one jurisdiction.

The only commonality that can be discerned across Member States is an upward trend in the number of claims made, with the exception of **France** where a decrease in the number of compensation claims can be seen between 2004 and 2006.

3.12 In which countries does application of the law lead to under-compensation for victims who are residents of your country?

On the whole, specific data in relation to which country's law will result in under-compensation for victims of other Member States is difficult to ascertain.

However, the national reports cite five kinds of situation in which under-compensation may result. Broadly, these are:

- When the country in which the accident occurred does not compensate for particular types of loss that are compensated in the victims' own State of residence, e.g. Visiting Victims in **Malta** will likely be under-compensated where their State of residence provides compensation for pain and suffering. Similarly, Czech Visiting Victims in **Slovakia** will not be compensated for damage leading to the hiring of a car, whereas in their country of residence they would have been compensated.
- Where the standard of living in the foreign victim's State of residence is higher than the country in which the accident occurred (see for example the national report for **Hungary**). Another example is **Finland**, where prices to have a car repaired are high by comparison to other Member States; in practice some foreign insurance companies refuse to pay high sums for repair to damaged cars whilst courts actually award high damages, thus forcing Victims to go to court to obtain proper compensation.
- Where levels of compensation are traditionally very low. The Polish national report cites a European study in which **Poland** is identified as the Member State with the lowest levels of compensation. On this basis, it may be presumed that all Visiting Victims in **Poland** will be under-compensated relative to their State of residence.
- Some cases may lead to under-compensation when a victim has neither proper information nor assistance, as stated in the **Romanian** national report²⁴⁷. The **Finnish** report confirms that the fact that Victims do not speak the local language often leads to misunderstandings.
- According to the calculation method of the compensation, victims can be under-compensated. For example, a 30 year old man whose future financial loss was estimated at 30,000 Euros per year would be awarded 2,406,100 Euros in **Belgium** whereas he will only receive 1,356,700 Euros in **France**;

²⁴⁷ Comments of the Romania court case: 26th day of September, 2007 Court of Appeal TIMISOARA, ROMANIA DATCU CONSTANTA and DATCU PAVEL/ HDI HANNOVER (AUSTRIAN INSURER); the case was pending before Romania court during 8 years.

- As stated in the **Finnish Report**, legal means available to Victims may be difficult or expensive to use if a foreign insurer denies compensation, offers a small amount of compensation or fails to respond;
- As stated in the **Finnish Report**, there can be conflicts of interest between the insurance companies and representatives of insurance companies.

3.13 Compensation levels for personal injury evolve over time

As shown in other studies²⁴⁸ and in this Study²⁴⁹, compensation levels for personal injury evolve over time. In particular, although the trend of compensation levels may be upward, there are countries such as Spain where compensation levels decreased over a period of time²⁵⁰. In a case study performed for the years 2002 and 2003, the results show a decrease in the average award of 4 percent in personal injury compensation.

Further, as science and technology have evolved and the expectations of victims have risen, new types of injuries are being recognised and attracting compensation. Whiplash is one of these and is taken very seriously today.

3.14 Difficulties in evaluating compensation levels accurately

In many countries the social or health systems are the primary providers of compensation for visiting victims. The amount of compensation that these organisations provide is not always taken into account in the final compensation award for the victim, or is not included in compensation calculated by the insurance company. This issue has been highlighted in recent years in **the UK** in particular. Since the NHS has decided to claim back the costs of care provided to victims from insurance companies, the personal injury awards paid out by UK motor insurers following road traffic accidents have risen sharply²⁵¹.

²⁴⁸ Personnel Injury Awards in EU and EFTA Countries, Edited by David McIntosh and Marjorie Holmes, Kluwer Law International, 2003.

²⁴⁹ Following our Country Experts.

²⁵⁰ Personal Injury Awards in EU and EFTA Countries, Edited by David McIntosh and Marjorie Holmes, Kluwer Law International, 2003, page 11.

²⁵¹ <http://www.beachcroft.co.uk/beachcroft/news-room/press-releases/press-release-09.10.07.cfm>

3.15 For victims resident of which Member States would the application of your country's laws lead to under-compensation?

Generally speaking, there are differences in levels of compensation when certain economic data are taken into consideration. Visiting victims resident in wealthy countries (**Luxembourg, Germany, France...**) travelling in countries with a low standard of living (**Cyprus, Lithuania, Slovakia...**) will probably be compensated at lower rates and for some situations possibly not at all. For example, the judgments no 3-2-1-51-05 and III-2/3-3/93 of the Estonian Supreme Court concluded that visiting victims from Scandinavian countries will receive less compensation in **Estonia** than in their country of residence. The court decided in its judgment: "The Chamber finds, that the courts were wrong by taking in account the fact that the plaintiff is the citizen of Norway and the cost of living is higher in Norway compared to **Estonia** when assessing the amount of non-proprietary damage incurred. The abovementioned example does not meet the principles of compensation of non-proprietary damage, the court practice and art 12 of the Constitution, by which all persons are equal before the law and nobody shall be discriminated based on nationality, race, colour of skin, sex, language, heritage, religious beliefs, political views, also condition of patrimonial wealth, social status or other merits²⁵²".

Similarly, the **Latvian** national report states that visiting victims will be compensated at a lower rate for pain and suffering than in their country of residence because insurance can cover no more than 1,422.87 Euros. Moreover, compensation ceilings being low to start with and the average amount of compensation being inferior in **Latvia** (759.48 Euros compared to 2,809.38 Euros in other EU Member States), the Visiting Victim will be the poorer in terms of compensation awarded.

It can be confidently stated that application of Polish laws leads to under-compensation for visiting victims from all other Member States. Conversely, the application of EU laws to a Visiting Victim resident of Poland will have an over-compensating effect. This is due to the

²⁵² Judgment no 3-2-1-51-05 from 25.05.2005, Riigikohtu tsiviilkolleegiumi 25. mai 2005. a kohtuotsus Anne Helene Gjelstadi hagi AS Enimex vastu varalise ja moraalse kahju hüvitamiseks, p24

fact that **Poland** appears to be the country where compensation levels are lower than in any other EU country²⁵³.

Additionally, the **Hungarian** national report states that application of its laws would result in under-compensation for victims of “western European countries”. Similarly, the **Bulgarian** report states that visiting victims are generally not satisfactorily compensated because of differentials in standards of living and the fact that some damage to victims and their property, and damage caused to parties associated with victims are not taken into account.

In **Slovakia**, criteria such as family, profession, social status or standard of living are not taken into account when assessing the amount of damage. This could lead Visiting Victims from countries such as **Bulgaria** to be under compensated; in fact, all criteria are taken into consideration in **Bulgaria**. Based on this example (and not taking into account general levels of compensation), Bulgarians would surely be disadvantaged in **Slovakia**.

In **Malta**, as moral damage is not taken into consideration at all, victims from nearly all other EU Member States will be not be as fully compensated. Similarly, in **Belgium**, compensation for moral damage due to the loss of a relative is low compared to levels set in **Italy**. In fact in **Belgium**, each relative will receive 9,915.74 Euros, whereas in **Italy** a widow and an orphan will respectively receive 90,000 and 108,000 Euros.

The Dutch national report states that two rules can lead to under-compensation or inadequate compensation for Visiting Victims in **the Netherlands**. In fact Dutch courts do not recognize the pain and suffering of surviving relatives as damage to be compensated. They only recognize funeral expenses and compensation for lack of subsistence. Moreover, the Dutch courts award a relatively low level of compensation for non-pecuniary damage.

In some countries, the risk of under-compensation is reduced by the existence of a national fund that augments compensation awarded abroad if it is not satisfactory and not calculated according to the standard of living of the victim’s country of residence.

²⁵³ *Full Compensation Of Victims Of Cross-Border Road Traffic Accidents In The Eu: The Economic Impact Of Selected Options*, Andrea Renda and Lorna Schrefler, Centre for European Policy Studies, Brussels, study requested by The European Parliament’s Committee on Legal Affairs, 2007

In **Estonia**, Visiting Victims may be compensated at a lower rate, as the Estonian Supreme court has stated that a victim cannot be compensated more than an average Estonian inhabitant due to the fact that the victim is resident in another Member State where the standard of living is higher. For example, in judgment no 3-3-1-12-06 from 18.04.2006 of the Estonian Supreme Court, it was decided that if medical expenses obtained abroad were too high, they would not be compensated as they could have been lower if treatment had been carried out in **Estonia**.

3.16 A case study to highlight the differences between Member States

A single very detailed Case Study²⁵⁴ (The Tartarin and Faradelle Case Study) was completed by the experts from the different Member States. The purpose of this Case Study was to try and ascertain the differences in compensation between Member States.

The Tartarin and Farandelle Case Study was created to highlight the importance of the differences in compensation levels across the EU, the different types of losses recognized and the different methods used for calculating quantum for each type of loss. To facilitate the comparison between the 27 Member States and understand the specific situation of a Visiting Victim (by opposition to a local victim), the situation involves nationals of one Member State only travelling to each of the other Member States. Lawyers from each Member State are asked to answer the questions as if the accident had occurred in their own Member State.

The Tartarin and Farandelle Case Study provides definite answers or levels of compensation neither with respect to specific facts nor in given situations. It is clear that this is not currently possible even for identical facts as many factors come into play including such variables as the location of the court within one Member State.

Although the above statement invites a prudent analysis and interpretation of the answers given, it is possible to see in such answers, patterns and trends as shown in the Study.

²⁵⁴ The Tartarin and Farandelle Case Study is entirely fictional. It was created by Jean Albert and edited by team members. Any resemblance with real people or events is purely coincidental. Although the names Tartarin and Tarascon are combined in the novel « Tartarin de tarascon » by Alphonse Daudet, that is the only similarity between this case study and the novel.

The Tartarin and Farandelle Case Study aims at identifying differences in compensation practices between Member States. The lawyers who answered the questions were asked (i) to answer each question based on their experience (ii) to check the law and case law where appropriate and (iii) confirm their answers with colleagues.

The Case Study provides for a set of circumstances that involve a cross-border road traffic accident. To implement the Case Study so as to obtain feedback that integrates the cross-border aspect, one country, **France**, was taken as the country of residence of the injured parties and compared against each country. This method then permitted a comparison between each country by reference to **France**. As a result countries such as **Sweden** and **Finland** had to provide an assessment of the losses that excluded the involvement of their own welfare systems since these could not intervene in **France**. The result is that **Finland** and **Sweden's** compensation levels are much higher under this Case Study than they were in other case studies that were previously performed.

3.16.1 Farandelle and Tartarin Case Study

The Case Study specifics are as follow:

PERSONAL INJURY

Tartarin and Farandelle are French and live in the South of France. Both are 40 years old.

They have been married for 12 years and have two daughters (one, Manuella, is two years old and the other, Astrid, five years old).

He is a bus driver in a small town in the South of France and earns a net salary of 1,500 Euros per month.

She is also a bus driver and earns a net salary of 1,500 Euros per month.

Their salaries have increased 6 percent per year over the last five years.

Tartarin and Farandelle are travelling to your country to participate in a Petanque (French bowls) competition. They both represent their town of Tarascon (the prize for winning the competition is a Gold plated Petanque ball worth about 200 Euros).

However, before they arrive in the town in which the competition is to occur, they have an accident. The accident involves a resident of your country who is insured

in your country and who admits that he is totally at fault, not having seen the red light.

At the time of the accident Farandelle was driving while Tartarin was taking a nap.

Date of accident March 1, 2008: collision with another vehicle.

Tartarin was killed instantly in the crash. He is flown back to Tarascon and buried on March 9, 2008.

Farandelle suffers from a number of minor bruises but was saved by her seat belt and air bag.

She does have a fractured right wrist (her dominant wrist), which leads to 9 surgical interventions under general anaesthetic and numerous physiotherapy sessions and, apart from the numerous scars, she is, and will be for the rest of her life, following the French medical expert's opinion, unable to use her right thumb to either pick up or hold.

She spends a week in a hospital in your country before she is repatriated to France.

Determination of the medical experts

Farandelle's wrist is a permanent condition.

Farandelle suffers from post traumatic stress disorder, a trauma of collisions and a fear of future trauma to hand or other limbs.

Farandelle has suffered through the different operations and suffers since the operations from chronic nagging and, at times, acute pain from her hand forcing her to take pain killers regularly.

Following the accident, she suffers from persistent clinical depression and she did not have any prior condition. The state of depression results from both Tartarin's death and Farandelle's own physical and professional situation.

Costs and compensation

Hospital costs and other medical related costs in YOUR country were 7,000 Euros. Farandelle was taken to a private hospital.

- How much of this will she be reimbursed? (1)

Hospital costs and other medical related costs in France after Farandelle is repatriated were 54,000 Euros. Farandelle was treated in the public hospital of Tarascon, route d'Arles.

- How much of this will she be reimbursed? (2)

The accident occurred on March 1, 2008.

- How much will Farandelle be reimbursed for her lost income from March 1 to August 31? (3)

The French medical expert consulted by Farandelle estimates that Farandelle will not be able to work again as a bus driver or to find a new employment.

- How much compensation will Farandelle obtain for future loss of professional income? (4)

Farandelle was going to be promoted to head driver at the end of the year. Her salary would then have been 1,700 Euros net per month.

- Will this be taken into account in the calculation of the compensation? If so please state how much compensation she would obtain in that case. (5)

The medical expert has determined that Farandelle's condition will require outside assistance of twenty hours per week for the rest of her life. The cost of outside assistance in Tarascon is 14 Euros an hour including taxes and social security.

- How much in total will Farandelle be compensated for the outside assistance? (6)

Given that she has had TWENTY hours per week since March 15 (24 weeks times equals 6,720 Euros paid for the period March 15 to August 31)

- For the future aid or outside help needed (7)

A medical expert in France has determined that Farandelle will need regular physiotherapy sessions and psychological support. The cost of these future treatments is estimated at 15,000 Euros.

- How much in total will Farandelle be compensated for these? (8)

Tartarin's funeral costs were 10,000 Euros.

- How much in total will Farandelle be compensated for these? **(9)**

Tartarin's body was flown back to Tarascon. Farandelle paid 3,000 Euros for the body to be flown back to Tarascon.

- How much of the 3,000 Euros will she be reimbursed? **(10)**

Tartarin's monthly net salary was 1,500 Euros.

- How much compensation will Farandelle obtain as a result of the past lost earnings from Tartarin (past is calculated from March 1, 2008 to August 31, 2008)? **(11)**
- How much compensation will Farandelle obtain as a result of the future lost earnings from Tartarin (future is calculated from September 1, 2008)? **(12)**

Farandelle suffers from post traumatic stress disorder, traumas, nagging, pain and depression.

- How much compensation will Farandelle obtain for pain and suffering? **(13)**

Farandelle will probably never play Petanque again, and if she did not at the level she used to.

- How much compensation will Farandelle obtain for the loss of leisure? **(14)**

Farandelle's wrist and hand is deeply scarred.

- How much compensation will Farandelle obtain for the aesthetic injury? **(15)**

Farandelle's condition means that she is not able to tend to her children as she used to previously.

- How much compensation will Farandelle obtain for the loss of enjoyment of her children **(16)**

Farandelle's loss of Tartarin and her condition mean that she has not been able to benefit from sexual enjoyment since the accident.

- How much compensation will Farandelle obtain for the loss of sexual enjoyment? **(17)**

Farandelle's loss of Tartarin has caused her immense grief.

- How much compensation will Farandelle obtain for the moral damages or bereavement as a result of the loss of Tartarin? **(18)**

Astrid and Manuella are deeply shocked by the accident and anxious about their mother's condition and will lose out from the loss of Tartarin's earnings capacity.

- How much will the first child, Astrid, obtain following Farandelle's injuries? **(19)**
- How much will the second child, Manuella, obtain following Farandelle's injuries? **(20)**
- How much will the first child, Astrid, obtain in emotional damages following Tartarin's death? **(21)**
- How much will the second child, Manuella, obtain in emotional damages following Tartarin's death? **(22)**
- How much will the first child, Astrid, obtain for the economic loss resulting from Tartarin's death? **(23)**
- How much will the second child, Manuella, obtain for the economic loss resulting from Tartarin's death? **(24)**

PROPERTY DAMAGE

Farandelle has been driving in the South of France for twenty years and has never had an accident before. Her car is insured in France. It is only third party insured.

The car

Renault Scenic Dynamique 1.6 16V

Model (07/06)

Date first on the road 01/05/07. It was purchased new in France by Tartarin and Farandelle.

The car's odometer shows 20 000 kms at the date of the accident.

No options have been taken for the car; this is the cheapest within the model range.

Car has been serviced once since purchase. The car was in excellent order prior to accident with no faults detected and all compulsory inspections and/or controls conducted.

No other accidents or problems have occurred with the car prior to accident.

The state of the car post-accident

An expert determines that the car is beyond repair. Such was the force of the crash caused by the other car that the Renault was so damaged both in front, rear and side that it has to be written off. The value of the car has to be established.

The compensation

- How much will Farandelle be reimbursed for the loss of the car? **(A)**

Farandelle had to pay 600 Euros to fly back to France because of the loss of the car and spent 65 Euros on taxis.

- How much of the 665 Euros will she be reimbursed? **(B)**

Farandelle has had to cancel her holiday accommodation in your country but has lost her deposit of 400 Euros.

- How much of the 400 Euros will he be reimbursed? **(C)**

Farandelle has lost her iphone and camera in the crash. She paid 500 Euros for both one month prior to the accident and has an invoice.

- How much of the 500 Euros iphone and camera will she be reimbursed? **(D)**

Farandelle has lost her new pair of shoes in the crash. She paid 200 Euros for them one month prior to the accident and has an invoice.

- How much of the 200 Euros shoes will she be reimbursed? **(E)**

Tartarin's clothes (new: 150 Euros), glasses (old paid 100 Euros two years ago) and wrist-watch (from his grand-father estimated by an expert at 400 Euros) were lost in the accident.

- How much will Farandelle be reimbursed for the items belonging to Tartarin? **(F)**

- Will Farandelle be compensated for spoiled holiday and how much? **(G)**

- Will Farandelle for herself and for Tartarin be compensated for the loss of a chance to win the 200 Euros Golden Petanque bowl? (H)

3.16.2 The resulting compensation levels

The tables and graphs provided below were compiled based on the answers provided to the Case Study by each Country Experts.

The general compensation levels are outlined in the table below:

COUNTRY	GRAND TOTAL in Euros	Proportional	Differential
SK	226405	16,867	-83,133
SI	471335	35,114	-64,886
DK	521470	38,849	-61,151
BG	533335	39,733	-60,267
ES	575255,52	42,856	-57,144
LT	684659	51,006	-48,994
RO	738122	54,989	-45,011
MT	777805	57,946	-42,054
PL	861225	64,160	-35,840
EE	1003235	74,740	-25,260
CY	1017555	75,807	-24,193
LV	1019001	75,915	-24,085
LU	1061685	79,094	-20,906
PT	1150349	85,700	-14,300
BE	1164249	86,735	-13,265
IE	1170787,68	87,223	-12,777
HU	1257165	93,658	-6,342
IT	1336897,32	99,598	-0,402
FR base	1342299,76	100,000	0,000
CZ	1430935	106,603	6,603
UK	1533672,39	114,257	14,257
NL	1555777,5	115,904	15,904
SE	1561807	116,353	16,353
EL	1564285	116,538	16,538
AT	1567985	116,813	16,813
FI	1915904	142,733	42,733
DE	1941221	144,619	44,619

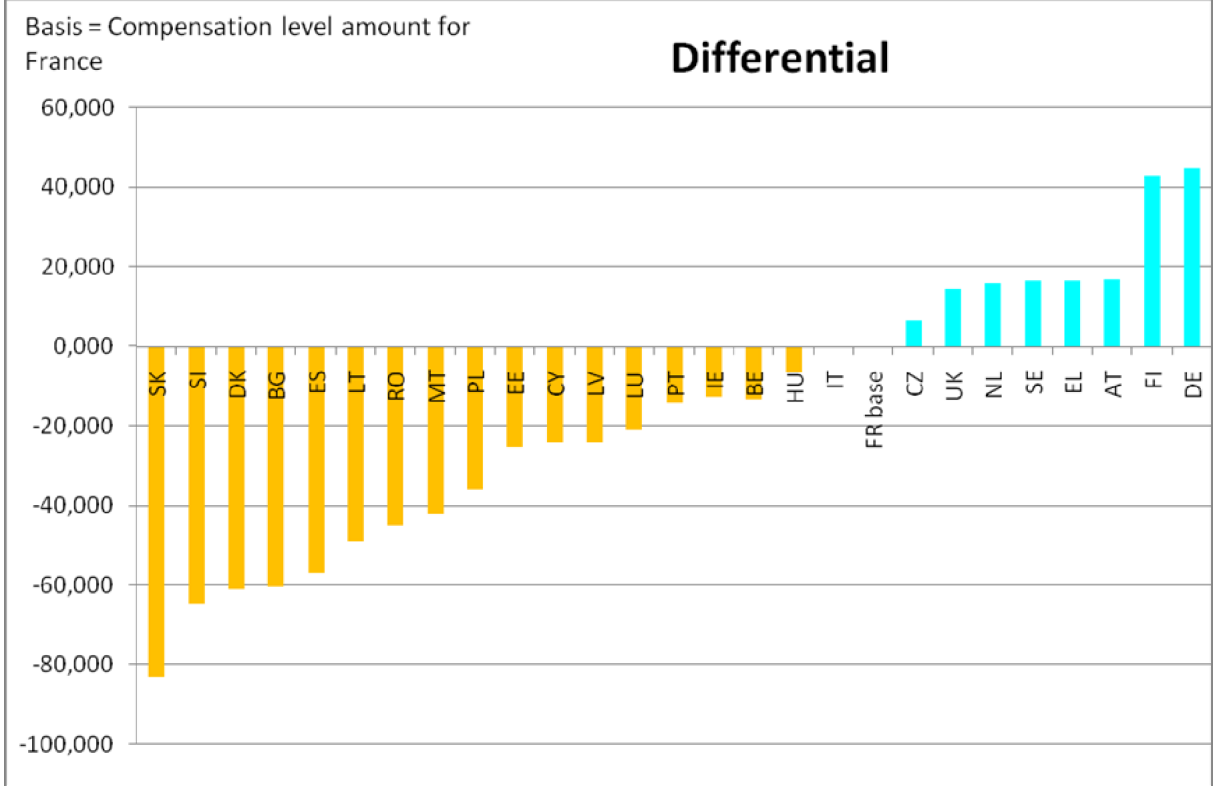
Source: Tartarin and Farandelle case study completed by the country experts under this Study.

From this table one can see that the compensation levels differ widely between Member States and that the risk of over or under compensation is clear. If the accident occurs in Italy, Farandelle would be over compensated by reference to what she would normally be

entitled to in France. However, if the accident occurred in Poland, she would then be under-compensated.

The differential Graph below highlights the compensation level differences clearly

Graph 4



Source: Tartarin and Farandelle case study completed by the country experts under this Study

It is also important to note that where only the death of Tartarin is taken into account, the differential between countries changes. This is shown by comparing the graph below with the graph above.

COUNTRY	Amount in Euros	Proportional	Differential
BG	15000	2,424	-97,576
SK	24310	3,928	-96,072
EE	45400	7,337	-92,663
SI	175000	28,280	-71,720
HU	201400	32,546	-67,454
PL	203000	32,805	-67,195
CZ	231160	37,355	-62,645
DK	231635	37,432	-62,568

COUNTRY	Amount in Euros	Proportional	Differential
MT	259600	41,951	-58,049
LV	259609	41,952	-58,048
ES	297322,64	48,047	-51,953
BE	325331	52,573	-47,427
UK	360151,8	58,200	-41,800
RO	380700	61,521	-38,479
IE	415164,22	67,090	-32,910
LU	424500	68,599	-31,401
AT	428600	69,261	-30,739
CY	519000	83,870	-16,130
LT	588250	95,060	-4,940
FR base	618817,2	100,000	0
IT	670441,19	108,342	8,342
PT	738740	119,379	19,379
DE	751556	121,450	21,450
NL	889646	143,766	43,766
EL	912100	147,394	47,394
SE	1200440	193,989	93,989
FI	1205340	194,781	94,781

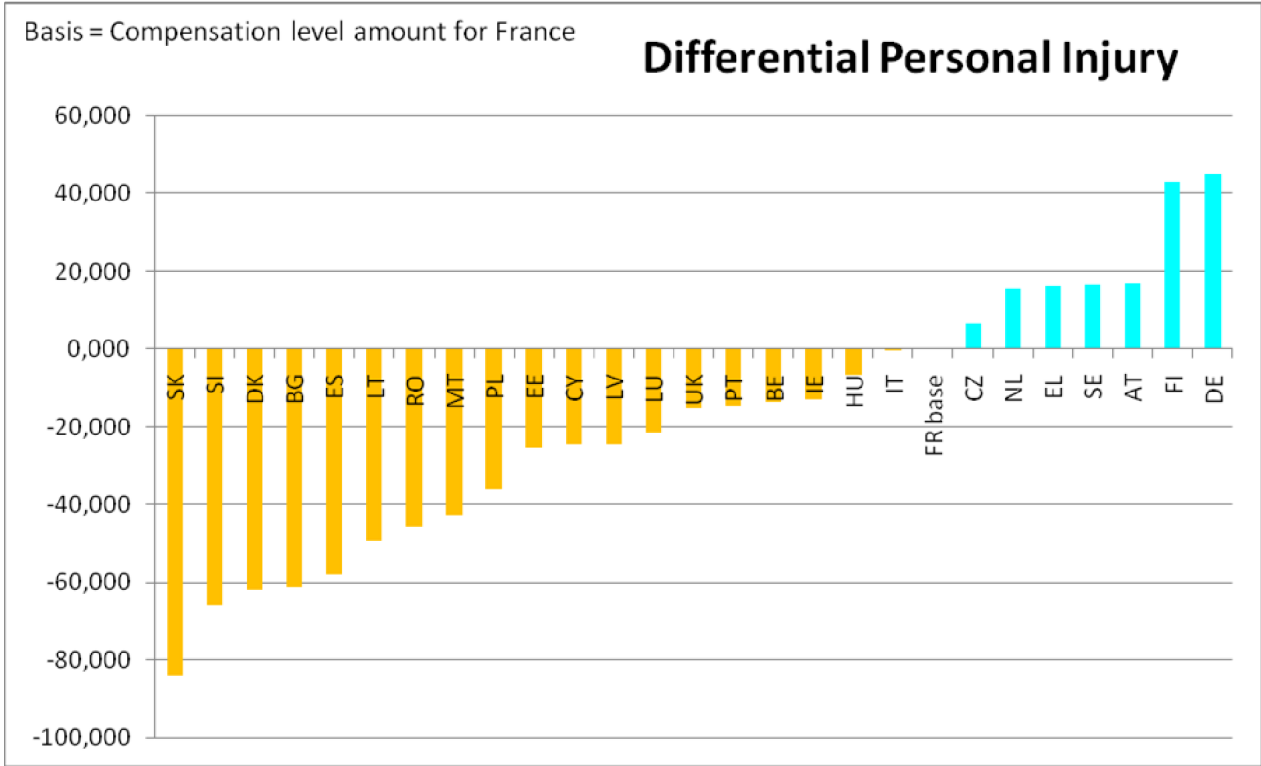
Source: Tartarin and Farandelle case study completed by the country experts under this Study (counting only the consequences of Tartarin's death).

Some countries will offer greater compensation levels for accidents resulting in “death” but lower compensation where the accident results in serious injuries whilst in other countries it will be the reverse. Further, some types of injuries will generate different levels of compensation in the different Member States. A leg amputation might generate a higher compensation in a Member State A than in Member State B but tetraplegia a higher level in Member State B than in Member State A as confirmed by the study conducted by Patrick Le Roy and Sascha Krahe²⁵⁵.

Similarly when separating compensation levels pertaining to personal injury from those pertaining to property damages one can conclude that a country may offer higher compensation levels for property damages than for personal injury damages by comparison to another country. This is highlighted in the graphs below.

²⁵⁵ Patrick Le Roy and Sascha Krahe, A European Comparison of Bodily Injury Claims, The Bases and practice of the Law of Damages for Bodily Injury in the light of the Liability Implications for Motor Third Party Liability Insurers: A comparison of Six European Countries, GeneralCologne Re, N 44, 2001 at pages 21 and 26. See also Personal Injury Awards in EU and EFTA Countries, 2003.

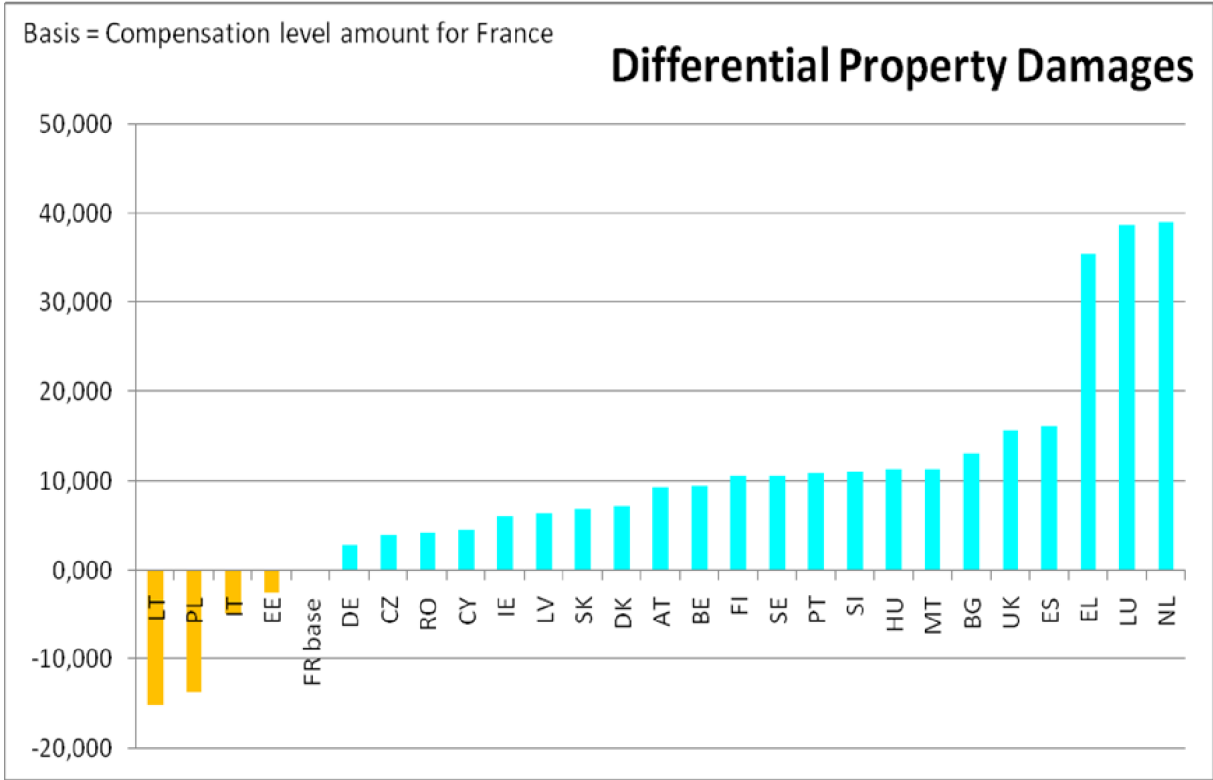
Graph 36 Personal Injury Differential Graph (Items 1 to 24 in the answers to the Tartarin and Farandelle Case Study)



Source: Tartarin and Farandelle case study completed by the country experts under this Study

In the graph above Germany and Finland would provide the higher compensation levels and indicates a high peak-to-peak amplitude. The graph below however shows that in terms of property damages the peak-to-peak amplitude is lower with the Netherlands and Luxembourg providing higher compensation levels.

Graph 37 Property Damage Graph (Items A to H in the answers to the Tartarin and Farandelle Case Study)



Source: Tartarin and Farandelle case study completed by the country experts under this Study

3.17 Conclusions and recommendations

3.17.1 Conclusions

Compensation levels vary from one Member State to another and the variation can be significant. This leads to potential under or over compensation in cross-border road traffic accidents.

The differences in compensation levels are not straight forward enough to clearly determine which Member State would provide higher compensation than the other. Compensation levels in each Member State depend on the nature and degree of the injury or loss. For some types of injuries some Member States will provide the highest levels of compensation whilst for others they can provide among the lowest levels.

Further not all types of losses are recognized by all Member States. Some Member States do not recognize sex damage for example. Others include different types of losses under the same heading. This adds to the confusion and makes comparisons difficult.

The causes for the differences in compensation levels are multiple and have social, economical and cultural roots. Further, judges have an important degree of discretion in determining quantum and even sometimes in “creating” new types of losses. The discretion awarded judges means that within the same country there may be some variations in compensation levels.

The impact of judges on the situation of the Victim is not limited to compensation levels per se. Judges also determine the interest rate applied on periodic payments and the discount rates on lump sum payments. Regulatory tables exist in some Member States to that affect but not in all Member States.

Even if judges were obliged to take into account the specific circumstances of the Victim in his or her country of residence, the issue of over compensation would remain. There is a risk involved in requiring judges to take into account the levels of compensation in other Member States if such a measure is not accompanied by better information for judges. The risk is that they will follow the presentation/arguments made by the Victim’s lawyer without checking whether it is correct. This is how it could lead to over compensation of Victims.

Medical experts also play an important role in the level of compensation as they evaluate the degree of injuries and the effect of the injury on the Victim’s future capacity to lead an normal life. There are currently important differences in how levels of injuries are assessed.

3.17.2 Recommendations

Various recommendations are made in the individual national reports with respect to compensation for victims of cross-border accidents.

Most national reports call for a Europe-wide harmonization of compensation laws to reduce uncertainty and disparities in compensation levels between Member States. Further, tables that serve as guidelines for the assessment of injuries could be generalised,

categorized, standardized and translated into all European languages so that, when faced with a cross-border case, judges could apply the compensatory specifications of the Visiting Victim's home country (local life expectancy, retirement age, employment perspectives, rate of return on investments etc), using tables based on the same parameters. These would serve as guidelines and leave judges enough discretion to make decisions on the circumstances of the case.

Some Member States call for the implementation of common principles for assessment of damage, for example with the proposed Draft Common Frame of Reference published in February 2008 (which harmonizes the legal basis for liability leading to the standardisation of compensation levels)²⁵⁶. This would increase legal certainty and promote relative equality of treatment between European citizens.

Some national reports call for the formation of a common framework of reference for types of losses, interest rates and discount rates to be applied to awards²⁵⁷. Several national reports also regard availability of information on compensation practices in Europe as an area ripe for improvement. They call for better and more accessible information. This information should be provided to judges, insurers, drivers, visiting drivers, European citizens and any other relevant parties.

The 4th Motor Directive, under Article 5, already provides for the establishment in each Member State of an Information Centre to disseminate information to Visiting Victims²⁵⁸. This obligation was extended to apply to any party involved in an accident under the 5th

²⁵⁶ Following our Country Expert for Finland, Juha Karhu.

²⁵⁷ One can imagine that given the level of preciseness of some statistical tools today, it could be possible to create either national tables that would take into account the same parameters for all Member States or a European table presented in the form of a software that would be accessible by all courts and insurers and facilitate the taking into consideration of the specifics of the victim. Because the tables are mainly based on numbers, language would not be an issue and a judge in France would be able to input the main information on the victim and obtain a multiplier that relates to the life expectancy of the victim in his or her country, or the inflation level in the victim's country of residence.

²⁵⁸ See Directive 2000/26/EC of the European Parliament and of the Council of 16 May 2000 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 amending Council Directives 73/239/EEC and 88/357/EEC. See also Consultation Paper *Implementing the Fourth Motor Insurance Directive*, Anna Silvester, HM Treasury, London, 2002.

Motor Directive²⁵⁹. The content of the information to be provided is limited to information pertaining to the parties to an accident. Since the Information Centres exist, they could facilitate access by Visiting Victims and relevant interested parties such as judges, to information on the legal framework and compensation methods in other Member States.

This information could be also generally be provided through brochures, available via the internet and in English, German and French (and other EU languages especially if Information Centres are given this function) and contain:

- The steps to be undertaken by parties involved in an accident following the accident;
- Whether the police should be involved;
- The address and function of the National Guarantee Fund;
- The rules on limitation periods;
- The compensation methodology and recognized losses;
- The possibility for the visiting victim to enforce the claim in his/her home country through Claim Representatives and their addresses.

Any regulation that would confer this informing role upon Information Centres should also set specific fees that may be required for keeping, updating and furnishing such information. Currently, Information Centers may set fees for information²⁶⁰ that they provide and this should be regulated at a EU level to ensure relatively cheap and uniform access to such information.

The **Spanish** national report recommends that drivers' insurance should be made compulsory in all Member States. A time-limit -set by insurers- during which the driver is fully covered (90 days as already put in place in **France** and **England**) when visiting another Member State could also be established. This time-limit would be agreed at the European level and would require the notification of travel to insurers. Such time limits may however be contradictory to the European spirit of free movement across borders.

²⁵⁹ See Article 4(5) of Directive 2005/14/EC of the European Parliament and of the Council of 11 May 2005 amending Council Directives 72/166/EEC, 84/5/EEC, 88/357/EEC and 90/232/EEC and Directive 2000/26/EC of the European Parliament and of the Council relating to insurance against civil liability in respect of the use of motor vehicles.

²⁶⁰ See for example http://www.miic.org.uk/documents/general_docs/MIDIS_TandC_01122006.pdf

The extension of the direct settlement insurance claims between insurance companies as applied in countries such as **France, Belgium, Italy, Finland, Spain, Greece and Portugal**, to cross-border claims, could also facilitate and speed up compensation²⁶¹. These direct settlement agreements for claims have meant that the time to settle claims has shortened considerably²⁶². The use of new technologies in conjunction with these agreements has had yet another significant and positive impact on settlement time. The technology and means clearly exist today to facilitate efficient management of claims and prompt compensation. The new Spanish CICOS system highlights the advantages of such a system. The CICOS System is a computing tool that acts as a claims clearing house for insurance undertakings. The implementation of this tool has led to a dramatic drop in the time taken to settle a claim²⁶³.

A first step toward direct settlement is already contained in the 4th Motor Directive²⁶⁴. The “compensation bodies” mechanism created by the 4th Motor Directive now appears to be efficiently applied in all Member States²⁶⁵. These bodies were designed to enable Victims to get prompter compensation in their Member State of residence. The injured party can apply to the compensation body when the faulty party’s insurer has not replied to a claim within three months or has failed to appoint a claims representative in the Victim’s Member State of residence. The mechanism appears to work for Victims in the circumstances described above. As a result its scope of activity could be extended and lead to a European system of claims settlement using new technologies to establish an efficient European claims clearing house.

²⁶¹ See Claims management and direct settlement in motor liability insurance - A comparison of the experience in various European countries, Munich Reinsurance Group, 1, 2002, at http://www.munichre.com/publications/302-03153_en.pdf.

²⁶² See S. Chanh, Fédération française des Sociétés d’Assurances, Direct settlement mechanisms and independent claims adjusters, The french Experience, Warsaw International Motor Insurance Forum, May 2008.

²⁶³ See CEA Position Paper, CEA response to the European Commission inquiry into the European business insurance sector pursuant to Article 17 of Regulation 1/2003, April 2007 at http://ec.europa.eu/comm/competition/sectors/financial_services/inquiries/replies_interim_report/36_cea.pdf.

²⁶⁴ See Article 4 of Directive 2000/26/EC of the European Parliament and of the Council of 16 May 2000.

²⁶⁵ See Commission report on motor insurance issues at http://ec.europa.eu/internal_market/insurance/motor_en.htm#20051222. The system may be efficient as it stands but it does seem that public awareness of its existence remains low.

The general application of *restitutio in integrum* so that under-compensation is avoided is also a solution proposed in some national reports such as those from **Lithuania** and **Spain**. This solution is already applied in some Member States such as **Finland**, **Greece**, **Hungary**, and **Malta**. Most Member States actually recognize the principle but its application is somewhat difficult given the nature of some losses incurred by Visiting Victims, especially non-economic losses.

Country experts diverge on the issue of *lex damni*. While the **Portuguese** and **German** experts do not subscribe to the implementation of *lex damni*, the **Estonian**, **Danish** and **Belgian** reports call for its application. The Finnish report promotes this principle as a major improvement in the protection of victims. For the **Finnish** expert, it would eliminate risks of under- or over-compensation, but would probably result in an increase of the price of insurance products. It would, in effect, transfer legal uncertainty from the insured to the insurer. Its implementation may also prove difficult because of the evidentiary issues it could lead to. It is usually recognized that the site of an accident provides the best possible source of evidence in respect of the circumstances of the accident, its immediate effects, the parties involved, witnesses, the first medical appraisal, the evaluation of the damage, and its immediate effects.

The **Hungarian** national report calls for the application of *lex patriae*. The applicable law for a victim will be the law of his/her country of residence. The law of the country where the accident happened should only determine traffic rules, whereas the law of the country where the injured person is resident should determine liability for specific types of loss and the extent of any damage.

Most countries call for the creation of a European Compensation fund for victims of cross-border road traffic accidents. The **Slovakian** national report states that this fund could provide the outstanding amount of compensation, i.e. the difference between the amount of awarded compensation and the amount of compensation to which the visiting victim would be entitled under the legislation of his or her country of residence.

Some countries do not take this possibility into consideration, as they already have a national compensation fund established within their own borders.

The **Czech** national report cites lengthy delays in the court system as a problem for victims seeking compensation for road traffic accidents.

The **Slovakian** national report calls for courts to be granted discretionary powers when taking into consideration the level of damages which would be awarded in the victim's country of residence. This will avoid the constraints of very strict and binding legislation.

For the experts some solutions are generally not conceivable. These are:

- Enabling the Court of the victim's country of residence to be competent on the issue of evaluating the amount of compensation payable. This solution would involve significant extra costs for a judgment to be effective in another Member State and increase delays for the final judgment. In particular, it would potentially
- Involve two judgments, one on fault or the circumstances of the accidents based on *lex loci*, and one founded on compensation based on *lex damni*. This may also create conflicts between jurisdictions of Member States;
- Regulatory civil law solutions introduced in the form of non-compulsory regulations;
- Coverage through first-party insurance instead of third-party.

Other solutions are conceivable. These are:

- Creating European guidelines that would provide a list of recognized losses, a list of injuries and disability levels, the calculation of aged car value and the calculation of interest rates or discount rates in relation to awards;
- Applying the principle of ubiquity which means applying the law of the location of the accident or the location of effects of the accident for the victim. This principle is seldom contemplated in national Country Reports;
- Improving and generalizing use of the Green Card System through diffusion of the kind of information it offers, which would improve European citizens' awareness;
- Creating a European body to give recommendations on the average sums of compensation for personal injury or damage to property (such as the Road Traffic Accident Damage Board "Liikennevahinkolautakunta" in **Finland**), to harmonize European compensation rules and to centralize the information available on these rules.
- Create a European tribunal which will replace existing mechanisms for determining disputed claims and compensation²⁶⁶;

²⁶⁶ See for example solutions proposed in Australia in the Report on personal injury compensation legislation / General Purpose Standing Committee No. 1.

[Sydney, N.S.W.] : The Committee, 2005, p27

Better communication between different practitioners such as medical experts, lawyers and insurers could improve assessment of damage and compensation for a victim's injuries²⁶⁷.

Rehabilitation programs and institutions could also become viable means to encourage victims to return as much as possible to their previous lives. In **Finland**, the Vakuutuskuntoutus VKK, Insurance Rehabilitation Association, is already working on these issues and trying to secure and stabilize the lives of victims following serious accidents. In 2000, they succeeded in rehabilitating some 2222 persons²⁶⁸.

4 Limitation periods

4.1 Introduction

There are basically as many limitation period systems in the EU as there are Member States. This would not be an issue as such, if information on limitation periods was readily obtained and the following factors were standard in all Member States:

- The triggering event determining when the limitation period starts to run;
- The existence and the nature of events or circumstances independent from the victims' actions that may suspend or interrupt the limitation periods;
- The existence and types of actions of victims that may suspend or interrupt limitation periods;
- The discretion granted to the courts to extend limitation periods;
- The existence of limitation periods differing in length depending on the type of damage (resulting from personal injury or property damage);
- The existence of general and specific limitation periods;
- The existence of different limitation periods for actions in tort and in contract;
- The existence of concomitant limitation periods: short/ flexible and long/ absolute; and

²⁶⁷ Case Management: a global approach to victims, Marketing unit, SCOR Group Development Department, January 2003, p29

²⁶⁸ Case Management: a global approach to victims, Marketing unit, SCOR Group Development Department, January 2003, p39

- The impact of other limitation periods on the limitation period in tort.

However, the above areas are another source of disparity between Member States. As a result there is little in common between Member States regarding limitation periods. In the EU, limitation periods basically vary from 1 to 30 years, and their length will depend on whether an action is based in tort or in contract, and on the nature of the accident²⁶⁹. The most significant differences between Member States are as follows.

- The determination of a start date for the limitation period;
- The duration of limitation periods;
- The special regime applicable to award disabled persons and minors;
- The possibility of suspending or interrupting running of the limitation period, and the different meanings given to these words.

Limitations periods appear to be a source of confusion even for home residents in particular because it is never easy to understand the exact situation in which one is in respect to the running of the limitation periods. Even though in most cases courts will tend to favour the victim, and extend limitation periods as far as possible so as to avoid the victim being barred from compensation, confusion remains. Victims end up not being able to adequately benefit from limitation periods as awarded to them by law, as is suggested by the Surveys. The situation is made more complex by the different limitation periods that apply in actions in contract or in tort. Legal counsels interviewed advise their clients to file a claim as soon as possible, regardless of whether they think that the limitation period is longer, because their relationship is a contractual one. This highlights that limitation periods as such may not be an insurmountable issue because of the fact that Visiting Victims are advised to file as soon as possible. However, such general advice by legal counsel also confirms that lawyers face difficulties when defending an injured person in another Member State in respect to limitation periods, and have not mastered the subject in detail²⁷⁰.

²⁶⁹ *Introduction to the proposal for a regulation of the European Parliament and the Council concerning limitation in respect of personal injury and fatal accident claims in crossborder litigation*, John Pickering and Marco Bona, PEOPIL, p8

²⁷⁰ *Les périodes de prescription dans le cas des dommages corporels et des accidents mortels dans le contentieux transfrontalier* (débat), Rapporteur: Diana Wallis (A6-0405/2006), Parlement Européen, 01.02.2007

For example in **Spain** the limitation period is one year for tort but fifteen years for contract claim. In the context of road traffic accidents this distinction may have an impact. For victims of a road accident, like passengers on board a commercial coach, the limitation period for action in contract will be fifteen years. This would be different in Italy where the limitation period for a claim against the tour operator would be three years, and ten years if the action was in contract against the transporter, but one year if the case fell under the strict liability provisions of the law, or five years in tort.

The particular situation of a victim will thus be very important in defining the applicable limitation period. The limitation periods vary considerably from Member State to Member State in contract and in tort. In some countries, such as **Denmark, Germany, the Netherlands, the UK and Sweden**, the limitation period in contract and tort is the same. In other countries such as **France, Italy, Spain** there are important differences between these two types of limitation periods.

4.2 The table below provides the different main features of limitation periods in the EU.

Country	Limitation Period (LP)* Against third party liable insurer or bureau or guarantee fund	Limitation Period (LP)* Against liable third party	Triggering Event for Start of LP Against third party liable insurer or bureau or guarantee fund	Triggering Event for Start of LP Against liable third party	Extension or Suspension of LP	Other limitation periods that may have an impact on LP
AT	3	3	Date of knowledge but with a maximum of 30 years after accident	Date of knowledge but with a maximum of 30 years after accident		
BE	3 against the insurer of the other party and its own insurer once the victim has introduced a claim against the liable party, the liable party still has 5 year to call his insurer into the proceeding	5	Date of accident Or date of knowledge of claim against insurer if late knowledge of insurer can be proved but with a maximum of 20 years after accident	Date of knowledge but with a maximum of 20 years after accident	Suspension Force majeure For minors runs from majority For disabled runs from being no longer disabled Extension (the delay restarts) The liable party recognizes the right of the victim A summon An order to pay or a seizure	For Criminal action, the prescription is 5 years, which can be extended with a maximum of 10 years

Country	Limitation Period (LP)* Against third party liable insurer or bureau or guarantee fund	Limitation Period (LP)* Against liable third party	Triggering Event for Start of LP Against third party liable insurer or bureau or guarantee fund	Triggering Event for Start of LP Against liable third party	Extension or Suspension of LP	Other limitation periods that may have an impact on LP
BG	5	5 for <i>Life</i> and <i>Accident</i> Insurances and <i>Third Party</i> <i>Liability</i> Insurances of Motorist 3 for all other insurance contracts	Date of accident	Date of accident	No	No
CY	2	2	Date of knowledge or of accident	Date of knowledge or Date of accident	Can be extended by judge up to 5 years	
CZ	3 for property 2 for injury 3+1 in case of insurance contract (Act 37/2004, Art.8)	3 for property 2 for injury	Date of accident for property and date of knowledge for injury	Date of accident for property and date of knowledge for injury	Up to 10 years by court decision of insurer accepting claim	Impact on criminal proceedings (special period of limitation depending on the seriousness of the crime) Up to 10 years for intentional damages Impact on civil proceedings is ten years

Country	Limitation Period (LP)* Against third party liable insurer or bureau or guarantee fund	Limitation Period (LP)* Against liable third party	Triggering Event for Start of LP Against third party liable insurer or bureau or guarantee fund	Triggering Event for Start of LP Against liable third party	Extension or Suspension of LP	Other limitation periods that may have an impact on LP
DE	3	3	Date of knowledge and name of the person responsible for the accident If there is a claim for an injury the LP is thirty years from the date of the accident	Date of knowledge and name of the person responsible for the accident If there is a claim for an injury the LP is thirty years from the date of the accident		
DK	5	5	Date that claim can be evaluated and settled	Date that claim can be evaluated and settled	The Court has some discretion but only uses in exceptional cases where the injury only developed many years later (only one case on record in the Supreme Court)	
EE	3/10/30	3/10/30	Date of knowledge General Part of Civil Code Act (tsiviilseadustiku üldosa seadus). RT I 2002, No. 35, Art. 216, adopted 27.03.2002; last amendments 19. 11. 2003.	Date of knowledge	None	
EL	<u>2</u> years (L.ΓπN/1911	5 years	Date of accident	Date of knowledge but		Limitation period for

Country	Limitation Period (LP)* Against third party liable insurer or bureau or guarantee fund	Limitation Period (LP)* Against liable third party	Triggering Event for Start of LP Against third party liable insurer or bureau or guarantee fund	Triggering Event for Start of LP Against liable third party	Extension or Suspension of LP	Other limitation periods that may have an impact on LP
	vicarious liability from venturing), and <u>5 years</u> collateral liability P.D 237/1986_	tort liability, 937 Greek Civil Code(GCC)		with a maximum of 20 years after accident	1. Force majeure (255 GCC) 2. 20 years extension in case of final judgment or enforceable act (268 GCC)	delinquencies (section 11 and 113 of Greek Penal Code in Combination with section 937 second paragraph: If the unlawful act constitutes at the same time a punishable offence which according to the criminal law is subject to a longer prescription such (longer) prescription shall also be applicable in regard to the claim for compensation.
ES	1	1	Date of accident	Date of accident		If case is criminal victim may file in criminal court but in that case will only

Country	Limitation Period (LP)* Against third party liable insurer or bureau or guarantee fund	Limitation Period (LP)* Against liable third party	Triggering Event for Start of LP Against third party liable insurer or bureau or guarantee fund	Triggering Event for Start of LP Against liable third party	Extension or Suspension of LP	Other limitation periods that may have an impact on LP
						have 6 months to file for action. If criminal court denies victim compensation new LP of one year starts for civil action
FI	3	3	Date of knowledge	Date of knowledge In property damages no later than 10 years from the date of accident	No	
FR	Against Fund: 1 year for property damages 3 years if party liable unknown 5 years in for other cases Against one's own Insurer: 1 years following the manifestation of damages or its aggravation (Not applicable to the	10	Date of accident unless there is an aggravation of the injury and in that case it will be the date of knowledge of aggravation	Date of accident unless there is an aggravation of the injury and in that case it will be the date of knowledge of aggravation	Courts May extend For minors runs from majority and for incapacitated until capacity	If civil action filed in context of criminal action the criminal limitations apply. These range from 1 year to 10 years.

Country	Limitation Period (LP)* Against third party liable insurer or bureau or guarantee fund	Limitation Period (LP)* Against liable third party	Triggering Event for Start of LP Against third party liable insurer or bureau or guarantee fund	Triggering Event for Start of LP Against liable third party	Extension or Suspension of LP	Other limitation periods that may have an impact on LP
	third party's victim: application of the 10 years limitation period ²⁷¹) Against third party liable insurer: 10 years as of the date of stabilisation (Article 2226 of the civil code)					
HU	5 In the event of damages originating from hazardous operation the period of limitation for claiming damages is three years.	5 In the event of damages originating from hazardous operation the period of limitation for claiming damages is three years.	Date of accident	Date of accident		The provisions on periods of limitation are applied with the exception that the period of limitation for a claim cannot be less than five years if the damage has been caused willfully or criminally. However, in respect of damages caused by the

²⁷¹ Cass.Civ I 9 may 1996, 94-14.560; Cass.Civ. III, 26 november 2003, n°01.11.245

Country	Limitation Period (LP)* Against third party liable insurer or bureau or guarantee fund	Limitation Period (LP)* Against liable third party	Triggering Event for Start of LP Against third party liable insurer or bureau or guarantee fund	Triggering Event for Start of LP Against liable third party	Extension or Suspension of LP	Other limitation periods that may have an impact on LP
						commission of a crime, the period of limitation for a claim does not expire even after five years as long as the criminal offense remains punishable under the statute of limitations
IE	6 for property except when claim is made against the Motor Insurance Bureau of Ireland where it is 1, 2 for personal injury	6 for property 2 for injury	Date of accident and for injury date of knowledge of cause of action		For victims under a disability (including minors) time runs from the date that the victim ceases to be under the disability. In respect of minors this means that time runs from the date they reach majority (18 years).	Claims against the estate of a deceased person must be commenced within 2 years. Notification of claim must be made within 2 months after accident or as soon as practicable thereafter. Failure to do so allows a court to draw such inferences from the

Country	Limitation Period (LP)* Against third party liable insurer or bureau or guarantee fund	Limitation Period (LP)* Against liable third party	Triggering Event for Start of LP Against third party liable insurer or bureau or guarantee fund	Triggering Event for Start of LP Against liable third party	Extension or Suspension of LP	Other limitation periods that may have an impact on LP
						failure as appear proper and in the interests of justice reduce or not award the victim the costs of prosecuting their claim.
IT	2	2	Date of accident	Date of accident Per l'art. 2935 c.c. la prescrizione comincia a decorrenza dal giorno in cui il diritto può essere fatto valere e pertanto, quanto al diritto al risarcimento del danno da fatto illecito, dal momento in cui il danno si è verificato. La norma si riferisce soltanto alla possibilità legale di far valere il diritto, per cui sono irrilevanti, ai fini della decorrenza del	The LP is suspended for minors and disabled people until such time as they can act or be represented by custodian May be extended by the courts if date of knowledge different On such regard, please note that - according a recent Court decision, the limitation period starts from the date of the right can be exercised. Therefore the compensation right starts	If crime, LP extended to crime LP if longer

Country	Limitation Period (LP)* Against third party liable insurer or bureau or guarantee fund	Limitation Period (LP)* Against liable third party	Triggering Event for Start of LP Against third party liable insurer or bureau or guarantee fund	Triggering Event for Start of LP Against liable third party	Extension or Suspension of LP	Other limitation periods that may have an impact on LP
				termine prescrizione, gli impedimenti di mero fatto, quale l'ignoranza del danneggiato, e gli altri motivi attinenti alla sua sfera soggettiva Cassazione Civile Sent. n. 14576 del 22-06-2007	form the date at which the damage has occurred It In this respect are not to be taken into consideration the elements and the circumstances referred to the damaged subject, as well the not-knowledge of the damaged subject (Court of Cassation n.14576/2007)	
LT	One year term is applicable for the submission of the claim to directly to the insurer, not to the court	Must be deleted as 3 year term is applicable	4 year term is considered as the term for the obligation of the insurer to pay the compensation, not as the limitation period. It means that if the victim submitted the claim (directly to the insurer or to the court) after 4 year from the date of the accident, the insurer is not obliged to pay the	Only in respect of the insurer, not in respect of the liable party.	May be extended by the courts as they determine date of knowledge Consider deleting as the court only determine the date of knowledge but the date of knowledge is always the start of limitation period The LP is extended for minors and disabled	

Country	Limitation Period (LP)* Against third party liable insurer or bureau or guarantee fund	Limitation Period (LP)* Against liable third party	Triggering Event for Start of LP Against third party liable insurer or bureau or guarantee fund	Triggering Event for Start of LP Against liable third party	Extension or Suspension of LP	Other limitation periods that may have an impact on LP
			compensation. In such case damages can be claimed from the liable person.		people to such time as they can act or be represented by custodian Consider deleting as the subscription term is suspended only until the custody is appointed. E. g. minor having parents does not enjoy suspension of limitation period as his/her parents are considered as legitimate custodians.	
LU	5 years regarding the third party liable insurer. 6 months regarding the guarantee fund	30	Date of accident or date of knowledge.	Date of accident or date of knowledge	For minors runs from majority and for incapacitated until capacity	NONE
LV	10 - for non-mandatory 3 rd party liability insurance 3 - for personal injury in	10	Date of accident	Date of accident	For minors runs from majority and for incapacitated until capacity	

Country	Limitation Period (LP)* Against third party liable insurer or bureau or guarantee fund	Limitation Period (LP)* Against liable third party	Triggering Event for Start of LP Against third party liable insurer or bureau or guarantee fund	Triggering Event for Start of LP Against liable third party	Extension or Suspension of LP	Other limitation periods that may have an impact on LP
	case of mandatory 3 rd party liability insurance 1 - for property in case of mandatory 3 rd party liability insurance					
MT	2	2	Date of knowledge	Date of knowledge	May not be extended by the courts For minors runs from majority May be interrupted by the filing of a judicial act or the filing of legal action	If crime, LP extended to crime LP if longer
NL	3 years (direct action) according to article 10 Motor Insurance Liability Act	Varies from limitation period prescribed by law (Motor Insurance Liability Act + Civil Code	Date of accident (exception: occasionally date of knowledge for personal injuries, according to article 10 Motor Insurance Liability Act, paragraph 2)	Date of accident or date of knowledge for personal injuries but no later than 20 years after accident (according to Civil Code, Vol. 3, article 310, paragraph 1 and	For minors : according to Civil Code, Vol. 3, article 310, paragraph 5(personal injury): In case the victim is a minor at the time of the accident, the limitation period starts on the day that the victim	No, not for the damage caused by an traffic accident.

Country	Limitation Period (LP)* Against third party liable insurer or bureau or guarantee fund	Limitation Period (LP)* Against liable third party	Triggering Event for Start of LP Against third party liable insurer or bureau or guarantee fund	Triggering Event for Start of LP Against liable third party	Extension or Suspension of LP	Other limitation periods that may have an impact on LP
		Vol.3): from 3 or 10 years (article 10 M.I.L.A.) and 5 to 20 years (Civil Code Vol. 3, article 310, paragraph 1 and 5(personal injury))		5(personal injury))	becomes major of age, the date that the victim becomes 18 years old. For disabled : no specific rule	
PL	3	3	Date of knowledge but not more than 10 years after date of accident. This is true for the damages to property only. Concerning personal damages it cannot be shorter than 3 years but there is no maximum limit.	Date of knowledge has two elements: date of knowledge of the accident and date of knowledge of the person responsible for it	May be extended by the courts For minors LP is 2 years from majority	In case of a crime the limitation period is extended to 20 years from the date of the criminal offence. If action is joined then the civil law principles do not apply but (article 442-152). According to the criminal code it is then 15 to 20 years according to

Country	Limitation Period (LP)* Against third party liable insurer or bureau or guarantee fund	Limitation Period (LP)* Against liable third party	Triggering Event for Start of LP Against third party liable insurer or bureau or guarantee fund	Triggering Event for Start of LP Against liable third party	Extension or Suspension of LP	Other limitation periods that may have an impact on LP
						the gravity of the offence.
PT	3	3	Date of knowledge		The LP is extended for minors and disabled people to such time as they can act Courts may extend LP in specific circumstances	Criminal action prolongs LP by 2 years.
RO	3	3	Date of accident	Date of accident	Force majeure - restricted capacity of injured party until legal capacity	
SE	3	3	Date of knowledge but not more than 10 years after date of accident		Actual date of knowledge may be interpreted by the courts	
SI	3	3	Date of knowledge (when the victim learns about the damage and the person who caused the damage) but not more than 5 years after the damage occurred		Force majeure - restricted capacity of injured party For minors and disabled people LP is 2 years from appointment of legal guardian and acquiring of capacity	If the damage is caused by crime, the limitation period for compensation claims correspond to the limitation periods for criminal prosecution of the said crime.
SK	For property damages	For property	For property damages: date of	For property damages:	Extension:	

Country	Limitation Period (LP)* Against third party liable insurer or bureau or guarantee fund	Limitation Period (LP)* Against liable third party	Triggering Event for Start of LP Against third party liable insurer or bureau or guarantee fund	Triggering Event for Start of LP Against liable third party	Extension or Suspension of LP	Other limitation periods that may have an impact on LP
	and personal injury: 2 years after date of knowledge (subjective LP), however, for property damages, the maximum LP is 3 years after date of accident, or 10 years in case of deliberately caused damage (objective LP).	damages and personal injury: 2 years after date of knowledge (subjective LP), however, for property damages, the maximum LP is 3 years after date of accident, or 10 years in case of deliberately caused damage (objective LP).	knowledge but not more than 3 years after date of accident and 10 years in case of deliberately caused damage for personal injury: date of knowledge without time limitation as of date of accident	date of knowledge but not more than 3 years after date of accident and 10 years in case of deliberately caused damage; for personal injury: date of knowledge without time limitation as of date of accident	New LP of 10 years commences upon written acknowledgement by Debtor of the obligation, including its amount and legal reason. With respect to rights of or against persons who must have a statutory representative (e.g. minors or mentally disabled persons), LP shall not start and an already started LP shall not expire earlier than one year following the day when the statutory representative was appointed to them or after this impediment expired otherwise. Suspension: If the victim (i) files a	

Country	Limitation Period (LP)* Against third party liable insurer or bureau or guarantee fund	Limitation Period (LP)* Against liable third party	Triggering Event for Start of LP Against third party liable insurer or bureau or guarantee fund	Triggering Event for Start of LP Against liable third party	Extension or Suspension of LP	Other limitation periods that may have an impact on LP
					<p>claim before a court (or other competent authority) within the LP and (ii) duly proceeds further with the commenced proceedings, LP shall be suspended from the moment of the filing of the claim until the termination of the proceedings.</p> <p>With respect to rights between statutory representatives and minor children or other represented persons, LP shall neither start nor continue except in case of LP to claim either interest (accrued on receivables) or repeated performance.</p>	
UK	The action is against the liable third party and the	6 for property 3 for injury	Date of accident or Date of knowledge	Date of accident or Date of knowledge	Court can allow claim to proceed based on party's	

Country	Limitation Period (LP)* Against third party liable insurer or bureau or guarantee fund	Limitation Period (LP)* Against liable third party	Triggering Event for Start of LP Against third party liable insurer or bureau or guarantee fund	Triggering Event for Start of LP Against liable third party	Extension or Suspension of LP	Other limitation periods that may have an impact on LP
	insurance is then joined. 6 for property (5 in Scotland) 3 for injury ²⁷²				arguments For minors (under 18 years old) and disability (claimant cannot manage own affairs) LP is 3 years from acquiring of capacity	

²⁷² The UK Limitation Act 1980 does not apply to Scotland. For Scotland, specific rules apply based on the Scottish Limitation Act 1973. The Act sets out a time limit of three years from the date of the cause of action or date of knowledge to bring a personal injury claim for damages, and five years from the date on which the cause of action accrued for an action founded on tort other than for personal injury.

4.3 Interruption of limitation period: when is LP interrupted?

In some countries the limitation period will stop or be interrupted by an event; for example, the start of legal proceedings, which will interrupt the limitation period in all these countries. Other events also have an interrupting effect on the expiry of the time limit for making a claim. Notification by the Victim to an insurer that a claim is made may constitute such an event. The limitation period would then start again when the insurer has notified its decision to the Victim. This is the case in **Spain**, for example. Thus, as shown above even though the limitation period is extremely short in **Spain** (one year), the fact that a notification to the faulty party or their insurer interrupts it, may in effect mean that such a limitation period will be similar to that in other countries where no such interruption is permitted.

In some countries claims made out of court do not interrupt the limitation period. The limitation period continues to run even during negotiations with the insurer or the faulty party. The result of this is that the Victim, in order to avoid being time-barred, may have to file legal proceedings even if he or she is still negotiating with the insurer. This is why it is important to determine precisely what events have an effect on the limitation period. The table below presents the events that may interrupt the limitation period in the 27 Member States

	Filing of law suit	Notification by victim to victim's own insurer	Acknowledgment of receipt of victim's claim by victim's own insurer	Notification by victim's insurer to liable third party insurer	Notification by victim to liable third party insurer	Notification by victim's insurer to liable third party insurer	Notification by victim to liable third party	Notification by victim's insurer to liable third party	Acknowledgment of receipt of claim by liable third party insurer to victim	Acknowledgment of receipt of claim by liable third party to victim	Acknowledgment of receipt of claim by liable third party to victim's insurer
AT	X										
BE	X								X		
BG	X	X				X			X		
CY	X										
CZ	X										
DE	X			X						X ²⁷³	
DK	X									X	
EE	X									X	
EL	X				X		X				
ES	X								X	X	
FI	X						X				
FR	X	X									
HU	x				x						
IE	X										
IT	X	X (in case of direct			X						

²⁷³ The limitation period will be suspended when you make a claim but you are in correspondence with an insurer and when you don't know who is going to pay. The LP is interrupted if the liable party pays or accepts the liability.

	Filing of law suit	Notification by victim to victim's own insurer	Acknowledgment of receipt of victim's claim by victim's own insurer	Notification by victim's insurer to liable third party insurer	Notification by victim to liable third party insurer	Notification by victim's insurer to liable third party insurer	Notification by victim to liable third party	Notification by victim's insurer to liable third party	Acknowledgment of receipt of claim by liable third party insurer to victim	Acknowledgment of receipt of claim by liable third party to victim	Acknowledgment of receipt of claim by liable third party to victim's insurer
		compensation procedure)									
LT	X									X ²⁷⁴	
LU	X	X ²⁷⁵			X	X ²⁷⁶					
LV	X	X	X	X	X	X	X	X	X	X	X
MT	X										
NL	X				X		X				
PL	X										
PT	X										
RO	X								X		
SE	X										

²⁷⁴ Consider deleting as the limitation term is interrupted only in case the victim fills the claim to the court or the insurer or liable party acts in a way considered as acknowledgement of their obligation to the victim.

²⁷⁵ But only with respect to the claims the victim is entitled to make to his/her own insurer (no impact on limitation periods running with respect to the third party liable).

²⁷⁶ The law only provides that the limitation period is interrupted if the third party insurer is informed of the will of the victim to be compensated. The law does not specifically provide that the victim him/herself shall inform the insurer, as that the victim might use a proxy in order to lodge a claim to the third party liable insurer.

	Filing of law suit	Notification by victim to victim's own insurer	Acknowledgment of receipt of victim's claim by victim's own insurer	Notification by victim's insurer to liable third party insurer	Notification by victim to liable third party insurer	Notification by victim's insurer to liable third party insurer	Notification by victim to liable third party	Notification by victim's insurer to liable third party	Acknowledgment of receipt of claim by liable third party insurer to victim	Acknowledgment of receipt of claim by liable third party to victim	Acknowledgment of receipt of claim by liable third party to victim's insurer
SI	X										
SK	X										
UK	X										

4.4 Interruption of limitation period: is the content of the claim important?

In some cases the limitation period will be interrupted only if the claim contains certain wording. A mere notification of the existence of an accident may not be sufficient. The notification may need to contain specific wording identifying injuries and requesting compensation.

The table below only applies in cases where the limitation period is suspended or interrupted by an action that is different than legal proceedings as identified in the table under 2.6.

	Should the claim be in a specific format to be considered valid for purposes of interrupting the limitation period?
AT	
BE	
BG	Cannot answer for now
CY	
CZ	The claim must be the same as for any law suits
DE	Does not matter (again not interrupting but suspending)
DK	The Defendant must acknowledge the claim for the period to be interrupted
EE	
EL	Under Greek Code of Civil Procedure the document of a suit must have some specific elements in order to be typically accepted which is the prerequisite of the further examination of the case. If the suit is rejected for typical reasons the limitation period is deemed that never before had been interrupted. Section 263 GCC. A term of prescription which was interrupted by the commencement of legal action shall be deemed not interrupted if the claimant desisted from the legal action or if the legal action was rejected by a final decision on grounds unconnected with the merits.
ES	A precise amount is claimed based on medical report that indicates number of days and points
FI	
FR	Article 2244 of the Civil Code

	Should the claim be in a specific format to be considered valid for purposes of interrupting the limitation period?
HU	The period of limitation is only suspended by a written notice for performance.
IE	The Personal Injuries Assessment Board must acknowledge a victim's application as received and complete in order for the suspension of the time period for initiating court proceedings to be activated while the Board assess the victim's claim.
IT	The claim has to include the asking for damages
LT	Only formal requirements indicated in the Code of Civil Procedure must be followed, no special wording is required
LU	Regarding claims to lodge against the third party liable insurer, there is no specific format to comply with, but the will of the victim to be granted compensation shall be clear.
LV	no formalities for notification are required
MT	The limitation period may be interrupted by the filing in the court registry a judicial act claiming compensation for damages sustained from the accident for which the liable party is at fault, which judicial act must be served on the liable party or the liable insurer.
NL	A mere notification of the existence of an accident is not sufficient. The victim should in no uncertain terms reserve his right to claim damages.
PL	
PT	
RO	
SE	
SI	
SK	The Debtor must acknowledge the right including its title and amount in writing for the LP to be interrupted and for a new LP of 10 years to start (please note that in case the liable policy holder undertakes to pay a statute-barred receivable, the third party liability insurer may refuse to pay the compensation to the victim in full or partially)
UK	

4.5 Effect of interruption of the limitation period

The table below only applies in cases where the limitation period is suspended or interrupted by an action that is different than legal proceedings as identified in the table under 2.6.

In **Ireland**, time starts to run six months after the date that the Personal Injuries Assessment Board authorises the victim to initiate court proceedings.

	What starts the limitation period running again?*				How is new limitation period calculated when it starts running again?	
	Notification of decision by liable third party insurer to victim	Notification of decision by liable third party to victim	Acknowledgment of receipt by victim of decision of liable third party insurer	Acknowledgment of receipt by victim of decision by liable third party	Prorata temporis taking into account what was left when interrupted	A whole new limitation period
AT						New LP
BE	X					New 5 year LP
BG						New 5 year LP
CY						
CZ						
DE					X and at least 3 months	New 3 year LP
DK						New 5 year LP
EE						X
EL	X	X				New 5 year LP
ES			X			New 1 year LP
FI						
FR						
HU	x					x

	What starts the limitation period running again?*				How is new limitation period calculated when it starts running again?	
	Notification of decision by liable third party insurer to victim	Notification of decision by liable third party to victim	Acknowledgment of receipt by victim of decision of liable third party insurer	Acknowledgment of receipt by victim of decision by liable third party	Prorata temporis taking into account what was left when interrupted	A whole new limitation period
IE					What was left at the time that the victim's application was initiated with the Personal Injuries Assessment Board plus six months from the date that the Board authorises the victim to take court proceedings	
IT						X (following to the interruption of LP starts a new LP

	What starts the limitation period running again?*				How is new limitation period calculated when it starts running again?	
	Notification of decision by liable third party insurer to victim	Notification of decision by liable third party to victim	Acknowledgment of receipt by victim of decision of liable third party insurer	Acknowledgment of receipt by victim of decision by liable third party	Prorata temporis taking into account what was left when interrupted	A whole new limitation period
						period)
LT					X	
LU	X					New 5 year LP
LV	X	X	X	X		New LP
MT			X			
NL	X(direct action)	X(civil code action)				New 3 or 5 year LP
PL						
PT						
RO						New 3 year LP
SE						
SI						
SK						
UK ²⁷⁷			X			

*This should only be answered if interruption of the limitation period is possible in cases other than the filing of a lawsuit as under Table.

4.6 Rules that may shorten limitation periods or end the right to make a claim

Often there are rules about reporting an accident either to the police, the liable party's insurer or to the Victim's insurer. These rules may have an effect on the time limit to

²⁷⁷ Not applicable

make a claim or on the right to make a claim or on the level of damages that the victims may be entitled to.

For **Slovenia**, statutory limitation periods are mandatory and may not be changed. The above provided situations do not change limitation periods.

	How many days does the victim have to report an accident to the police?	Consequence of failure to report to the police	How many days does the victim have to report an accident to the faulty party's insurer (or guarantee fund if applicable)	Consequence of failure to report to the faulty party's insurer within delay (or guarantee fund if applicable)
AT				
BE				
BG	<p>Immediately from the beginning of 2008, the victims do not have to report to the police for small accidents (report only compulsory when there are injuries) before, for every accident the driver was supposed to report to the police.</p> <p>The driver's cover is not compulsory in Bulgaria</p>	A refuse an indemnity payment	<p>Every insurer has different requirements between 24 hours and 7 days</p> <p>7 day period of coming of knowledge of occurrence of an insured event;</p> <p>Term under the contract may not be shorter than 3 days as of coming into knowledge.</p> <p>may not be shorter than 24 hours as of coming into knowledge in case of theft or robbery ;</p>	<p>Some insurers will not pay the claims if reported late</p> <p>have the right to <i>refuse payment</i> in the case of:</p> <ul style="list-style-type: none"> - <i>Hinder</i> the insurer in <i>establishing the circumstances</i>, under which the event has occurred ; - <i>Impossible</i> for the insurer to <i>establish the said circumstances</i>.
CY				
CZ	No specific time. It has	No	It has to be within	

	How many days does the victim have to report an accident to the police?	Consequence of failure to report to the police	How many days does the victim have to report an accident to the faulty party's insurer (or guarantee fund if applicable)	Consequence of failure to report to the faulty party's insurer within delay (or guarantee fund if applicable)
	to be within "reasonable limits"	consequence unless the victim needs to prove something	"reasonable limits" (if reported late it is impossible to prove)	
DE	No limit	No consequence unless one is beyond the LP. If one thinks the accident was caused intentionally, one has three months to report it to the police if you want the person responsible to be punished	No limit within the limitation period	
DK				
EE	-	-	At the earliest opportunity	-
EL	It is not provided by the law time-limit. In general Greek authorities must be informed as soon as it is possible.		It is not provided by the law time-limit. Under the principle of good faith the victim should not retard to report the accident.	

	How many days does the victim have to report an accident to the police?	Consequence of failure to report to the police	How many days does the victim have to report an accident to the faulty party's insurer (or guarantee fund if applicable)	Consequence of failure to report to the faulty party's insurer within delay (or guarantee fund if applicable)
ES			Les assurés des véhicules accidents doivent respectivement informer leurs compagnies d'assurance (délai : 7 jours) Le fond de garantie sera informé à la réception de la demande présentée par la victime voie civile (1 an) ou voie pénale (6 mois).	Insurance Company doesn't have to compensate the victim.
FI				
FR	It is not provided by the law and there is no binding time-limit. in general Police authorities must be informed as soon as it is possible. Usually the Police authorities is always present in case of bodily injuries.	None Subject to the Police authority's report helps to prove the liability of the tortfeasor, or the victim, or the two of them	Not applicable because this is the victim's insurer's duty. In the event of guarantee fund: 6 weeks as of the date of the accident.	Late notification to the guarantee fund, no possible claims.
HU			30 days	In the case of late notification - except where the injured party can prove that missing

	How many days does the victim have to report an accident to the police?	Consequence of failure to report to the police	How many days does the victim have to report an accident to the faulty party's insurer (or guarantee fund if applicable)	Consequence of failure to report to the faulty party's insurer within delay (or guarantee fund if applicable)
				the deadline was caused by factors beyond its control - the legal consequences of late performance shall not be applied to the insurer, the Claim Settlement Agent, the Guarantee Fund and the National Bureau.
IE	If the victim is making a claim against the Motor Insurance Bureau of Ireland (MIBI) the victim must report the accident to the Police within 2 days or as soon as they reasonably can. Not necessary to inform police if claim made against insurance.	Notification to the police is a condition precedent to the MIBI's liability.	Dependent on contract of insurance. In respect of a claim against the MIBI the Bureau must be informed of a claim for personal or fatal injuries within the limitation period for initiating such claim and in respect of property damage within one year.	May relieve insurer of liability if notification is deemed to be a condition precedent to the insurer's liability however will be a matter of construction of contract.
IT			LP period	Right Prescription
LT	Reasonable term	Compensation shall not be paid except for cases when laws do not	3 working days but the insurer or the Bureau shall pay compensation if the claim is presented	Compensation shall not be paid

	How many days does the victim have to report an accident to the police?	Consequence of failure to report to the police	How many days does the victim have to report an accident to the faulty party's insurer (or guarantee fund if applicable)	Consequence of failure to report to the faulty party's insurer within delay (or guarantee fund if applicable)
		require to inform the police	within one year from the date of knowledge but not later than within 4 years from the date of the road accident concerned	
LU	The victims do not have to make any report to the police	None	5 years with respect to the faulty party's insurer 6 months with respect to the guarantee fund	The victim is not entitled to claim anymore.
LV	same day - for the drivers involved in accident it is forbidden to leave the place of accident without reporting to the police in case of (1) personal injury, or (2) damage to 3 rd party property, or (3) car inability to drive, or (4) three and more drivers are involved, or (5) two drivers and unable to agree on the circumstances of accident	in case the reporting to the police was mandatory, the insurer is not obligated to provide compensation to the victim, who acted in gross negligence	as soon as possible	the compensation might be not provided

	How many days does the victim have to report an accident to the police?	Consequence of failure to report to the police	How many days does the victim have to report an accident to the faulty party's insurer (or guarantee fund if applicable)	Consequence of failure to report to the faulty party's insurer within delay (or guarantee fund if applicable)
MT	There is no time-limit to report the accident to the police.		2 years. But if action is undertaken against the liable party, the insurer would not be bound to satisfy a judgment against the liable party unless before or within seven days after the conclusion of the evidence of the plaintiff in the proceedings in which the judgment was given, the authorized insurer had notice of the bringing of the proceedings by means of a judicial act	
NL	No limit	no consequences	As long as the LP is running	After LP, you cannot claim
PL	If small damage to property: no obligation to contact the police If personal damage: police should be contacted immediately	If small damage to property: harder to prove because the car	It is the legal amount that has to be applied because you are not contractually linked with the faulty	Prescription of the action

	How many days does the victim have to report an accident to the police?	Consequence of failure to report to the police	How many days does the victim have to report an accident to the faulty party's insurer (or guarantee fund if applicable)	Consequence of failure to report to the faulty party's insurer within delay (or guarantee fund if applicable)
	(art 16 of act on compulsory insurances	accident claim is non official information so it will be easier to contest for insurance companies and art. 17 of the same act states that the consequences of the non respect of art. 16 are that the insurance companies can ask for the repayment of a party of compensation price.	party insurer. So it is three years.	
PT				
RO				
SE				
SI				
SK	Participant of an accident is obliged to notify the accident to police officer without any delay in case when (i) damage to	The insurer is entitled to receive full or partial reimbursement	Reporting obligation towards insurer relates to insured person, not victim and shall be fulfilled	The insurer is entitled to receive full or partial reimbursement of the paid insurance benefits from the insured in

	How many days does the victim have to report an accident to the police?	Consequence of failure to report to the police	How many days does the victim have to report an accident to the faulty party's insurer (or guarantee fund if applicable)	Consequence of failure to report to the faulty party's insurer within delay (or guarantee fund if applicable)
	<p>property exceeds ten multiples of the minimum wage in the Slovak Republic (currently EUR 2,688) or</p> <p>(ii) personal injury occurred or (iii) public propriety has been damaged.</p>	<p>of the paid insurance benefits from the insured in case the insured breached his/her obligation to notify the accident - being an insured event, to police officer.</p>	<p>in writing within 15 days after the accident or 30 days in case when the accident occurred beyond the territory of the Slovak Republic.</p>	<p>case the insured breached his/her reporting obligation without reasons worth special respect.</p>
UK	<p>no time limit for uninsured vehicles; however the Untraced Drivers' Agreement 2003 which includes compensation for property damage resulting from accidents occurring on or after 14 February 2003 requires the following steps before making a claim:</p> <p>* Make a formal report of the incident to the</p>			

	How many days does the victim have to report an accident to the police?	Consequence of failure to report to the police	How many days does the victim have to report an accident to the faulty party's insurer (or guarantee fund if applicable)	Consequence of failure to report to the faulty party's insurer within delay (or guarantee fund if applicable)
	Police; The Agreement requires this within 14 days of the accident occurring or for damage to property within 5 days. Thereafter there is a 3 years limitation period for injury claims and 9 months for property.			

4.7 Limitation Periods on the right of the victim to claim from their own insurance company in case of the need to obtain compensation for damages not covered or compensation by third party

In the Netherlands, the damage will be compensated according to what parties have agreed on. The compensation results from negotiations of both parties (the victim and the liable party or its insurer). Also future damage is taken into account. Parties lay down the total amount of damage (occurred and for the future (bad and good chances/opportunities/possibilities) in a final agreement, which will be signed by both of them. The agreement is final and therefore parties cannot claim for damage that occurs after the final agreement is signed.

4.7.1 Limitation periods

	Limitation Period (LP)* Against victim's own insurance	Triggering Event for Start of LP Against victim's own insurance	Extension or Suspension of LP	Other limitation periods that may have an impact on LP
AT	3			
BE	3			
BG	5 For some insurers it can be a shorter time	Date of accident	No	No
CY				
CZ	1+3	Date of accident	Start of legal proceedings would stop LP	
DE	3	With your insurance contract normally you have one week to report an accident to your insurer but when you write to your insurer you suspend the LP. For example if the insurer denies the claim you start legal proceedings against your own insurer suspends the LP.		
DK	(5 years contract law)			
EE	3 years	accident		Within year after the Insurance company has refused to compensate the damage
EL	4 years contract law	accident		8 days from the day of accident
ES	6 months in front of	Accident	Same answer than the preceding	Victim has 7 days to

	Limitation Period (LP)* Against victim's own insurance	Triggering Event for Start of LP Against victim's own insurance	Extension or Suspension of LP	Other limitation periods that may have an impact on LP
	criminal court and 1 year in front of civil court		one.	notify the accident to her own insurance.
FI				
FR	2 years contract law	accident	The suspension of LP only in case of circumstances where it is impossible for the victim to take any action. (Cass.civ II 12 july 2007,06-20548; RC et Ass 2007, Com n° 293) Article 2252 of the Civil Code : for minors and disabled persons	The Victim has 5 days after the event to notify the accident to her own insurance
HU	5 years. Parties are entitled to agree on a shorter period of limitation; the agreement is valid only in writing. If the period of limitation is shorter than one year, the parties shall be entitled to extend it to a maximum of one year in writing; otherwise, an agreement on the extension of a period of limitation is null and void.	accident	See the general rules on limitation periods.	It depends on the insurance contract. The Insurer usually needs to be notified within some days after the accident.
IE				
IT	1 year	accident		Insurer needs to be notified 3 days after event
LT	1 year			

	Limitation Period (LP)* Against victim's own insurance	Triggering Event for Start of LP Against victim's own insurance	Extension or Suspension of LP	Other limitation periods that may have an impact on LP
LU	3 years	Date of accident unless the victim has knowledge at a later date (cannot go over five years)	Case of "force majeure" but otherwise no provision	no
LV	10 life insurance 3 any other insurance except life insurance	accident		as provided by the insurance contract; the general rule - the insurance event shall be notified by the victim to the insurer as soon as possible
MT	5 years in contract law	Date of knowledge	The limitation period is interrupted by the filing of a judicial act against the insurance company and suspended by the filing of legal proceedings	
NL	Not applicable	n.a.	n.a.	n.a.
PL	3 years	accident	Action in court or mediation	Limit of days in which you have to notify the accident to the insurer but this limit depends of the insurer (approximately 3 days)
PT				
RO	2 years			
SE	10 for action in contract			

	Limitation Period (LP)* Against victim's own insurance	Triggering Event for Start of LP Against victim's own insurance	Extension or Suspension of LP	Other limitation periods that may have an impact on LP
SI	5 years for life insurance (objective term 10 years), 3 years for other insurance contracts (objective term 5 years).	First day of the year posterior to the year in which the insured risk occurred or when the insured person learned about the occurrence of the insured risk.	Filing of claim.	
SK	3	LP starts 1 year after the insured event, i.e. after the obligation of the insurer to pay the damages arises. In case the court rules on the claim for damages, the insured event corresponds to the day, when the decision imposing the obligation of the insurer to pay the damages became final and binding.	<p>Extension:</p> <p>New LP of 10 years commences upon written acknowledgement by Debtor of the obligation, including its amount and legal reason.</p> <p>With respect to rights of or against persons who must have a statutory representative (e.g. minors or mentally disabled persons), LP shall not start and an already started LP shall not expire earlier than one year following the day when the statutory representative was appointed to them or after this impediment expired otherwise.</p> <p>Suspension:</p> <p>If the victim (i) files a claim before a court (or other competent authority) within the LP and (ii) duly proceeds further with the commenced proceedings, LP shall be suspended from the moment of the filing of the claim until the</p>	

	Limitation Period (LP)* Against victim's own insurance	Triggering Event for Start of LP Against victim's own insurance	Extension or Suspension of LP	Other limitation periods that may have an impact on LP
			termination of the proceedings.	
UK	6 years contract law			

4.7.2 Interruption of limitation period: when is LP interrupted?

	Notification by victim to victim's own insurer	Acknowledgment of receipt of victim's claim by victim's own insurer	Should the claim be in a specific format to be considered valid for purposes of interrupting the limitation period?	Filing for legal proceedings
AT				
BE				
BG	X			X
CY				
CZ				X
DE	X (suspension)			X (suspension)
DK				
EE				X
EL	X			X
ES	X			X
FI				
FR	X			X
HU				x
IE			In respect of suspending the period for an application to the Personal Injuries Assessment Board the application must be in the format as required by the Board.	
IT	X		Registered letter	X
LT				X
LU	X		NO	X
LV	X	X	no specific format required	X
MT			X - in the form of a judicial act	X

	Notification by victim to victim's own insurer	Acknowledgment of receipt of victim's claim by victim's own insurer	Should the claim be in a specific format to be considered valid for purposes of interrupting the limitation period?	Filing for legal proceedings
NL	n.a.	n.a.	n.a.	n.a.
PL	No	No	No	yes
PT				
RO				
SE				
SI				X
SK			For the LP to be interrupted and for a new LP of 10 years to start, the Debtor must acknowledge the right including its legal reason and amount in writing.	X
UK				

4.8 Effect of interruption of the limitation period

	What starts the limitation period running again?		How is new limitation period calculated when it starts running again?	
	Notification of decision by victim's insurer to victim	Acknowledgment of receipt by victim of decision of victim's insurer	Prorata temporis taking into account what was left when interrupted	A whole new limitation period
AT				
BE				
BG		X		X
CY				
CZ	no	no	no	no
DE				
DK				
EE				
EL	X			X
ES	X			X
FI				
FR		X		X

	What starts the limitation period running again?		How is new limitation period calculated when it starts running again?	
	Notification of decision by victim's insurer to victim	Acknowledgment of receipt by victim of decision of victim's insurer	Prorata temporis taking into account what was left when interrupted	A whole new limitation period
HU				
IE			What was left at the time that the victim's application was initiated with the Personal Injuries Assessment Board plus six months from the date that the Board authorises the victim to take court proceedings.	
IT				
LT	X			X
LU	X			New LP three years
LV	X	X		New LP
MT				
NL	n.a.	n.a.	n.a.	n.a.
PL	no	no	no	yes
PT				
RO				
SE				
SI				
SK				
UK				

4.9 Limitation periods for contracts

Country	Primary Limitation Period
AT	3 years (same as for tort)
BE	10 years

Country	Primary Limitation Period
CZ	3 years
DK	5 years
EE	3 years
EL	5 years
ES	15 years
FI	10 years
FR	30 years
GE	10 years
HU	5 years
IE	3 years (same as for tort)
IT	10 years
LT	10 years
LU	30 years
LV	10 years
NL	5 years
PL	10 years
PT	20 years
SE	10 years
SK	3 years
UK	3 years (same as for tort)

4.10 The effect of limitation periods in criminal cases on limitation periods in civil liability cases

In most countries, limitation periods differ depending either on the degree of offence or on the length of sentence that can be imposed. This is the case in France, where the case is joined to a criminal procedure, the limitation period follows that related to the crime²⁷⁸. This period is 3 years in case of minor criminal offence²⁷⁹ and 10 years in case of a serious crime²⁸⁰.

²⁷⁸ Article 10 of the criminal proceedings code (introduced by the law n°2008/561 of June 17,2008)

²⁷⁹ ARTICLE 8 of the criminal proceedings code (introduced by the law n°2008/561 of June 17,2008)

²⁸⁰ ARTICLE 7 of the criminal proceedings code (introduced by the law n°2008/561 of June 17,2008)

4.11 Conflict of laws rules in respect of limitation periods

Generally speaking, Member States adopt a substantive/*lex causae* approach to limitation periods under which the limitation law is the same as the law that governs the claim more generally. *Lex causae* refers to the law governing the substance of the case, designated by the rules in conflict of laws²⁸¹. In **Cyprus** or the **Czech Republic**, for instance, the limitation period is the one provided by the laws of the country in which the action is filed²⁸².

In **Malta**, limitation periods are considered procedural so Maltese limitation periods will apply to claims heard in **Malta** regardless of the *lex causae*. This principle is also applied in **Bulgaria**.

In **Latvia**, there is no particular conflict of law rule applicable to limitation periods. In cases of liability of a person for a car accident, the principle *lex loci delicti commissi* is applicable. The limitation period will be that of the location of the accident.

In **Finland and Portugal** the *lex loci delicti* is also applied.

Some Member States provide for the application of the Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents²⁸³. The applicable law is the internal law of the State where the accident occurred (article 3). Article 8 provides that the applicable law shall also determine rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation, and the interruption and suspension of this period.

4.12 Evaluation of the number of claims that fail because of the limitation periods

Most national reports cited the difficulties associated with attempts to obtain this data.

²⁸¹ Glossary, European Judicial Network, http://ec.europa.eu/civiljustice/glossary/glossary_en.htm

²⁸² Depending on which country's law is the substantive law of the dispute, this could be an example of either a *lex causae* or *lex fori* approach to limitation periods.

²⁸³ See at http://www.hcch.net/index_en.php?act=conventions.text&cid=81

For most jurisdictions, the national report stated that the number of claims was likely to be low. Reasons stated in support of this presumption include the length of the limitation period and the fact that, in some countries, it runs from the victim's date of knowledge of the damage.

Further, in some countries, courts have some discretion to hear a claim in the interest of justice even if the limitation periods have expired

4.13 Conclusions and recommendations

Various recommendations are made in the individual national reports with respect to limitation periods in compensating the victims of cross-border accidents.

Most national reports call for a Europe-wide harmonization of limitation periods to reduce uncertainty and disparities between Member States. They call for the introduction of European regulation on limitation periods (e.g. a Directive) that would provide for an harmonized minimum period, with rules on possible extensions and suspension of limitation periods in specific circumstances. According to the **Lithuanian** national report, this would relieve the victim of additional costs such as travel, translation and others. On the other hand, this would increase the price of insurance (a 10 to 30% increase according to the **Polish** national report).

Several national reports also recommend making information on limitation periods easily available and accessible. They call for better and more accessible information. Others highlight the fact that regulations on limitation periods are complicated and cannot be understood by everybody. This is confirmed by the present Report. Because of the fact that the procedures that apply to limitation periods are so complex, some national reports (e.g. **Finland**) do not see any benefits in improving information offered to European citizens.

Most national reports call for the creation of an agreement between insurers with a view to harmonizing the time scale within which a claim should be presented to a foreign liability insurer, or to a claims representative in the victim's country of residence. However, this solution might create tensions between the public and private sectors; such an agreement would not always prove compatible with the public order in each Member State. However, a direct claims settlement system under the supervision of a public body

and managed by an independent “clearing house” could be an efficient tool for the Victims and the insurers.

Some national reports such as the **Belgian, Bulgarian, Danish, Swedish, Spanish and Portuguese** reports, call for the application of the limitation periods of the Visiting Victim’s place of residence. This would improve protection of the victim. However, that would mean that courts would need to know the limitation periods applicable in other countries, which is not the case today.

The **Lithuanian and Finnish** reports call for the introduction of a generally applicable minimum limitation period for cross-border motor insurance claims.

A degree of harmonization of European limitation periods was recommended by most country experts. It seems that some form of harmonization at the European level is the only way of ensuring a degree of simplicity in the rules defining limitation periods.

Other recommendations are:

- the obligation on a victim’s insurer to inform the injured party on limitation periods, in default of which the insurer will be held responsible for expiry;
- the creation of a suspension rule that suspends limitation periods as soon as a victim has sent a claim by letter with acknowledgement of receipt , either to the third party, to the liable party’s insurance company, to the victim’s insurance company or to a guarantee fund. The limitation period would be suspended until the other side has either declined the claim or made an offer. If the other side declines the claim on the basis that it is not the appropriate organization to make a claim to, the limitation period will be suspended again when the victim makes its claim to the correct organization. The advantage of the suspension is that, as we have seen (e.g. **Spain**), a limitation may appear very short on the surface, but be in fact as lengthy as other Member States’ limitation periods because of the ability to suspend it indefinitely.
- the creation of a suspension rule to address the problems of minors and the disabled.

Some of these solutions are different to the solutions as proposed in the *Draft Report with recommendations to the Commission on limitation periods in cross-border disputes*

*involving injuries and fatal accidents (2006/2014(INI))*²⁸⁴ presented by Diana Wallis, and should also be evaluated.

5 Assessment of solutions

A number of solutions to the problems highlighted herein have been identified following interviews conducted and as provided in the different country reports.

5.1 Introduction

A number of solutions are identified above to resolve issues related both to access to compensation and levels of compensation. These solutions include all but one of the five solutions assessed in a comprehensive and thorough study conducted in 2007 by Andrea Renda and Lorna Schrefler of the Centre for European Policy Studies and requested by The European Parliament's Committee on Legal Affairs²⁸⁵. The solution that was not identified as a result of the analysis of the issues that arise in cross-border road traffic accident is that which proposes the application by the courts of the “principle of ubiquity”. The experts would not have proposed this as a solution because traditionally the principle distinguishes between the location of the accident, the cause of the injury, and the actual injury or damage. In a road traffic accident, especially those that involve severe injuries, the location of the cause of the injury and the actual damage or injury are technically the same. Whether the extent of the damage is assessed somewhere else is another issue. Truly, some injuries may develop over time and some damage such as bereavement may be located in another country. But these are most often secondary to the main injury and rarely even recognized unless there is a primary physical injury²⁸⁶. Similarly, property

²⁸⁴ *Draft Report with recommendations to the Commission on limitation periods in cross-border disputes involving injuries and fatal accidents (2006/2014(INI))*, presented by Diana Wallis, Committee on Legal Affairs available online at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-367.972+03+DOC+PDF+V0//EN&language=EN>

²⁸⁵ *Full Compensation Of Victims Of Cross-Border Road Traffic Accidents In The Eu: The Economic Impact Of Selected Options*, Andrea Renda and Lorna Schrefler, Centre for European Policy Studies, Brussels, study requested by The European Parliament's Committee on Legal Affairs, 2007,

²⁸⁶ See for example from a conceptual perspective CJCE Case C-220/88 Dumez France and Tracoba [1990] ECR I-49.

damage will occur on location. In effect, it is a solution that would only spring to mind by quite a stretch²⁸⁷. However, because this solution was proposed under the 2007 study, it was decided to assess it also assuming that in this context the principle of ubiquity refers to the assertion of jurisdiction by a court based on the location of the accident or the location of effects of the accident for the victim.

5.2 Presentation of the proposed solutions

Amongst the proposed solutions some would generally deal with both the issues on limitation periods and levels of compensation (“General Solutions”).

5.2.1 The General Solutions are as follows:

- S1 - Do nothing (at the EU level);
- S2 - Apply the *Lex damni* or law of habitual residence of the Victim for assessing the quantum;
- S3 - Provide better information for people in cross-border situations or for European citizens who wish to travel to other Member States;
- S4 - Harmonise of traffic accident legislation based on existing EU regulations in other areas (e.g. products liability);
- S5 - Apply the principle of ubiquity or right by the Victim to choose;
- S6 - Apply the principle of *forum conveniens* (right given to judge to determine better forum based on set criteria);
- S7 - Provide coverage through first party insurance instead of third party, meaning that the applicable law would be the proper law of contract rather than that pertaining to accidents;
- S8 - Create a new European tribunal which would follow a set of EU rules on limitation periods, disputed claims and compensation;

5.2.2 Solutions tailored to issues pertaining to limitation periods (“Limitation Periods Solutions”)

- S9 - Apply the limitation periods of the Visiting Victim’s place of residence;
- S10 - Make it compulsory for insurers to inform victims on the limitation periods and related procedures, failing which they might be held responsible in case of expiry

²⁸⁷ See for example from a conceptual perspective CJCE Case C-168/02 Kronhofer [2004] ECR I-0000.

or the loss of a chance;

- S11 - Increase the limitation period for Visiting Victims to take into account the fact that they will have to organize their action from their country of residence;
- S12 - Create a suspension rule that suspends the limitation periods as soon as the victim has sent a claim by registered letter with acknowledgement of receipt either to the third party, to the liable party's insurance company, to the victim's insurance company or to a guarantee fund. The limitation period would be suspended until the other side has either declined the claim or made an offer. If the other side declines the claim on the basis that it is not the appropriate organization to make a claim to, the limitation period will be suspended again when the victim makes its claim to the correct organization. The advantage of the suspension is that, as we have seen (e.g. in Spain), a limitation period may appear very short but in fact because of a number of stipulated procedures be rather long, and vice versa;
- S13 - Create a suspension or starting date rule to address the problems of minors and the disabled.
- S14 - Provide better information on limitation periods for people in cross-border situations or for European citizens who wish to travel to other Member States (for example a brochure that would explain the differences between limitation periods that could be provided by insurers)
- S15 - Create an agreement between insurers, with a view to harmonizing the time scale within which the claim must be presented to a foreign liability insurer or its claims representative in the country where the victim resides.
- S16 - Introduce a generally applicable minimum limitation period for cross-border motor insurance claims.
- S17 - Introduce a general European regulation on limitation periods that would provide for a harmonized minimum period, with rules on possible extensions.

5.2.3 Solutions tailored to issues pertaining to levels of compensation ("Compensation Solutions")

- S18 - Apply the principle of *lex damni* for assessing the quantum²⁸⁸;

²⁸⁸ *Full Compensation Of Victims Of Cross-Border Road Traffic Accidents In The Eu: The Economic Impact Of Selected Options*, Andrea Renda and Lorna Schrefler, Centre for European Policy Studies, Brussels, study requested by The European Parliament's Committee on Legal Affairs, 2007, p60.

- S19 - Provide a common framework of reference for the assessment of damages on which judges can rely²⁸⁹;
- S20 - Provide coverage through the third-party liability insurance of the victim;
- S21 - Create a European compensation fund for victims of cross-border road traffic accidents²⁹⁰;
- S22 - Create European guidelines that would provide a list of recognized losses;
- S23 - Harmonize types of recognised losses and injuries levels; tables that serve as guidelines for the assessment of injuries could be generalised, categorised, standardised and translated into all European languages so that when faced with a cross-border case, judges can apply the specifics of the Visiting Victim's home country (local life expectancy, retirement age, employment perspectives, rate of return on investments and so on) but using tables that are based on the same parameters. These would serve as guidelines and leave judges enough discretion to make a decision on the circumstances of the case;
- S24 - Create European guidelines for the calculation of interest rates or discount rates in relation to awards;
- S25 - Create guidelines for the assessment of injuries that could be generalised, categorized, standardized and translated into all European languages so that when faced with a cross-border case, judges can apply the specifics of the Visiting Victim's home country (local life expectancy, retirement age, employment perspectives, rate of return on investments and so on) but using tables that are based on the same parameters. These would serve as guidelines and leave judges enough discretion to make a decision on the circumstances of the case.
- S26 - Create European guidelines for the calculation of aged-car value.
- S27 - Create a common framework of reference for types of losses, interest rates and discount rate to be applied to awards²⁹¹

²⁸⁹ *Id*, p60.

²⁹⁰ *Id*, p60.

²⁹¹ One can imagine that given the level of precision in some statistical tools today, it could be possible to create either national tables that would take into account the same parameters for all Member States, or a European table presented in the form of software that could be made available to courts and insurers, and facilitate consideration of the specific circumstances of the victim. Because the tables are based mainly on numbers, language would not be an issue and a judge in France would be able to input the main information on the victim and obtain a multiplier that relates to the life expectancy of the victim in his or her country, or the inflation level in the victim's country of residence.

- S28 - Enable Visiting Victims to claim directly from their insurer (as is the case for Comprehensive and Third Party with extra guarantees);
- S29 - Provide information to judges, so that they have accurate information in their own language about compensation levels, practices and expectations in other countries, and are more able and likely to take into consideration many aspects of the Visiting Victim's situation at home;
- S30 - Enable Visiting Victims to claim from their own third party insurer, if within 30 days of sending a request or claim to a guarantee fund or the third party's insurance they have not received a reply;
- S31 - Enable Visiting Victims to file a suit in their own country, if within 30 days of sending a request or claim to a guarantee fund or the third party's insurance they have not received a reply;
- S32 - Impose on Visiting Victims' insurer an obligation to provide information and assistance on how to proceed with a claim against a third party abroad;
- S33 - Provide information for people in a cross-border situation or for European citizens who wish to travel to other Member States, such as a brochure that would explain differences in damage awards between countries and the possibilities or options that exist to reduce or eliminate the risks of under compensation;
- S34 - Make driver's insurance compulsory in all Member States, with a potential time-limit (90 days in **France** and **England**) to visit another Member State which would be agreed at the European level and of which insurers would be informed;
- S35 - Extend direct settlement insurance claims as applied in **France, Italy, Germany**, to cross-border claims;
- S36 - Apply the principle *restitutio in integrum* so that under-compensation is avoided;
- S37 - Create a European body to give recommendations on the average sums of compensation for personal injury/damage to property (such as the Road Traffic Accident Damage Board "Liikennevahinkolautakunta" in **Finland**), to harmonize European compensation rules and to centralize the information on these rules.
- S38 - Create a single market in insurance distribution²⁹² to unify insurance products;
- S39 - Create a minimum award per type of injury table at the EU level (similar to Convention IDA in **France**);
- S40 - Create a European Court for compensation issues only.

²⁹² An internal market strategy for services, Communication by the European Commission, CEA Note, June 2001, p6

5.3 The goals pursued by each solution

Many issues have come to light during the course of this Study and the different solutions proposed reflect these issues.

The proposed solutions generally pursue the goals of ensuring that compensation is available for Visiting Victims (e.g. by avoiding the expiration of limitation periods) and that such compensation is appropriate (i.e. avoiding over or under compensation). Some solutions may address one goal and not the other. Other solutions may pursue both goals but to a limited extent with some degree of risk of inappropriate compensation remaining. There are also solutions that seek to provide a complete answer to the issues at hand. But the impact of these may be disproportionate in relation to the goal to be attained.

The table below provides a preliminary analysis of the goal of each solution. It does not describe positive or negative aspects of a solution or costs and benefits. It merely tries to identify the basic goal of each solution based on the issues from which it derives. It is important to identify the goal pursued in proposing a solution in order to evaluate the solutions, relevancy, appropriateness and potential efficiency. Further, defining the goal of each solution enables us to determine, given a general problem to resolve, whether a global solution is more appropriate or whether a series of small corrective measures might attain the same goals but cost less or cause less legal, social, economic and cultural disruption in Member States. This analysis is essential to the performance of prospective impact assessments of solutions.

GOAL / SOLUTION	Restitutio in integrum in Victim's country of residence	Rehabilitation*	Limiting the risk of under compensation	Eliminating the risk of under compensation	Limiting the risk of over compensation	Eliminating the risk of over compensation	Enhancing the management of injury-related information and claims	Limiting the risk of expiry of limitation periods	Eliminating the risk of expiry of limitation periods	minimising the impact of injury on the community	Ensure effective compensation	Fast compensation and settlement of claims
General Solutions												
S1-Doing nothing (application of Rome II)	X		X								X	X
S2-Lex damni	X		X		X			X				
S3-Better information			X				X	X		X	X	X
S4-Harmonising regulation	X	X		X		X	X		X	X	X	X
S5-Principle of ubiquity (right of victim)	X		X					X			X	X
S6-Lex forum conveniens (judge decides)		X	X							X	X	X

GOAL / SOLUTION	Restitutio in integrum in Victim's country of residence	Rehabilitation*	Limiting the risk of under compensation	Eliminating the risk of under compensation	Limiting the risk of over compensation	Eliminating the risk of over compensation	Enhancing the management of injury-related information and claims	Limiting the risk of expiry of limitation periods	Eliminating the risk of expiry of limitation periods	minimising the impact of injury on the community	Ensure effective compensation	Fast compensation and settlement of claims
S7-First party insurance		X	X	X	X	X	X	X		X	X	X
S8-EU tribunal for cross-border issues	X			X		X	X		X		X	X
Limitation Periods Solutions												
S9-Apply LP of Victim's residence								X			X	X
S10-Information by insurers on LP									X			
S11-Increased LP in cross-border cases								X	X			

GOAL / SOLUTION	Restitutio in integrum in Victim's country of residence	Rehabilitation*	Limiting the risk of under compensation	Eliminating the risk of under compensation	Limiting the risk of over compensation	Eliminating the risk of over compensation	Enhancing the management of injury-related information and claims	Limiting the risk of expiry of limitation periods	Eliminating the risk of expiry of limitation periods	minimising the impact of injury on the community	Ensure effective compensation	Fast compensation and settlement of claims
S12- Harmonization of suspension rules								X				
S13- Rules for minors and disabled								X		X	X	X
S14- Better information									X			
S15- Agreement between insurers and in particular a direct settlement agreement							X		X		X	X

GOAL / SOLUTION	Restitutio in integrum in Victim's country of residence	Rehabilitation*	Limiting the risk of under compensation	Eliminating the risk of under compensation	Limiting the risk of over compensation	Eliminating the risk of over compensation	Enhancing the management of injury-related information and claims	Limiting the risk of expiry of limitation periods	Eliminating the risk of expiry of limitation periods	minimising the impact of injury on the community	Ensure effective compensation	Fast compensation and settlement of claims
S16- Introduction of a minimum LP at EU level								X				
S17- Harmonization of LP and extensions									X			
Solutions to issues on level of compensation												
S18- Application of lex damni	X		X		X							
S19- Judges rely on CFR		X	X		X							

GOAL / SOLUTION	Restitutio in integrum in Victim's country of residence	Rehabilitation*	Limiting the risk of under compensation	Eliminating the risk of under compensation	Limiting the risk of over compensation	Eliminating the risk of over compensation	Enhancing the management of injury-related information and claims	Limiting the risk of expiry of limitation periods	Eliminating the risk of expiry of limitation periods	minimising the impact of injury on the community	Ensure effective compensation	Fast compensation and settlement of claims
S20-coverage through third party insurance of Victim		X	X		X				X		X	X
S21-creation of EU fund	X		X		X				X		X	X
S22- EU guidelines on recognized losses	X		X		X		X					
S23- Harmonization of types of losses and injury levels	X		X		X		X					
S24-Table to calculate lump sum and periodic payments	X			X		X	X					

GOAL / SOLUTION	Restitutio in integrum in Victim's country of residence	Rehabilitation*	Limiting the risk of under compensation	Eliminating the risk of under compensation	Limiting the risk of over compensation	Eliminating the risk of over compensation	Enhancing the management of injury-related information and claims	Limiting the risk of expiry of limitation periods	Eliminating the risk of expiry of limitation periods	minimising the impact of injury on the community	Ensure effective compensation	Fast compensation and settlement of claims
S25- Guidelines on injury assessment and relevant tables for all countries	X			X		X	X					
S26- Guidelines on aged-car value	X			X		X	X					
S27-CFR on losses, interest rates, discount rates, mortality tables	X			X		X	X					
S28- Imposing comprehensive insurance	X			X		X	X				X	X

GOAL / SOLUTION	Restitutio in integrum in Victim's country of residence	Rehabilitation*	Limiting the risk of under compensation	Eliminating the risk of under compensation	Limiting the risk of over compensation	Eliminating the risk of over compensation	Enhancing the management of injury-related information and claims	Limiting the risk of expiry of limitation periods	Eliminating the risk of expiry of limitation periods	minimising the impact of injury on the community	Ensure effective compensation	Fast compensation and settlement of claims
S29- Information for judges	X	X		X		X	X					
S30-Allow Victim to claim from own insurer if faulty party insurer fails to reply							X		X		X	X
S31-Allow Victim to sue in own country under own law if faulty party's insurer fails to respond							X		X		X	X
S32-Victim's insurer to provide information			X				X		X		X	X

GOAL / SOLUTION	Restitutio in integrum in Victim's country of residence	Rehabilitation*	Limiting the risk of under compensation	Eliminating the risk of under compensation	Limiting the risk of over compensation	Eliminating the risk of over compensation	Enhancing the management of injury-related information and claims	Limiting the risk of expiry of limitation periods	Eliminating the risk of expiry of limitation periods	minimising the impact of injury on the community	Ensure effective compensation	Fast compensation and settlement of claims
S33-Brochure on compensation practices			X				X					
S34-Driver insurance compulsory	X			X		X					X	X
S35-Direct settlement of claims						X					X	X
S36-Apply restitutio in integrum	X			X		X						
S37-European assessment body		X		X		X	X					
S38-Unify insurance products				X		X	X					

GOAL / SOLUTION	Restitutio in integrum in Victim's country of residence	Rehabilitation*	Limiting the risk of under compensation	Eliminating the risk of under compensation	Limiting the risk of over compensation	Eliminating the risk of over compensation	Enhancing the management of injury-related information and claims	Limiting the risk of expiry of limitation periods	Eliminating the risk of expiry of limitation periods	minimising the impact of injury on the community	Ensure effective compensation	Fast compensation and settlement of claims
S39- Minimum awards				X								X
S40- European Court				X		X						

* Achieving an appropriate quality of life through the provision of entitlements that restores to the maximum practicable extent a claimant's health, independence, and participation.

5.4 Proportionality of solutions

As stated before, solutions should be proportionate to the objectives pursued. At the EU level, they should also be proportionate to the significance of the issues in the internal market.

As shown in this study, there are important differences in compensation levels in the EU. But it is not clear that the distortions created by these differences significantly impact the internal market at least with respect to road traffic accidents. The latest figures confirm that road traffic accidents involving Visiting Victims represent a minute share of all road traffic accidents. Of this very small share many will involve cross-border commuters who are generally insured by their employers. Others will involve accidents involving people from countries with similar compensation practices and laws (for example France, Luxembourg, Belgium). Finally, the countries concerned by under compensation are also generally those that have high standards of living, highly developed insurance products and other forms of protection, and efficient health care systems. It is also true that from a prospective point of view more and more people will travel. European intervention should thus be limited to those measures necessary for preservation.

5.5 Assessment of Solution 1: S1 - Do nothing (at the EU level).

5.5.1 Issues and objectives

Solution 1 refers to the current situation at the EU level. This is the solution proposed under Rome II. Rome II affirms *lex loci laesionis* although in the context of road traffic accident it is really the same as *lex loci delicti* as the injury is usually sustained where the accident occurs. Thus, the statement made previously “le rattachement à la *lex loci delicti* reste le pivot autour duquel articuler le droit international privé des actes illicites...²⁹³” remains valid under Rome II²⁹⁴.

²⁹³ Bernard Dutoit, La *lex loci delicti* à travers le prisme des deux Conventions de La Haye sur les accidents de la circulation routière et la responsabilité du fait des produits, in L'UNIFICAZIONE DEL DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE. STUDI IN MEMORIA DI MARIO GIULIANO 417 (1989), at 434

Rome II seeks to resolve the issues outlined above by providing both certainty and a certain degree of flexibility to Visiting Victims involved in road traffic accidents.

Rome II will come into force on January 11, 2009²⁹⁵. This means that it is not at present possible to evaluate the impact of Rome II. The assessment conducted herein is thus only prospective.

Rome II lays down uniform rules, to be applied by the courts of each Member States, to determine the applicable law in cross-border cases involving non-contractual obligations, which include claims pertaining to road traffic accidents. The objective of Rome II is to provide legal certainty, predictability and a certain amount of flexibility²⁹⁶. Reduced costs, for insurers, and benefits, for Victims, should flow from the legal certainty and predictability enshrined in Rome II.

Rome II has been criticized²⁹⁷. However, before envisaging any other solution, it would be appropriate to let Rome II run its course and evaluate its impact over the next two to five years.

5.5.2 Impact on Visiting Victims

Typically, the expectation of a Visiting Victim is that, when travelling to another country, they will be subject to the law of that other country for the duration of their visit. This position is clearer in cases of road traffic accidents than it is in cases of cross-border environmental damage where the injury occurs in the Victim's own place of residence but is caused in the other country.

²⁹⁴ For a detailed explanation of the principle see See Antonio Nicita and Matteo Winkler, *The Cost of Transnational Accidents: Evolving Conflict Rules on Torts*, Paper prepared for the 2007 EALE conference.

²⁹⁵ REGULATION (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), L 199/40, at Article 32.

²⁹⁶ See Recital 16 of Rome II.

²⁹⁷ Symeon C. Symeonides, Rome II and Tort Conflicts: A Missed Opportunity, *AMERICAN JOURNAL OF COMPARATIVE LAW*, 56, 2008.

Rome II will have little impact on secondary victims or on cases where aggravation of Victims' condition occurs as provided under Article 4 paragraph 1 which states "irrespective of the country or countries in which the indirect consequences of that event occur".

Rome II will provide *restitutio in integrum* in the sense that most countries consider that they currently abide by the principle. However, this is only at a theoretical level as the principle itself does not, in practice, apply in the context of personal injuries and non-pecuniary damage. If one considers the concept of rehabilitation as meaning achieving an appropriate quality of life through the provision of entitlements that restores to the maximum practicable extent the Victim's health, independence, and participation in society, then Rome II will not provide rehabilitation. The exception of Article 4 paragraph 3 is too limited and, moreover, Recital 33 is just that, a recital, and not a very clear one either, especially with respect to words such as "actual" and "losses". Further, it should be noted that this principle would have to be reconciled with other legal principles whereby it will be for the person wishing to rely on a law to demonstrate that there is merit in such reliance. Recital 33 does not per se contradict the principle.

5.5.3 Impact on defendants

Rome II will have little effect on defendants. It has no impact on jurisdiction. It has little impact on the applicable law since the location in which the injury or property damage are sustained will generally also be the location of the accident.

5.5.4 Impact on insurers and their customers

Rome II will have little impact on insurers and their customers except in as far as Recital 33 will be considered by national courts. Courts are invited to take into account the Victim's specific situation in determining quantum, particularly with respect to actual losses and costs of medical care.

5.5.5 Impact on public health services

Rome II will have little impact on insurers and their customers except in as far as Recital 33 will be considered by national courts.

5.5.6 Impact on the taxpayer

There will be no immediate change for taxpayers because of the nature of the Regulation itself which basically invites courts to take the Victim's actual situation into account. Many Member States already take the Victim's situation into account especially with respect to actual damage. It is only if courts start to interpret Rome II as granting them a right to generally apply the laws of the Victim's country of residence in determining the quantum that a shift will occur from those bearing the weight of under compensation to those benefiting from it.

5.5.7 Impact on courts and lawyers

Through Recital 33, Rome II invites courts to take into account the actual circumstances of the Victim, "including actual losses and costs of after-care and medical attention" when quantifying damages. The formula is included in Recital 33 rather than as an article and its legally binding effect will therefore be limited. However, it does make clear that national courts do have to take into account the actual circumstances of the Victim in his or her place of residence and that refusing to do so could violate the intent of the authors of Rome II. Recital 33 itself is not extremely clear and is obviously a formula that results from a compromise. It seems to invite courts to take into account actual costs incurred by the Victim in their own country. This, as such, is straight-forward. However, by referring to actual "losses" it opens the possibility of actually taking into account "losses" as defined in the Victim's country of residence. Rome II does not define the notion of losses and it is not clear from the Recital how courts should define losses. Further, the use of the term "actual" can include past, present and future losses. Each country uses different criteria to evaluate future losses. There are even differences within countries. It is not clear which criteria courts should apply here. Given the confusion that this recital creates, it is probably wise to have included it as a recital, or a general intent, rather than as an article.

However, Rome II also grants the courts limited discretion in applying the law of the Victim's country of residence. However any such application would be restricted by Article 17, which requires that courts take into account the "rules of safety and conduct".

5.5.8 Impact on the Victim's country of residence

Rome II does not significantly impact the Victim's country of residence except with respect to the exception under Article 4 paragraph 3 and Recital 33. Article 4 paragraph 3 does

not specifically allow for a “depeçage” as between applicable laws. As a result, read alone, in respect to road traffic accidents, “ALL” circumstances will seldom designate the law of the Victim’s country of residence. Recital 33 does not per se designate an applicable law but rather seeks to ensure that the costs sustained by the Victim in his or her own country are duly taken into account by the courts.

5.5.9 Impact on the country of the location of the accident or injury

With respect to cross-border road traffic accidents, Rome II does not impact the country of the location of the accident or injury. The principles laid down by Rome II provide that the law applicable is that where the injury is sustained rather than that where the accident occurs. In the case of road traffic accidents the injury is sustained where the accident occurs.

5.5.10 Impact on compensation levels

Rome II will not significantly impact compensation levels as it does not provide a significant change to the previous situation but rather lays down rules that are generally followed by most Member States.

5.5.11 Impact on limitation periods

Rome II will have little impact on issues related to limitation periods since it can be anticipated that in most cases the law of the accident (which in case of road traffic accidents will be the law where the injury is sustained) will apply. The exception created by Article 4 paragraph 3 will only apply in the rarest cases to road traffic accidents. It can hardly be imagined when ALL circumstances will designate the law of the Victim’s country of residence especially when at least two important elements, the tort and the damage, are located or sustained in the country where the accident occurred.

Further, even if courts take into account the Victim’s country of residence, this will be with a view to determining quantum rather than the applicable limitation period.

The interpretation that judges will make of the exception will determine the extent to which there is an impact on limitation periods.

5.5.12 Policy and implementation costs

Rome II has not come into force yet that it is already either widely criticized or celebrated. In terms of policy and appropriate use of resources it is important to let Rome II run its course for a few years. As a regulation, it will immediately be transposed into Member States' legal systems and can thus be reviewed after a short period of implementation.

Article 28 of Rome II creates confusion in respect to its inter-action with other international agreements and in particular the Hague Convention. For those Member States who are part of the Hague Convention, this Convention will be applicable rather than Rome II. The effect, apart from the confusion that it creates, is that this may exacerbate the risk of forum shopping²⁹⁸.

5.5.13 Costs benefits analysis

The main benefit of Rome II is that it provides for a uniform system for determining the applicable law to cross-border road traffic accidents. This uniformity is guaranteed by the fact that the general application of *lex loci damni* (law applicable is that where the injury is sustained) suffers few and limited exceptions. Uniformity and legal certainty are important benefits for EU citizens.

Incidentally, the level of uniformity would have been enhanced further had Rome II provided that it took precedence over other conventions or treaty on conflict of law rules.

However, it must be noted that the uniformity achieved by Rome II is of a procedural rather than substantive nature. It is indeed true that the universal application of the *lex loci damni* will provide Visiting Victims with greater certainty in respect of which country's law will be applied in the case of a cross-border road traffic accident. But, as long as there remain differences between Member-States in terms of the substantive law applicable to issues of compensation, uniformity of result will remain elusive.

²⁹⁸ Thomas Thiede and Markus Kellner, "Forum shopping' zwischen dem Haager Übereinkommen über das auf Verkehrsunfälle anzuwendende Recht und der Rom-II-Verordnung", *Versicherungsrecht*, 2007.

5.6 Assessment of Solution 2: S2 - Law of habitual residence of the Victim (referred to here as *lex damni*).

5.6.1 Issues and objectives

Solution 2 refers to the application of the law of the habitual residence of the Victim as where the Victim has to live with the injury.

The objectives of such solution are four fold. The main objective is *restitutio in integrum*.

The three underlying objectives are:

- Limiting the risks of under-compensation
- Limiting the risk of over-compensation
- Limiting the risk of expiry of limitation periods.

5.6.2 Impact on Visiting Victims

This solution answers the concerns that Victims may have when involved in accidents in other Member States. It also guarantees that secondary victims or victims “by ricochet” will have their rights recognized as under the law of the main Victim which will most often be the law of such secondary victims’ residence.

Visiting Victims would obtain a compensation that is in line with the expectations that they may have had, had the accident occurred in their own country of residence. This does not necessarily mean that the victim will be adequately compensated or that the compensation level will actually meet the victim’s expectations. However, it is likely that there will be a lower risk of over or under compensation as it can be assumed that the level of compensation will be calibrated according to the costs and standard of living in the country in which the victim will have to bear the costs of the accident (e.g. replacement or repair of property and any treatment or care that may be necessary)

Expectations are a difficult subject. As stated before compensation is rarely satisfactory and *restitutio in integrum* is impossible for some types of losses.

The solution has a further impact in that to a certain extent it rewards unprepared and irresponsible travellers and creates an assistance that should be unnecessary if public awareness programs were adequately put in place. People who travel abroad should

prepare themselves and insure themselves against the extra risks of travelling to a country and place they are not familiar with. Many insurance products exist and travellers should, to a certain extent, be held responsible for choosing not to cover the extra risks. A solution that limits travellers' need to know about the features and legal culture of the countries that they are visiting limits available choices and places too little trust in the capacity of normal adults to evaluate and make appropriate decisions.

As a conflict of laws rule it imposes an obligation on a court, which may be located in the country of the accident, to become familiar with the law of the Victim's country of residence. This will lengthen proceedings duration and delay compensation for the Victim²⁹⁹.

5.6.3 Impact on defendants or faulty party

As a conflict of laws rule, the application of *lex damni* should not force the defendant into foreign courts. Thus, the defendant will be able to litigate locally. However, the fact that it is the law of the Visting Victim's domicile state that applies may be a factor in deciding which jurisdiction is the most appropriate to hear the case (the '*forum conveniens*'), This is the case, for example, in the **UK**.

Additionally, in the long term, the risk is that the *lex damni* rule may be coupled with the right of the Victim to go before their own court system, the result would be to force the defendant, who may never have been to the Victim's country of residence, and may have even less of an understanding of the Victim's legal system, to have to litigate there. Imagining that the follow-up on the application of *lex damni* would be conflict of jurisdiction rules attributing jurisdiction to the courts of the Victim's country of residence is not difficult. Who better than local courts to apply local law? Even if enforcement of judicial decisions is easier today in the EU than it ever was, it will only take a few decisions where courts incorrectly apply the foreign law for a campaign to start on conflicts of jurisdiction.

²⁹⁹ This poses an interesting question. Given that the application of the law of the Victim's country of residence is chosen to favor the Victim's situation, should the procedural delays created by such application also enable the Victim to claim interest on the period covering such delays may lead to an unfair outcome.

5.6.4 Impact on insurers and their customers

Insurers benefit in countries where the applicable law leads to low compensation levels.

In appearance, the application of *lex damni* is neutral by comparison to *lex loci*. However, it is only neutral overall in the EU if Victims come equally from countries with low and high compensation levels. But on an individual country level it may lead to higher premiums for those countries that have low compensation levels. The consequence of higher premiums, especially in countries with low standards of living, will mean a higher proportion of uninsured vehicles.

The unpredictability level created by the application of this principle depends on a number of factors such as the levels of intra-European cross-border traffic and the evolution of the number of cross-border accidents.

The cost to insurers will depend on the number of cross-border accidents in which the foreign party is the innocent party, the evolution of that number over-time and travelling patterns across the EU. The cost will become a major issue if, as is likely, cross-border travel in Europe increases. Countries with lower standards of living would see the insurance premiums of their citizens rise considerably not to better cover the citizens but to better compensate foreigners who may decide to choose their country as a travel destination.

5.6.5 Impact on public health services

Public health services for the Victim's country of residence will be able, when this is possible under the law, to claim back the amounts paid to provide relevant care to the Victim. Such health services will however need to closely follow up on any compensation provided to the Victim from a foreign jurisdiction.

It can be anticipated that those Member States that do not yet have a claim back system for public health care services rendered may, as a result, install one.

5.6.6 Impact on the taxpayer

The taxpayer in the Victim's country of residence will suffer less from the economic consequences of the accident where the Victim's country of residence offers higher levels of compensation than the country of the location of the accident.

However, the increases in the costs of justice in each Member States may offset the previously identified benefits.

Tax payers from low standard of living countries may end up picking up the bill in case of compensation levels exceeding the ceilings that may exist in the country of the location of the accident.

Where the compensation system of a country is dominated by the fault-system and the main source of compensation is the at-fault party, there will likely be no appreciable impact on tax payers in the country where the accident occurred as any increase or decrease in the cost associated with the administration of justice, borne by the tax payer, will be minimal.

However, where, as is often the case, multiple compensation systems co-exist in a country, there may be an impact on the tax payer. This is because compensation may, in part, be provided by the government of the country in which the accident occurred out of general taxation. Accordingly, if compensation is awarded at a higher or lower level this could have a flow on effect on tax payers. But, given the low number of cross-border accidents, as noted above, this is unlikely.

5.6.7 Impact on courts and lawyers

Courts are required to apply the law of the accident in assessing the quantum. Under a variation of the principle, they could also be required to “*consider the level of damage award the victim would have obtained had the accident occurred in his/her own country*”. Both options would require courts to have precise knowledge of the national laws and practices in other Member States. Further, both solutions and in particular the second one, would require a large degree of standardisation in compensation levels and practices at the national level which this study shows seldom exists currently.

Alternatively, the courts would have to rely extensively on the Victim’s assertions and their lawyer’s evidence, which in turn may lead to abuses and false or exaggerated claims.

5.6.8 Impact on the Victim’s country of residence

The strain of providing compensation that is in line with the practice in the country of the Victim’s country of residence will be shifted to the country in which the tortfeasor resides.

However, the Country of the Victim's residence may see its laws applied or "misapplied" by courts located in another country. Typically, a hierarchy of courts exists in each Member-State. One of the principal functions of an appellate system is to ensure quality of judicial decision-making. In the context of a court applying the law of another country, there is no guarantee that an appellate court will have any greater success in the application of that foreign law than a court of first instance. This means that the efficacy of the appellate system may be lessened. Although, it should be noted that, generally speaking, judicial decision-makers at the appellate level are chosen on the basis of their being more competent. Moreover, appellate courts generally have more time to reach decisions. Accordingly, although it can be confidently stated that an appellate court is better placed to apply its own law rather than that of another country, an appellate court is *a priori* less likely to reach an erroneous view of the foreign law than a court of first instance.

However, in some Member-States (e.g. **the UK**), determinations of foreign law are considered to be a question of fact to be established by expert evidence. Appellate courts are generally reluctant to overturn decisions of lower courts on questions of fact, having often not heard the evidence directly. Accordingly, in a country such as **the UK**, the ability of an appellate court to ensure that the relevant law has been correctly interpreted and applied will be lessened where that law is the law of another country which has been established by expert evidence.

5.6.9 Impact on the country of the location of the accident or injury

The country of the location of the accident or injury may have an interest in ensuring that tortfeasors are sanctioned based on their laws.

Further, given that the situation implies that litigation has been resorted to, this means that the separation between the determination of fault and that of compensation may lead to (i) two cases being litigated and (ii) more incentive for defendants to try and argue for the recognition of partial fault at least on the Victim.

Countries traditionally define regulations that pertain to conduct that occur on their territory and have an interest in sanctioning a tortfeasor adequately and based on these regulations. If a tortfeasor causes harm in a country that, through its regulation, has adopted policy of tort deterrence by awarding high levels of compensation to victims of

road traffic accidents, then that country's policy will be undermined if a victim happens to originate from a country where compensation levels are very low. Further, in such a context the fact that two laws apply to the same conduct means that regulation itself treats differently different tortfeasors: those that were "lucky" enough to cause harm to a foreign victim and those that were "unlucky" enough to cause harm to a local victim.

Further, it is important to take into consideration that the State has an interest in compensating victims for accidents. The forum is the situs of the location of the accident and it has an interest in ensuring that victims are adequately compensated. Victims are often tourists and commuters and their experience in the country will determine the likelihood of their coming back. If they are compensated as if they had not left their own country, it is possible the Victim will feel that compensation emanates not from the foreign country but rather from its own "protective" country of residence. Against this, it can be said that a Victim who is compensated at a level comparable to that of their home country would be more likely to return. This is because it is only under-compensation that would provide a disincentive to return to the country in which the accident occurred, and the risk that this would occur is effectively eliminated by the provision of compensation at levels of the Victim's home country.

Finally, in some countries compensation ceilings are permitted. If *lex damni* is applied there may be a risk that existing compensation ceilings will be exceeded. For example, if country A had a compensation ceilings of 2 million Euros and applying the law of country B means that the Victim would be entitled to 3 million Euros, country A's ceiling will be exceeded and the question of who pays the difference arises.

5.6.10 Impact on compensation levels

The Victims would be compensated based on the practice of his or her country of residence. If this does not lead to *restitutio in integrum* per se it leads to the compensation reflecting the Victim's expectation had the accident occurred in his or her own country. However, this will create issues when fault is shared between the parties to the accident. In that case it is unclear which law would apply. The result could be a discriminatory outcome to victim's who are partly at fault. In particular, one could expect that litigation on the determination of fault will increase as a means to determine applicable law.

Compensation levels will indirectly be impacted. An important part of compensation practice is based on case law. If courts apply the law of the Victim's residence, the decision will be publicly available and future victims including local citizens will try and use the compensation levels attained by previous court decision to justify their entitlement to a level of compensation. Although courts may resist this initially, only the test of time will tell. If in fact the effect is that courts do end up accepting to compensate local victims in a manner not dissimilar to Visiting Victims, the result will be both a rise and a harmonisation of compensation levels in the EU.

5.6.11 Impact on limitation periods

If the laws of the Victim's country of residence apply only in respect to quantum, the statute of limitation of the location of the accident will apply. This in effect does not resolve limitation period issues that may arise in cross-border accidents.

If *lex damni* applies not only to quantum but also to limitation periods, the Victim will benefit from the application of his or her country of residence's limitation periods. This may not resolve the fact that some limitation periods systems are either very complex or are very unforgiving to categories of victims, but it does place the Victim in the familiar setting of his or her own country. However, applying the limitation period system of the Victim's country of residence will often merely shift the uncertainty from the Victim to their legal counsel. If, as is likely, the action is filed in the country in which the accident occurred, it is probable that the Victim will be represented by a local lawyer who will not be familiar with the limitation period system that applies. This will then impact on the quality of advice the lawyer is able to provide the Victim in respect of limitation issues. Additionally, this will create issues when fault is shared between the parties to the accident. In that case it is unclear which law would apply. As noted above, the result could be a discriminatory outcome to victims who are partly at fault and the focus on determinations of fault in litigation can be expected to increase.

5.6.12 Policy and implementation costs

The legal uncertainty is transferred from the faulty party to the Victim.

Countries with no fault systems will not be affected but do lose out in the sense that they would gain from a European no fault system.

Implementation costs would be important and would include:

- National standardisation and simplification of compensation levels and practices;
- Access by judges to relevant compensation rules and practices in all Member States in their own language;
- Harmonisation of medical experts reporting practices;

5.6.13 Costs-benefit analysis

Lex damni does not mean that it is the courts of the Victim's country of residence that have jurisdiction to hear the claim but rather that the competent court has to take the laws of the Victim's country of residence into account when determining the quantum.

PEOPIL advocates the application of the *lex damni* to the assessment of the injuries suffered by the Visiting Victim and to the calculation of any compensation to be paid. This will lead to a reduction in the risk that Visiting Victims will be under or over compensated, relative to compensation levels in their domicile state. While it can be said that application of the *lex damni* is a victim-focused solution which will may lessen the occurrence of injustice for those involved in road traffic accidents that have a cross-border element, at a systemic, European-wide level, this solution is problematic.

If *lex damni* is applied purely as a conflict of laws rule, the competent court will be the courts of the location of the accident. Courts are not currently prepared to meet the challenge of applying compensation levels from other countries especially given the complexity of how quantum is determined in each Member State and the significant differences that exist within each Member State. There are currently, in many Member States, effort made to cut down on the increasing costs of running the justice system and the length of proceedings. Applying the law of the Victim's country of residence would undoubtedly lead to further increases in costs in the Member States of the location of the accident because applying a foreign law involves further translation and interpretation costs, which also happen to be those in which the standard of living is lower.

The effect will be higher premiums in the Member State of the accident where such Member State has low levels of compensation by comparison to other Member States. Premiums will most probably not drop in Member States which have high levels of compensation.

This will lead to more litigation on the issue of fault as the tortfeasor will contest his or her fault or claim that fault is partly shared so that his or her own laws apply.

The cost of the implementation of *lex damni* is eventually borne by countries with lower standard of living or countries that cannot afford to offer for their own citizens the levels of compensation that other countries offer.

It can be expected though that any push for *lex damni* would come from countries that have higher levels of compensation. These are also generally the countries that have higher standard of living and those for which the population can afford to travel to other places. It is important to note that *lex damni* is a principle that favours richer countries over poorer ones, or countries that can afford high levels of compensation over countries that cannot.

Forum shopping would be a major issue in implementing a *lex damni* principle. In Europe today, EU citizens move freely and take up residency in one country or another with ease. This is one of the purposes of the internal market. However, if *lex damni* were applied, little would stop a Victim from taking up residency in one Member State with high compensation levels and/or standard of living and then taking up residency in another Member State with lower standard of living. Even if the rules state that the Victim's country of residence is that at the date of the accident nothing can prevent, especially in the internal market, the victim from being compensated based on the country of residence at the time of accident and then moving to another country. One could be a UK resident at the time of an injury that occurred in Spain and then once compensated based on UK standards move to Spain. One can also imagine citizens declared as residence in one country but effectively living in another. This in effect defeats the whole justification for *lex damni*. The argument for *lex damni* is generally that it is unfair for Victims to be compensated without their situation in their country of residence being taken into account. Thus, *lex damni* can only be justified if there are guarantees that the Victim will, once compensated based on that Victim's country of residence, remain in that country of residence. And this would be counter-productive for the internal market, which seeks to promote movement within its borders. It is important to put into focus the purpose of the internal market and that is to blur Member States' borders and not re-create them.

5.7 Assessment of Solution 3: S3 - Better information.

5.7.1 Issues and objectives

Solution 3 aims at the provision of better information in general on compensation levels and limitation periods.

The objectives of such solution are seven fold. The main objective is public awareness in order to empower European citizens in making appropriate decision based on knowledge. This is the opposite of assistance. The six underlying objectives are:

- Limiting the risks of under-compensation
- Enhancing the management of injury-related information and claims
- Limiting the risk of expiry of limitation periods
- Minimizing the impact on the community
- Ensuring effective compensation
- Ensuring fast compensation and settlement of claims

Better information may be provided in a number of ways and may target different stakeholders. Insurers could provide information to the travelling EU citizens. Brochures could be sent to the insured prior to holiday dates. The Green Card could be delivered with a travel booklet. A website could be set up to inform victims or insurers and courts on the different Member States' practices. The website could be updated by authorized institutions from Member States.

Further, better information should also target Courts in particular with respect to compensation practices in other countries.

5.7.2 Impact on Visiting Victims

If EU citizens knew:

- Which law would apply to the accident,
- the extent of compensation practices in the country which they are visiting,
- the limitation periods in the country which they are visiting,
- the time it would take for them to be compensated and the legal procedures,

They would be able to make informed decisions and if necessary take complementary insurance in their own country. Insurance companies, especially in countries with high standard of living and high levels of compensation, provide a wide range of products to protect travellers. Should the travelling EU citizen not take complementary insurance, his or her expectation with respect to compensation levels and claims procedures at the least would be in line with the practice in the country visited.

The solution would also enhance the management of injury-related claims as Victims would have information on local procedures and how to make claims.

The cost of better information will trickle down to the Victim but less as a Victim than as an insured party or a tax payer.

5.7.3 Impact on defendants or faulty party

Better information would not impact defendants per se. Better information may impact on defendants where compensation takes into account compensation levels in the Victim's domicile state as it would provide defendants with fuller information about the risks they take when driving irresponsibly. This would especially be the case for information concerning neighbouring countries with, presumably, higher levels of incoming travelers.

5.7.4 Impact on insurers and their customers

All drivers of vehicles have to take third party insurance. As a result insurers are better placed to provide information to EU citizens who wish to travel. Information could be provided in various ways including immediately prior to major travel periods or combined with the provision of the green card. This would be a cost to insurers but would also benefit insurers in a number of ways such as:

- Sale of complementary insurance,
- Better management of claims.

5.7.5 Impact on public health services

Better information should lead to increased sales in complementary insurance products and as a result faster compensation or advances on compensation and less weight on the local public health system because of the prompter and more effective compensation.

5.7.6 Impact on the taxpayer

The impact on the tax payer will be limited although the form of information provided will determine the extent of the cost. If information is mainly provided through insurance companies, the cost will be included in premiums rather than borne by the tax payer. Tax payers could bear the costs of public information campaigns on travelling in other Member States yet, in the medium or long term, this could be compensated by the decrease in the expenses of the public health system mentioned above.

5.7.7 Impact on courts and lawyers

Courts need better information and better access to information in a language that they can understand. There will always be many language-related difficulties in the EU. French speaking courts refer and are aware of legal principles of other French speaking countries (i.e. **Belgium, France and Luxembourg**). Similarly in **Austria and Germany**, courts refer often to legal principles of the other country. **Ireland** and the **UK** see courts referring to decisions from the other country's case law. Cooperation has started between the courts systems of the different EU countries but lower courts remain uninformed on the practices in other Member States. Language remains the greatest barrier to progress in this respect. The cost of providing information on court practices in relation to compensation and limitation periods in all EU languages would be exorbitant and never ending as practices change.

The courts would deal with victims or defendants who are aware to some extent of the features of their legal systems on certain aspects: limitation periods, compensation levels.

The information provided to victims, however limited it may be, could also be handed in to courts so they are aware of a few elements of the Victim's own system regarding road traffic accident.

5.7.8 Impact on the Victim's country of residence

Better information should minimize the consequences on the community of cross-border road traffic accidents. Better public awareness should help Victims make appropriate decisions and as a result enable them to adapt their expectations to the level of protection that they choose to have. They would be encouraged to seek complementary insurance when necessary to protect themselves and their loved ones.

Better public awareness also fosters a better understanding of the EU and cultural, legal, social and economic differences that exist.

5.7.9 Impact on the country of the location of the accident or injury

The impact on the country of the location of the accident or injury will depend on how the information is to be provided. If each country is invited to provide full information in 27 languages and update it regularly, the cost might be greater than if the burden of providing such information rests on insurers.

5.7.10 Impact on compensation levels

Compensation levels would be in line with the Victim's expectations. Victims cannot expect a higher compensation levels than that which they know themselves to be or have chosen to be protected for.

5.7.11 Impact on limitation periods

The knowledge of the limitation periods in the country where the injury is sustained will help Victims ensure that these do not expire. According to this study, the expiration of limitation periods does not seem to be an important issue currently because insurers and lawyers file claims as promptly as possible. Knowledge may resolve the issue of limitation periods for minors or incapacitated persons to the extent that complementary insurance can be taken to avoid the related risk.

5.7.12 Policy and implementation costs

Public awareness is a major issue in the EU. EU citizens need to be empowered into making informed choices rather than be assisted in their choice making. However, language is a big barrier to the understanding of the workings of other EU countries and the temptation to assist EU citizens in overcoming this barrier by harmonizing many areas is great. However, harmonization has the immediate effect of ironing out cultural, social and historical differences. Thus, renewed efforts to provide EU citizens with targeted information should be a priority over policies. Many new EU schemes using the internet have had some effect and these should be generalized.

5.7.13 Cost-benefit analysis

The costs of providing better information will depend on the means used to provide such information.

In general however, better information means empowerment of EU citizens. It can also mean better management of claims by insurers and a better understanding by courts of Victims' specific circumstances in their country of residence. Better information also goes hand in hand with Rome II.

5.8 Assessment of Solution 4: S4 - Harmonizing regulation

5.8.1 Issues and objectives

Solution 4 proposes an EU level intervention to harmonise levels of compensation and limitation periods.

The objectives of such solution are eight fold. The main objective is an absolute degree of certainty by EU citizens as to their rights in any EU country in which they may fall victim of road traffic accidents. The seven underlying objectives are:

- *Restitutio in integrum* for Victims,
- Eliminating the risk of under compensation,
- Eliminating the risk of over compensation,
- Enhancing the management of injury-related information and claims,
- Eliminating the risk of expiry of limitation periods,
- Minimising the impact of injury on the community,
- Ensuring fast compensation and settlement of claims.

5.8.2 Impact on Visiting Victims

Harmonisation of types of losses and methods and criteria used to evaluate injuries and determine compensation leading to harmonization of compensation levels, together with a harmonisation of limitation period, would provide answers to victims' concerns in general.

5.8.3 Impact on defendants or faulty party

Harmonisation provides certainty to defendants and faulty parties.

5.8.4 Impact on insurers and their customers

Harmonisation will not impact EU insurance premium levels over the EU as compensation levels would globally remain the same. However, in some specific countries, premiums may increase as compensation levels rise as a result of the application of new rules for assessing damage and determining compensation.

5.8.5 Impact on public health services

Similar to Solution 2.

5.8.6 Impact on the taxpayer

Similar to Solution 2.

5.8.7 Impact on courts and lawyers

Courts would be applying the same criteria to assess and determine losses and a level of discretion would remain for them to assess precisely the consequences of the injuries and losses given the Victim's personal situation. Visiting Victims would not be concerned about the application of other laws to them as levels of compensation would be similar from country to country. However, harmonisation may lead to lower compensation levels in countries that currently provide high levels of compensation.

5.8.8 Impact on the Victim's country of residence

The impact on the country of the location of the accident or injury will be significant as most countries' regulations would change.

5.8.9 Impact on the country of the location of the accident or injury

The impact on the country of the location of the accident or injury will be significant as most countries' regulations would change.

5.8.10 Impact on compensation levels

Compensation levels may be higher or lower than they currently are in the different Member States as a result of harmonization.

There would arguably be no more issues relating to under or over compensation.

5.8.11 Impact on limitation periods

Harmonisation, including rules relating to limitation periods, would change the EU landscape in this field.

It may not prove too difficult however given that it exists in other areas such as product liability. A proposal adopted by the EU Parliament even exists. The effect would not only bring legal certainty throughout the EU but it would also simplify and clarify existing national regulations.

5.8.12 Policy and implementation costs

It is not clear currently that EU intervention let alone harmonisation is necessary. With

- approximately 7.5 percent of all road traffic accidents in the EU involving visiting parties,
- around half of which can be assumed to result from the visiting party's fault,
- many of the accidents will involve commuters or cross-border workers who may be protected under special insurance schemes, labour laws and/or their contract with their employer,
- many of the accidents occur in neighbouring countries to that of the visiting party with similar laws or practices, and
- more than 90 percent of cases settled out of court with the insurance companies,

the justification for harmonisation at the EU level may not exist as based on the subsidiarity principle or as a proportioned answer to an issue or problem.

Harmonisation may also be unnecessary where *lex damni* could as easily apply with less significant changes involved.

5.8.13 Cost-benefit analysis

Harmonisation would benefit all Member States in that it can be expected to bring simplification and clarity to sometimes very complex and unclear regulation and case law.

Issues of over or under compensation and expiry of limitation periods would be addressed.

However, the costs associated with harmonization would not out-weigh the benefits.

5.9 Assessment of Solution 5: S5 - Principle of ubiquity.

5.9.1 Issues and objectives

One of the main issues with this principle will be its definition. Its definition does not usually include the Victim's country of residence but rather the country where the damage or injury is sustained.

Further, it should be clarified that in the present context adopting the principle of ubiquity would amount to granting a right for the Victim to choose freely between two equally applicable laws. It would not in this sense be left to the decision of the courts.

Solution 5 aims at granting the Victim a right to choose the applicable law as that of his or her country of residence or that of the location of where the accident occurred or where the damage was sustained.

The objectives of such solution are five fold. The main objective is *restitutio in integrum* as applied in the Victim's country of residence. The four underlying objectives are:

- Limiting the risk of under compensation
- Minimising the impact of injury on the community
- Ensuring effective compensation
- Ensuring fast compensation and settlement of claims

5.9.2 Impact on Visiting Victims

This solution answers the concerns that Victims may have when involved in accidents in other Member States. It also guarantees that secondary victims or victims by ricochet will have their rights recognized as under the law of the main Victim which will most often be the law such secondary victims' residence.

Visiting Victims would obtain a compensation that is in line with the expectations that they may have had had the accident occurred in their own country of residence. Visiting Victims may even, if they determine that the law of the accident is more favourable to them, obtain the application of that law.

5.9.3 Impact on defendants or faulty party

The defendant could be drawn into the application of a law that he or she is not familiar with even though he or she has not left his or her country of residence.

Additionally, uncertainty on the part of defendants would be increased as the origin of victims is not capable of determination in advance. This uncertainty may, to an extent, be alleviated if the principle of ubiquity is applied in conjunction with the better provision of information concerning compensation practices in other countries, as noted above.

5.9.4 Impact on insurers and their customers

For insurers it would create a level of uncertainty as to the level of compensation that could be generated from the outcome of the procedure. In general the Victim would choose the law which would generate the highest level of compensation. The result will thus be increased costs for insurers and premiums for their customers.

It should be noted that if premiums rise in some countries, there is a risk that the number of uninsured vehicles will also increase.

5.9.5 Impact on public health services

Similar outcome as under Solution 2.

5.9.6 Impact on the taxpayer

Similar outcome as under solution 2.

5.9.7 Impact on courts and lawyers

Similar outcome as under solution 2.

5.9.8 Impact on the Victim's country of residence

Similar outcome as under solution 2.

5.9.9 Impact on the country of the location of the accident or injury

Similar outcome as under solution 2.

5.9.10 Impact on compensation levels

The Victims would be compensated based on the highest level of compensation that can be obtained in either his or her country of residence or the country of the location of the injury. This creates a risk of over compensation.

5.9.11 Impact on limitation periods

The Victim would use the limitation period that serve his or her interest best³⁰⁰. He or she would have to determine which law he or she wishes to be applied to his or her situation. The principle of ubiquity does not entail a “depeçage” and as a result the Victim would have to choose the law that serves his or her interests best from the perspective of compensation and limitation period.

5.9.12 Policy and implementation costs

The legal uncertainty is transferred from the faulty party to the Victim.

Countries with no fault systems will not be affected but do lose out in the sense that they would gain from a European no fault system.

5.9.13 Costs benefits analysis

By comparison to solution 2, this solution adds yet another level of risk of forum shopping. Indeed, initially given the choice between two laws the Victim will choose that which best suits his or her interests. This is at the same time the purpose and the risk of this solution, it may enable the Victim to avoid under compensation and at the same time enable him or her to try and be over compensated.

5.10 Assessment of Solution 6: S6 - Lex Conveniens.

5.10.1 Issues and objectives

This solution invites the Victim to argue that the application of the law from his or her country of residence would provide a fairer result than the application of the law where

³⁰⁰ This is provided that the country in which the claim is filed adopts a substantive rather than procedural approach to limitation periods.

the injury was sustained. This solution is similar to the exception provided under Rome II although it is not as limited. The court would consider the Victim's arguments and be free to apply the law of the Victim's country of residence if they agree with the Victim's reasoning. A "*conveniens*" test would have to be defined, which should include elements such as:

- Whether rehabilitation would be easier for the Victim,
- What would be the impact on the faulty party, and
- Whether the location of the accident has a bearing on the outcome.

Solution 6 aims at granting the Victim a right to claim that the applicable law should be that of his or her country of residence rather than the location of where the accident occurred or where the damage was sustained.

The objectives of such solution are five fold. The main objective is rehabilitation as applied in the Victim's country of residence. The four underlying objectives are:

- Limiting the risk of under compensation
- Minimising the impact of injury on the community
- Ensuring effective compensation
- Ensuring fast compensation and settlement of claims

In this solution, we distinguish *restitutio in integrum* from the concept of rehabilitation. Rehabilitation refers to the objective of achieving an appropriate quality of life through the provision of entitlements that restore to the maximum practicable extent the Victim's health, independence, and participation in society.

5.10.2 Impact on Visiting Victims

This solution provides Victims with the possibility to make a case for the application of the law of their country of residence. It does not, however, guarantee that the courts will apply such law, especially if the court believes that such application would lead to over-compensation or that elements of the case indicate that there are doubts as to the Victim's connection to the alleged country of residence (ie. Victim is also established in the country of the location of the accident where he or she owns a house and spends part of the year).

The solution may lead to delays for the Victim in obtaining appropriate compensation as if

lower courts refuse to apply the law of the Victim's country of residence, the Victim will need to appeal that decision to higher courts and this can prolong already rather lengthy proceedings and increase the costs of justice.

5.10.3 Impact on defendants or faulty party

The defendant could be drawn into the application of a law that he or she is not familiar with even though he or she has not left his or her country.

Additionally, uncertainty on the part of defendants would be increased as it is not possible to determine the origin of victims in advance. Again, this may be to some extent alleviated by the provision of better information concerning compensation practices in other Member States, as noted above.

5.10.4 Impact on insurers and their customers

The solution creates a level of uncertainty that will be reflected in premium increases. Further, because it is the Victim that seeks a change in applicable law under this solution, the level of uncertainty that the solution creates only relates to the possibility of over-compensation. Victims will seldom argue that their laws should be applied if that means lower compensation than as provided under the law of where the injury is sustained.

5.10.5 Impact on public health services

Similar outcome as under Solution 5 with less certainty.

5.10.6 Impact on the taxpayer

Similar outcome as under Solution 5 with less certainty.

5.10.7 Impact on courts and lawyers

Similar outcome as under Solution 5 with less certainty.

5.10.8 Impact on the Victim's country of residence

Similar outcome as under Solution 5 with less certainty.

5.10.9 Impact on the country of the location of the accident or injury

Similar outcome as under Solution 5 with less certainty.

5.10.10 Impact on compensation levels

The courts would have discretion on whether to apply the law of the Victim's country of residence. The short term impact on compensation levels is not expected to be significant as courts will be reluctant to apply laws that they are not perfectly familiar with, especially in an area as complex as personal injury. The difficulty will be that the lower courts will seldom apply foreign laws and that the Victim may have to appeal or go to the highest degree of jurisdiction in the country before judges even consider applying the foreign law. This will lead to delays in obtaining compensation. In the long term, the impact can be expected to be more significant as information on an EU level is more readily available and courts become more familiar with other EU laws.

5.10.11 Impact on limitation periods

Similar outcome as under Solution 5 with less certainty.

5.10.12 Policy and implementation costs

This solution provides the courts with sufficient flexibility to take into consideration the law of the Victim's country of residence.

It gives the courts an important level of discretion. Courts, as shown in this study, already enjoy discretion in the determination of quantum and even in some countries in extending limitation periods. This would add more discretion. The only issue with granting courts so much discretion in the determination of the applicable law is that the application of the *lex conveniens* principle will not be uniform throughout the EU or even within the same country and there is no guarantee that Victims will be able to obtain the application of the law of their country of residence.

Defining a set test or a set of criteria at the EU level for applying the *lex conveniens* principle might bring the necessary uniformity whilst maintaining some flexibility.

5.10.13 Cost-benefit analysis

This solution creates an extra level of uncertainty. Courts can freely decide which law to apply.

The benefit is that courts will be able to assess on a case by case basis whether the application of the law of the accident/injury would bring about an outcome that is so unfair to the Victim, given his or her particular circumstances, that the Victim's country of residence laws should be applied.

To avoid some of the costs, basic criteria for the application of the principle could be defined at the EU level.

5.11 Assessment of Solution 7: S7 - First Party Insurance

5.11.1 Issues and objectives

Solution 7 proposes a EU level system of first party insurance.

The objectives of such solution are tenfold. The main objective is an absolute degree of certainty by EU citizens as to their rights in any EU country in which they may fall victims of road traffic accidents. The eight underlying objectives are:

- Rehabilitation
- Limiting the risk of under compensation
- Eliminating the risk of under compensation
- Limiting the risk of over compensation
- Eliminating the risk of over compensation
- Enhancing the management of injury-related information and claims
- Limiting the risk of expiry of limitation periods
- Minimising the impact of injury on the community
- Ensuring effective compensation
- Fast compensation and settlement of claims

5.11.2 Impact on Visiting Victims

Visiting Victims would pay for an insurance policy to cover themselves and their own injuries and those of their passengers. They would have to be insured for the minimum

amount described in the Motor Directives and would be able to opt for different compensation ceilings as permitted under their own laws. They would be compensated based on their own insurance contract whatever the circumstances of their accident, faulty or not faulty. They would also have to subscribe to third party insurance to the extent that they can cause injuries or damage to other parties not in the context of a collision (i.e. Pedestrians).

5.11.3 Impact on defendants or faulty party

The notion of fault would disappear to a certain extent given that the insured is insured regardless of the existence of a faulty party.

5.11.4 Impact on insurers and their customers

Premiums would rise significantly although third party liability premiums should drop.

5.11.5 Impact on public health services

Public health services would be able to deal directly with the Victim's insurance company.

5.11.6 Impact on the taxpayer

There would be no significant impact on the tax payer except that the drop in the cost of the administration of justice and the ability for public health services to provide adequate medical care and be reimbursed for it would positively impact tax payers.

5.11.7 Impact on courts and lawyers

In relation to administration costs, it is anticipated that the proposed solution would not significantly decrease the costs to the courts. Most cases are settled extra-judicially as stated before. First-party insurance would decrease further the costs to the courts in the sense that there would be no more need to refer to cross-border issues or information. If the Victim feels that it is being under-compensated, it can sue its own insurer directly.

There would be less involvement of lawyers.

5.11.8 Impact on the Victim's country of residence

For countries where fault is an important policy concern and the sanction of fault also important, a first party insurance system is problematic as the faulty party becomes irrelevant to the compensation scheme and fault only has a bearing on general insurance premiums.

5.11.9 Impact on the country of the location of the accident or injury

The impact on the country where the accident or injury occurs is greater even than that on the Victim's country of residence because such country may have based its fault system on the premise that it prevents accidents or has some degree of deterring effect. If fault becomes irrelevant because the Victim is indemnified by his or her insurer, the faulty party is not sanctioned as such. Third party liability is already a first step in this direction but first party insurance brings it a step further by totally removing the faulty party from any procedure involving the Victim.

5.11.10 Impact on compensation levels

There would be little impact on compensation levels.

5.11.11 Impact on limitation periods

There would be an impact on limitation periods in as far as the relevant limitation periods would be the one set by the first party insurance contract.

5.11.12 Policy and implementation costs

There are serious policy issues in adopting a first party insurance system. In general it is similar to a no fault system except for the fact that the risk is borne by insurers rather than tax payers in general. People without cars or those who use public transportation would not bear the cost.

5.11.13 Costs benefits analysis

This solution proposes a harmonisation of regulation of insurance and the adoption of a new policy on road traffic accidents beyond the cross-border issue. The costs are similar to any harmonisation schemes. Practically it may not be difficult to implement as it could

be implemented by transforming third party insurance policies into first party insurance policies.

The benefits are that Victims are compensated by their insurance companies, in their country of residence, irrespective of proceedings against the faulty party or their insurance.

The Victim will be compensated based on their insurance contract and the compensation practice in his or her own country of residence.

In terms of costs, the main issue with this solution is that the faulty party is not sanctioned as such. These costs may result in lack of care or caution by drivers as they are unconcerned by the consequences of their behaviour (excluding criminal liability of course).

5.12 Assessment of Solution 8: S8 - EU tribunal for cross-border issues

5.12.1 Issues and objectives

Solution 8 proposes the creation of a European court system.

The creation of European courts in cases of cross-border issues could be considered in order to facilitate access to justice and legal aid granting as well as to balance the costs between parties. The American federal system could provide some insight into how to design a jurisdiction competent to hear cases involving conflicts between citizens of two different Member States.

Without necessarily creating a European civil law or adopting the US system, the role of such courts could be limited to (i) determining which national jurisdiction is competent and refer the case to a court there (ii) determining the applicable law, and (iii) facilitating access to information.

Further, access to justice would benefit from a neutral body deciding on the above mentioned questions. The costs of justice would be more acceptable in a process that is considered fair and more transparent in general.

Moreover, the judge's status before such a court would have to be defined but one could imagine a mobile corpus of judges from different countries divided into European Courts and sitting together - by groups of three in one Member State or another - once every so often to resolve cross-border cases. One can also imagine the increased use of online services to enable the court to resolve urgent matters without having to travel to another site.

One could also imagine a more ambitious system, similar to the one implemented in the United States where federal courts have exclusive jurisdiction over some matters and concurrent jurisdiction over others. In the case where a party is from one State and the other party is from another State, and the amount in controversy exceeds 75 000 dollars, concurrent jurisdiction and Federal jurisdiction are possible³⁰¹. This means that the plaintiff may bring the action before either State courts or US District courts (Federal courts). If the plaintiff chooses to bring the action before a State court, the defendant may apply to remove the cause to the competent District court. If the action ends up in the District court, the court will apply substantive State law to the matter, based on conflicts of laws rules applicable in the State in which the District court is located, and Federal rules of procedure.

The creation of mixed courts is also a possibility. This would include legal professionals from two different Member States arguing their cases based on their own legal systems with judges deciding in equity rather than law.

These options involve complexities that may lead to further difficulties in understanding an already complicated system. The first involves the creation of a new set of rules applicable at a supra national level. The second involves the reconciliation of different rules on a case by case basis and the issues that arise in relation to the interpretation of national laws.

³⁰¹ We are only making here a short and incomplete presentation of the US model.

The recommendation that is formulated here provides for a more limited scope of action by European Courts; A scope of action that aims at enhancing transparency and access to justice for parties residing in two different Member States.

In any case the creation of a body of European courts in DPC matters is a question that should be addressed in another study. The question is only relevant here in the context of a recommendation aimed at facilitating (i) access to information, (ii) access to legal aid and (iii) at ensuring that the interests of a party going to trial before a court in another Member State will be taken into consideration

The objectives of such solution are eight fold. The main objective is an absolute degree of certainty by EU citizens as to their rights in any EU country in which they may fall victims of road traffic accidents. The seven underlying objectives are:

- *Restitutio in integrum* for Victim,
- Eliminating the risk of under compensation,
- Eliminating the risk of over compensation,
- Enhancing the management of injury-related information and claims,
- Eliminating the risk of expiry of limitation periods,
- Minimising the impact of injury on the community,
- Ensuring fast compensation and settlement of claims.

5.12.2 Impact on Visiting Victims

Visiting Victims would be able to go before a Court that would be well versed into cross-border issues and better able to take his or her concerns and circumstances into consideration.

5.12.3 Impact on defendants or faulty party

The defendant would be able to argue his or her case to have his or her law applied.

5.12.4 Impact on insurers and their customers

A European Court System would generally speaking lead to a uniform system of dealing with cross-border issues which over time creates the kind of legal certainty and predictability that is required to facilitate the effective assessment of risks and could result in lower premiums.

5.12.5 Impact on public health services

Public health services would be impacted depending on whether the European Court aims at ensuring the Victim's effective rehabilitation.

5.12.6 Impact on the taxpayer

The creation of a new court system would obviously be borne by the EU at large and the EU tax payer.

5.12.7 Impact on courts and lawyers

The creation of a new court system would impact the court system of each and every Member State and affect rules of jurisdiction profoundly.

Judges would have to be trained and a system of appointment defined. Ideally the court would include judges from all Member States and cases involving two countries would include judges from each country.

Lawyers would have to be trained to appear before the new court system.

5.12.8 Impact on the Victim's country of residence

The creation of a European Court system for cross-border matters takes away some of the matters for which the Victim's country of residence may have had jurisdiction for. The policy implications for each country are important.

5.12.9 Impact on the country of the location of the accident or injury

The creation of a European Court system for cross-border matters takes away some of the matters for which the country of the location of the accident or injury may have had jurisdiction for. The policy implications for each country are important.

5.12.10 Impact on compensation levels

A European Court system set up for the purpose of dealing with the complexity of cross-border issues should favour the striking of a balance between the interests of the various stakeholders.

5.12.11 Impact on limitation periods

A European Court system set up for the purpose of dealing with the complexity of cross-border issues should favour the striking of a balance between the interests of the various stakeholders.

5.12.12 Policy and implementation costs

From a policy perspective the creation of European courts/ADR organizations in cases of intra-EU cross-border issues or diversity of parties to a conflict could be considered in order to both ensure that all parties' interests are adequately taken into account and to facilitate access to justice and balance the costs of justice between parties (given that the Victim has to pay for the proceedings in another country the resulting costs are deemed to be more important than those incurred by the faulty party).

Without necessarily creating a corpus of European civil law or adopting the US system of federal courts, the role of such courts could be limited to (i) assessment of quantum, (ii) determining which national jurisdiction is competent and refer the case to a court there and/or (iii) facilitating access to information.

Issues pertaining to quantum, limitation period issues and access to justice and the specificities of cross-border matters would be better addressed by a neutral body deciding on the above mentioned questions. A decision on compensation would be more acceptable in a process that is considered fair and more transparent in general. Such a court would also have an informational duty. Provision of information could become the responsibility of the court's administrators rather than falling on the judge. Moreover, the judge's status before such a court would have to be defined but one could imagine a mobile corpus of judges from different countries divided into European Courts and sitting together - by groups of three in one Member State or another - once every so often to resolve Diversity cases. One can also imagine the increased use of online services to enable the court to resolve urgent matters without having to travel to another site.

The creation of mixed courts is also a possibility. This would include legal professionals from two different Member States arguing their cases based on their own legal systems with judges deciding in equity rather than law.

These options involve complexities that may lead to further difficulties in understanding an already complicated system. The first involves the creation of a new set of rules applicable at a supra national level. The second involves conciliating different rules on a case by case basis and issues in respect to interpretation of national laws.

The recommendation that is formulated here provides for a more limited scope of action by European Courts; a scope of action that aims at dealing with road traffic accidents where the parties reside in two different Member States.

In any case the creation of a body of European courts in cross-border matters is a question that should be addressed in another study.

5.12.13 Costs benefits analysis

Rome II related to non-contractual obligations. It was only worth regulating a whole area of legal relationships rather than just cross-border road accidents. Similarly, the creation of a European Court system would only be worthwhile within the greater context of all cross-border issues.

5.13 Assessment of solutions relating to limitation periods

The assessment of targeted solutions pertaining to limitation periods is conducted in the tables below. These solutions provide varying degrees of change to the current situation in Member States. The purpose for identifying and assessing all these solutions is to facilitate the determination of the most relevant solution given the importance of the issues at hand and the fact that any chosen solution should be proportionate to the issues identified. It does not appear that limitation periods poses a major problem to Victims and given that the number of Victims is relatively small as previously stated, any solution adopted should be precisely tailored to the real needs.

Limitation Periods Solutions	S9 Apply LP of Victim's residence	S16 Introduction of a minimum LP at EU level	S17 Harmonization of LP and extensions	S12 Harmonization of suspension rules	S13 EU Rules for minors and disabled
Issues and Objectives	<p>Issues Limitations periods differ greatly from Member State to Member State causing a risk for the Victim to misunderstand them and risk expiry of the limitation period.</p> <p>Objectives Limiting the risk of expiry of limitation periods Ensure effective compensation Fast compensation and settlement of claims</p>	<p>Issues Limitations periods differ greatly from Member State to Member State causing a risk for the Victim to misunderstand them and risk expiry of the limitation period.</p> <p>Objectives Limiting the risk of expiry of limitation periods</p>	<p>Issues Limitations periods differ greatly from Member State to Member State causing a risk for the Victim to misunderstand them and risk expiry of the limitation period.</p> <p>Objectives Eliminating the risk of expiry of limitation periods</p>	<p>Issues Suspension rules differ greatly from Member State to Member State causing a risk for the Victim to misunderstand them and risk expiry of the limitation period. Suspensions rules are significant in that they extend limitation periods.</p> <p>Objectives Limiting the risk of expiry of limitation periods</p>	<p>Issues In some countries there are no provisions addressing minors and incapacitated persons in relation to limitation periods. This may lead to expiry of LP even though minors and incapacitated persons have representatives that can be designated to act on their behalf.</p> <p>Objectives Limiting the risk of expiry of limitation periods Minimising the impact of injury on the community</p>

Limitation Periods Solutions	S9 Apply LP of Victim's residence	S16 Introduction of a minimum LP at EU level	S17 Harmonization of LP and extensions	S12 Harmonization of suspension rules	S13 EU Rules for minors and disabled
Impact on Visiting Victims	Visiting Victim benefits. Risk of expiry of LP is only linked to complexity of local system. If limitation period is longer in the country where the injury is sustained, the Victim will not benefit from that.	This solution would create a <u>level</u> of certainty and predictability with respect to LP rules.	This solution would create certainty and predictability with respect to suspension rules.	This solution would create certainty and predictability with respect to suspension rules.	This would impact Victims who are minors or incapacitated persons
Impact on defendants	Little impact on defendant although it does create a level of uncertainty as to the timing of claims	Little impact on defendant although a level of uncertainty will remain	Benefits defendants too as it would lead to a simplification of LP	Benefits defendants too as it would lead to a simplification of suspension rules	Little impact on defendant
Impact on insurers and their customers	Neutral overall. Little impact on insurers	The uniformity this solution creates will be beneficial to insurers	The certainty and predictability this solution creates will be beneficial to insurers	The certainty and predictability this solution creates will be beneficial to insurers	Little impact on insurers
Impact on public health services	Positive impact on public health system as they would, otherwise, at least partly bear the burden of the expiry	Beneficial as limits risk of expiry	Eliminating the risk of expiry of limitation periods is beneficial to public health systems	Beneficial as limits risk of expiry	Beneficial as limits risk of expiry
Impact on the taxpayer	Impact on the tax payer in so far as there is less burden on the health system	Little impact	Little impact	Little impact	Little impact

Limitation Periods Solutions	S9 Apply LP of Victim's residence	S16 Introduction of a minimum LP at EU level	S17 Harmonization of LP and extensions	S12 Harmonization of suspension rules	S13 EU Rules for minors and disabled
Impact on courts and lawyers	Courts will have to familiarize themselves with limitation periods in other countries.	Little impact	Benefits as it would lead to a simplification of LP	Benefits as it would lead to a simplification of suspension rules	Little impact
Impact on the Victim's country of residence	No significant impact	Legislative changes will be necessary	Legislative changes will be necessary	Legislative changes will be necessary	Legislative changes will be necessary
Impact on the country of the location of the accident or injury	Limitation periods are policy oriented. In some countries limitation periods aim at providing predictability to both the Victim and the faulty party and often to prevent potential claim from hanging over the lives of people like Damocles swords. This solution creates a level of unpredictability for the faulty party.	Legislative changes will be necessary	Legislative changes will be necessary	Legislative changes will be necessary	Legislative changes will be necessary
Impact on compensation levels	Neutral in respect to individuals compensation levels except for the fact that when a Victim suffers the expiry of the LP, aggregate compensation levels, decrease	Beneficial as limits risk of expiry	Beneficial as eliminates risk of expiry	Beneficial as limits risk of expiry	Beneficial as limits risk of expiry

Limitation Periods Solutions	S9 Apply LP of Victim's residence	S16 Introduction of a minimum LP at EU level	S17 Harmonization of LP and extensions	S12 Harmonization of suspension rules	S13 EU Rules for minors and disabled
Impact on limitation periods	The impact will be significant.	The impact will be significant.	The impact will be significant.	The impact will be significant.	The impact will be important.
Policy and implementation costs	This involves a depeçage which would separate the law applicable to limitation periods to that which is applicable to the compensation				

Limitation Periods Solutions	S9 Apply LP of Victim's residence	S16 Introduction of a minimum LP at EU level	S17 Harmonization of LP and extensions	S12 Harmonization of suspension rules	S13 EU Rules for minors and disabled
Costs benefits analysis	<p>The study shows that there is no evidence of more Victims suffering from expiry of limitation periods in cross-border cases than in purely national cases. Further, there is no evidence that LP are a significant issue for Victims. However, the development of the internal market and the growth of cross-border traffic will lead to issues in the future.</p> <p>Courts will have to proceed to depeçage and obtain information on limitation periods in Victim's country of residence.</p> <p>This solution may appear disproportionate to the importance of the problem</p>	<p>This solution provides more certainty and predictability whilst enabling Member States discretion to increase the length of LPs for the Victims' benefit. This solution is not as constraining as solution 17 whilst providing similar advantages.</p>	<p>Harmonizing LP and extensions would impact the Member States legal systems and result in a new level of complexity since general LP will still apply. Such a solution may seem costly and disproportionate. However, the simplification, uniformity, legal certainty and predictability that this solution creates provide a compelling argument for its adoption. Further a European Parliament proposal already exists on this and other EU regulations exist in this area (ie products liability).</p>	<p>This solution aims as simplifying some of the more complex aspects of LP in different Member States. Its main advantage is simplification and uniformity. It does not however resolve the issue pertaining to the important differences in LP in different Member States</p>	<p>Minors and incapacitated persons usually have representatives who can act on their behalf. Thus the issue is not significant. However, ensuring that minors and incapacitated people benefit from a suspension until they are able to act by themselves appears just. The costs are limited and the benefits although small in numbers are important from a justice and fairness perspective.</p>

Limitation Periods Solutions	S10 Information by insurers on LP	S14 Better information	S11 Increased LP in cross-border cases	S15 Agreement between insurers and in particular a direct settlement agreement
Issues and Objectives	<p>Issues Limitations periods differ greatly from Member State to Member State causing a risk for the Victim to misunderstand them and risk expiry of the limitation period.</p> <p>Objectives Eliminating the risk of expiry of limitation periods</p>	<p>Issues Limitations periods differ greatly from Member State to Member State causing a risk for the Victim to misunderstand them and risk expiry of the limitation period.</p> <p>Objectives Eliminating the risk of expiry of limitation periods</p>	<p>Issues Limitations periods differ greatly from Member State to Member State causing a risk for the Victim to misunderstand them and risk expiry of the limitation period.</p> <p>Objectives Eliminating the risk of expiry of limitation periods</p>	<p>Issues Limitations periods differ greatly from Member State to Member State causing a risk for the Victim to misunderstand them and risk expiry of the limitation period.</p> <p>Objectives Eliminating the risk of expiry of limitation periods Enhancing the management of injury-related information and claims Ensure effective compensation Fast compensation and settlement of claims</p>
Impact on Visiting Victims	Better informed Visiting Victims are able to act within the legal time limits	Better informed Visiting Victims are able to act within the legal time limits although the information will mainly be beneficial for the Victim's lawyer or insurer.	By definition Victims are not residents of the country where the injury is sustained. It will take them time to settle back in their own country and to understand the intricacies of the foreign country's LP system	Victims benefit because of the contract that ties them with their own insurer.
Impact on defendants	Little impact	Little impact	Little impact as uniform rule applies.	Little impact

Limitation Periods Solutions	S10 Information by insurers on LP	S14 Better information	S11 Increased LP in cross-border cases	S15 Agreement between insurers and in particular a direct settlement agreement
Impact on insurers and their customers	Insurers need to be very familiar with all LP systems. This is an extra constraint which will require training and any information should be provided in writing so that if there are held responsible they can prove that the information has been given and its content correct.	Little impact	Generally facilitates management of claims.	Beneficial to insurers as this increases predictability and facilitates claims management
Impact on public health services	Beneficial as limits risk of expiry	Beneficial as limits risk of expiry	Beneficial as limits risk of expiry	Beneficial as limits risk of expiry
Impact on the taxpayer	Little impact	Little impact	Little impact	Little impact
Impact on courts and lawyers	Little impact	Little impact	Courts and lawyers will need to deal with another level of complexity as specific rules would apply in cross-border cases	Less recourse to litigation
Impact on the Victim's country of residence	Little impact	Little impact	Little impact	Little impact
Impact on the country of the location of the accident or injury	Little impact	Little impact	another level of complexity as specific rules would apply in cross-border cases	Little impact
Impact on compensation levels	Impact in so far as information helps avoid expiry of LP	Impact in so far as information helps avoid expiry of LP	Impact in so far as helps avoid expiry of LP	Impact in so far as information helps avoid expiry of LP.
Impact on limitation periods	Little impact	Little impact	Important impact on limitation periods as it creates a new system of limitation periods that applies in Member States as lex specialis.	Little need to know and use LP systems

Limitation Periods Solutions	S10 Information by insurers on LP	S14 Better information	S11 Increased LP in cross-border cases	S15 Agreement between insurers and in particular a direct settlement agreement
Policy and implementation costs	<p>Insurers are best placed to provide such information to their clients. The cost of implementation is borne by the insurer and translates into higher premiums. Alternatively the obligation could be imposed on the faulty party's insurer's representative bureau in the Victim's country of residence. Implementation could involve both the Victim's insurer and the representation bureau of the faulty party's insurer. The Fourth Motor Directive could be amended to impose such an obligation explicitly.</p>	<p>The provision of better information and raising public awareness is one of the constant goals of the EU. The difficulty with LP is to find appropriate means to communicate the information in a cost effective and efficient manner.</p>	<p>This would require EU regulation.</p>	<p>Costs to be borne by insurers. Leaves great leeway to insurers in managing claims.</p>

Limitation Periods Solutions	S10 Information by insurers on LP	S14 Better information	S11 Increased LP in cross-border cases	S15 Agreement between insurers and in particular a direct settlement agreement
Costs benefits analysis	Victims go to their insurers to obtain information on the procedures to obtain compensation. Insurers are a natural source of information. The most appropriate source of information could be representative office of the faulty party's insurer. There would be little costs involved and the benefits would be important for Victims.	Informing Victims efficiently on LPs without recourse to insurers to do so may prove costly as LP system are complex and Victims not always able to understand such complexities. Keeping updated information requires important resources. The information could be provided through a centralized website at the EU level and updated by Member States to limit costs.	Increased LP in cross-border would be costly as it would require a new EU regulation; the implementation of the regulation; that judges and lawyers manage a new LP exception. This solution although appealing for Victims may involve too many costs and even lead to disgruntled Victims where the increased LP remains lower than that of the Victim's country of residence.	The risk of agreement between insurers and direct settlement of claims is the conflict of interest that may exist when insurers control the whole settlement procedure.

5.14 Assessment of solutions relating levels of compensation

5.14.1 Compensation level solutions focusing on CFR and guidelines

Soft law solutions have been identified to address the issues pertaining to compensation levels. They are assessed below.

Solutions to issues on level of compensation	S19- Judges rely on CFR	S22- EU guidelines on recognized losses	S25-Guidelines on injury assessment and relevant tables for all countries	S26-Guidelines on aged-car value	S27-CFR on losses, interest rates, discount rates, mortality tables
<p>Issues and Objectives</p>	<p>Issues</p> <p>Compensation levels differences at least partly stem from the discretion granted to judges. A common framework of reference could be used to serve as guidelines for judges and even medical experts in assessing damages and determining quantum.</p> <p>Objectives</p> <p>Rehabilitation Limiting the risk of expiry of limitation periods</p> <p>Limiting the risk of over compensation</p>	<p>Issues</p> <p>Compensation levels differences stem from the fact that some types of losses are not recognized in all Member States. Guidelines on recognized losses and how losses headings function could be used to assist judges and even medical experts in assessing damage and determining quantum and move toward a more harmonized system.</p>	<p>Issues</p> <p>Compensation levels differences stem from the fact that the same injuries are not assessed in the same way in all Member States. Guidelines on injury assessment could be used to assist judges and even medical experts in assessing injuries and determining quantum and move toward a more harmonized system. This would help judges rely more on scientific material rather than on intuition.</p> <p>Objectives</p>	<p>Issues</p> <p>Compensation levels differences stem from the fact that the same car damage may not be assessed in the same way in all Member States. Guidelines on car damage assessment could be used to assist judges and even experts and move toward a more harmonized system.</p> <p>Objectives</p> <p>Restitutio in integrum</p> <p>Limiting the risk of expiry of limitation periods</p> <p>Eliminating the risk of</p>	<p>Issues</p> <p>Compensation levels differences stem from the discretion granted to judges and types of losses recognized in different Member States, levels of interest rates applied on periodic payments, levels of discount rate applied on lump sum payments and generally mortality tables. A common framework of reference for all of these could be used to serve as guidelines for judges and even medical experts in assessing damage and determining quantum.</p> <p>Objectives</p> <p>Rehabilitation Eliminating the risk of under and over compensation</p>

Solutions to issues on level of compensation	S19- Judges rely on CFR	S22- EU guidelines on recognized losses	S25-Guidelines on injury assessment and relevant tables for all countries	S26-Guidelines on aged-car value	S27-CFR on losses, interest rates, discount rates, mortality tables
		<p>Objectives</p> <p>Restitutio in integrum</p> <p>Limiting the risk of expiry of limitation periods</p> <p>Limiting the risk of over compensation</p> <p>Enhancing the management of injury-related information and claims</p>	<p>Restitutio in integrum</p> <p>Limiting the risk of expiry of limitation periods</p> <p>Eliminating the risk of under compensation</p> <p>Eliminating the risk of over compensation</p> <p>Enhancing the management of injury-related information and claims</p>	<p>under compensation</p> <p>Eliminating the risk of over compensation</p> <p>Enhancing the management of property damage related information and claims</p>	<p>Enhancing the management of injury-related information and claims</p>
Impact on Visiting Victims	Little impact at first but in time compensation levels should increase and a better understanding of judges will facilitate their taking into account the practice in the Victim's country of residence	Little impact at first but in time compensation levels should increase across the board as Member States recognize more types of losses	Little impact at first but in time compensation levels should increase and a better understanding of judges will facilitate their taking into account the practice in the Victim's country of residence	Little impact at first but should lead to the taking into account of different practices although this is not really an issue since the assessment of the property damage is organized by an expert from the Victim's place of residence who applies values in the Victim's country.	Facilitates slow harmonization throughout EU and benefits Victims over the medium term.
Impact on defendants	Little impact	Little impact	Little impact	Little impact	Little impact

Solutions to issues on level of compensation	S19- Judges rely on CFR	S22- EU guidelines on recognized losses	S25-Guidelines on injury assessment and relevant tables for all countries	S26-Guidelines on aged-car value	S27-CFR on losses, interest rates, discount rates, mortality tables
Impact on insurers and their customers	Higher predictability should lead to lower premiums	Higher predictability should lead to lower premiums	Higher predictability should lead to lower premiums	Little impact	Higher predictability should lead to lower premiums
Impact on public health services	In as far as this leads ultimately to better compensation, it is beneficial	In as far as this leads ultimately to better compensation, it is beneficial	In as far as this leads ultimately to better compensation, it is beneficial	No impact	Interest rates, discount rates and taking into account local mortality rates into the compensation calculus will benefit public health services over the long term
Impact on the taxpayer	Little impact	Little impact	Little impact	No impact	Little impact
Impact on courts and lawyers	Judges are better able to use their existing discretion in a way that promotes greater harmonization. There may be reluctance by judges to use thee because they could be perceived as an encroachment on their powers.	Judges are better able to use their existing discretion in a way that promotes greater harmonization	Judges are better able to use their existing discretion in a way that takes into account Victim's specific circumstances and ultimately promotes greater harmonization	Judges are better able to use their existing discretion in a way that promotes greater harmonization	Judges are better able to use their existing discretion in a way that promotes greater harmonization. There may be reluctance by judges to use thee because they could be perceived as an encroachment on their powers.
Impact on the Victim's country of residence	This could have a significant impact over time but will depend on level of judicial discretion	This could have a significant impact over time but will depend on level of judicial discretion	This could have a significant impact over time but will depend on level of judicial discretion	Little impact	This could have a significant impact over time but will depend on level of judicial discretion

Solutions to issues on level of compensation	S19- Judges rely on CFR	S22- EU guidelines on recognized losses	S25-Guidelines on injury assessment and relevant tables for all countries	S26-Guidelines on aged-car value	S27-CFR on losses, interest rates, discount rates, mortality tables
Impact on the country of the location of the accident or injury	See above	See above	See above	See above	See above
Impact on compensation levels	Should lead to fewer risks of under and over compensation over time	Should lead to fewer risks of under and over compensation over time	Should lead to fewer risks of under and over compensation over time	See above	Should lead to fewer risks of under and over compensation over time
Impact on limitation periods	No impact	No impact	No impact	No impact	No impact
Policy and implementation costs	CFRs could be a good way to proceed so that change is fostered over time.	Facilitating slow harmonization	Facilitating slow harmonization	Facilitating slow harmonization	CFRs could be a good way to proceed so that change is fostered over time.

Solutions to issues on level of compensation	S19- Judges rely on CFR	S22- EU guidelines on recognized losses	S25-Guidelines on injury assessment and relevant tables for all countries	S26-Guidelines on aged-car value	S27-CFR on losses, interest rates, discount rates, mortality tables
<p>Costs benefits analysis</p>	<p>CRF are a relatively new concept but could be beneficial in the context of trying to identify common grounds between different practices (definition of losses, identification of injuries, determination of quantum, common criteria to assess damage).</p> <p>It should be clear that CFR or common principles do not take away judges' discretion to applying them to the Victim's unique set of circumstance.</p>	<p>Slow harmonization is proportionate to the reality of the issues at stake</p>	<p>Slow harmonization is proportionate to the reality of the issues at stake</p>	<p>Slow harmonization is proportionate to the reality of the issues at stake</p> <p>In some Member States this is not an issue as the Victim's insurance deals with this and has the car valued by its own experts in agreement with the local expert. This means that the Victim's loss in his or her country of residence is taken into account. Ensuring that this system is implemented in the whole of the EU should not be costly.</p>	<p>CRF could be beneficial in the context of trying to identify common criteria for assessment of losses or determination of lump sum payments, periodic payments and length of time for which the compensation is due.</p>

5.14.2 Compensation level solutions focusing on information

Solutions involving the provision of relevant information on compensation levels have been identified. They are assessed below.

Solutions to issues on level of compensation	S29-Information for judges	S32-Victim's insurer to provide information	S33-Brochure on compensation practices
<p>Issues and Objectives</p>	<p>Issues Compensation levels differences at least partly stem from the discretion granted to judges. Better information for judges could help guide them in a more uniform way in determining compensation.</p> <p>Objectives Rehabilitation Eliminating the risk of under and over compensation Enhancing the management of injury-related information and claims</p>	<p>Issues If Victims are made aware of information on compensation levels in their country of destination they are better able to assess whether they need to take complementary insurance</p> <p>Objectives Eliminating the risk of under compensation Enhancing the management of injury-related information and claims</p>	<p>Issues If Victims are made aware of information on compensation levels in their country of destination they are able to better assess whether they need to take complementary insurance</p> <p>Objectives Eliminating the risk of under compensation Enhancing the management of injury-related information and claims</p>
<p>Impact on Visiting Victims</p>	<p>Little impact at first but in time compensation levels should increase and a better understanding of judges will facilitate their taking into account the practice in the Victim's country of residence</p>	<p>Victim is able to anticipate potential risk and act accordingly</p>	<p>Victim is able to anticipate potential risk and act accordingly</p>
<p>Impact on defendants</p>	<p>Little impact</p>	<p>Little impact although when Victims take complementary insurance, defendant's fault less relevant</p>	<p>Little impact although when Victims take complementary insurance, defendant's fault less relevant</p>

Solutions to issues on level of compensation	S29-Information for judges	S32-Victim's insurer to provide information	S33-Brochure on compensation practices
Impact on insurers and their customers	Higher predictability should lead to lower premiums	The impact on insurers will be the resources used to produce and communicate the information. However, better awareness of Victims should lead to increased sales of insurance products. It is not certain that premiums will increase given the above consideration.	Better awareness of Victims should lead to increased sales of insurance products.
Impact on public health services	In as far as this leads ultimately to better compensation it is beneficial	In as far as this leads ultimately to better compensation it is beneficial	In as far as this leads ultimately to better compensation it is beneficial
Impact on the taxpayer	Little impact	Insured invited to pay for differences in compensation levels, which means that tax payer does not have to pay the bill here.	Little impact
Impact on courts and lawyers	Judges are better able to use their existing discretion and take into account Victim's specific circumstances	Less recourse to judges as better information should mean better insurance for Victims	Judges and lawyers are better informed and more likely to take into account Victim's specific circumstances
Impact on the Victim's country of residence	This could have a significant impact over time but will depend on level of judicial discretion	If following information Victim takes complementary insurance, compensation in country of residence and litigation more likely in country of residence but against own insurer	If following information Victim takes complementary insurance, compensation in country of residence and litigation more likely in country of residence but against own insurer
Impact on the country of the location of the accident or injury	See above	Fewer litigations	Fewer litigations
Impact on compensation levels	Should lead to fewer risks of under and over compensation over time	If following information, Victim takes complementary insurance compensation will be more in line with practice in Victim's country of residence	If following information, Victim takes complementary insurance compensation will be more in line with practice in Victim's country of residence

Solutions to issues on level of compensation	S29-Information for judges	S32-Victim's insurer to provide information	S33-Brochure on compensation practices
Impact on limitation periods	Little impact	May lead to Victim taking up complementary insurance	No impact
Policy and implementation costs	Facilitating slow harmonization and the taking into account of a Victim's specific circumstances	Implementation costs for insurers who should benefit as Victim's purchase complementary insurance	From a policy perspective, public awareness is always positive. It may be costly to implement though given the needs for regular updates and the number of EU languages in which to translate the updates.
Costs benefits analysis	There are many benefits to providing judges with information that comes from an official or neutral source. Often when judges have to apply foreign law, they rely on one of the parties or on an expert hired by one of the parties. This reliance can be detrimental to a good administration of justice.	If avoiding under compensation is the objective, Victims should buy complementary insurance when they travel to other countries. The Victims who are likely to suffer from under compensation come from countries with the higher standards of living and thus can afford the extra insurance policy.	Information is important but a brochure may not lead to effective public awareness and be a waste of resources.

5.14.3 Compensation level solutions focuses on insurance

Insurance solutions have been identified to address the issues pertaining to compensation levels. They are assessed below.

Solutions to issues on level of compensation	S28-Imposing comprehensive insurance	S30-Allow Victim to claim from own insurer if faulty party insurer fails to reply	S31-Allow Victim to sue in own country under own law if faulty party insurer fails to respond	S34-Driver insurance compulsory	S35-Direct settlement of claims OR S20 coverage through third party insurance of Victim	S38-Unify insurance products
<p>Issues and Objectives</p>	<p>Issues Compensation levels differences between countries may lead to under compensation. If travellers were adequately insured the risk of under compensation would disappear.</p> <p>Objectives Restitutio in integrum in Victim's country of residence Eliminating the risk of under compensation Eliminating the risk of over compensation Enhancing the management of injury-related information and claims Ensure effective</p>	<p>Issues Victims should be promptly compensated. If faulty party insurer fails to reply then Victim has right to obtain compensation directly from their insurance and for their insurance to then claim back from the faulty party insurer.</p> <p>Objectives Enhancing the management of injury-related information and claims Eliminating the risk of expiry of limitation periods Ensure effective</p>	<p>Issues Victims should be promptly compensated. If the faulty party or their insurer is not reactive, they lose the chance to have any litigation in their own country under their own law.</p> <p>Objectives Enhancing the management of injury-related information and claims Eliminating the risk of expiry of limitation periods Ensure effective compensation Fast compensation and settlement of claims</p>	<p>Issues In some countries such as France and the UK a special driver cover affords full protection for drivers who are Victims of road traffic accidents. The assumption is that drivers are more often Victims than passengers.</p> <p>Objectives Restitutio in integrum in Victim's country of residence Enhancing the management of injury-related information and claims Eliminating the risk of expiry of limitation periods Eliminating the risk of under compensation</p>	<p>Issues Victims should be promptly compensated. Direct settlement of claims between insurers allows prompt compensation and better general management of claims. Also allows a better taking into account of Victim's own circumstances.</p> <p>Objectives Eliminating the risk of over compensation Eliminating the risk of expiry of limitation periods</p>	<p>Issues This would facilitate claims management and ensure that insurance products are less complex and include fewer exceptions to adequate coverage.</p> <p>Objectives Enhancing the management of injury-related information and claims Eliminating the risk of under compensation Eliminating the risk of over compensation</p>

Solutions to issues on level of compensation	S28- Imposing comprehensive insurance	S30-Allow Victim to claim from own insurer if faulty party insurer fails to reply	S31-Allow Victim to sue in own country under own law if faulty party insurer fails to respond	S34-Driver insurance compulsory	S35-Direct settlement of claims OR S20 coverage through third party insurance of Victim	S38-Unify insurance products
	compensation Fast compensation and settlement of claims	compensation Fast compensation and settlement of claims		Eliminating the risk of over compensation Ensure effective compensation Fast compensation and settlement of claims	Ensure effective compensation Fast compensation and settlement of claims	
Impact on Visiting Victims	Important impact as Visiting Victim is less concerned about the faulty party and the applicable law.	Important reassuring impact.	Important reassuring impact.	If Visiting Victim is driver he or she is fully insured by his or her own insurance company and thus the risk of under compensation is limited.	Victim is compensated promptly.	Enable a better understanding on how insurance can help in avoiding under compensation.
Impact on defendants	Little impact although in the long term the notion of fault may be of lesser importance	Important impact and defendants have to be proactive about the Victim's compensation	Important impact and defendants have to be proactive about the Victim's compensation	Little impact	Little impact	Little impact

Solutions to issues on level of compensation	S28- Imposing comprehensive insurance	S30-Allow Victim to claim from own insurer if faulty party insurer fails to reply	S31-Allow Victim to sue in own country under own law if faulty party insurer fails to respond	S34-Driver insurance compulsory	S35-Direct settlement of claims OR S20 coverage through third party insurance of Victim	S38-Unify insurance products
Impact on insurers and their customers	Increase in premiums although if a “blue card” system were created, the increase would be limited to those who are travelling	Important impact and defendant’s insurers have to be pro-active about the Victim’s compensation. Victim’s own insurer also has an interest in making sure that faulty party’s insurer replies. This thus gives an incentive to all insurers to act.	Important impact and defendant’s insurers have to be pro-active about the Victim’s compensation	Small increase in premiums (40 Euros per year in France)	Important impact on insurers as studies have shown that direct settlement of claims mechanisms generate efficiencies and costs savings. Cost savings can be transferred to customers through lower premiums.	Important impact as insurers will have to review their product lines.
Impact on public health services	Public health services can claim back from Victim’s insurer.	Indirect impact	Indirect impact	Public health services can claim back from Victim’s insurer.	Prompt settlement of claims means less strain on public health services	Indirect impact
Impact on the taxpayer	Impact in the sense that coverage means that the insured rather than the community bear the costs	Indirect impact	Indirect impact	Small impact in the sense that coverage means that the insured rather than the community bear the costs	Indirect impact	Indirect impact

Solutions to issues on level of compensation	S28-Imposing comprehensive insurance	S30-Allow Victim to claim from own insurer if faulty party insurer fails to reply	S31-Allow Victim to sue in own country under own law if faulty party insurer fails to respond	S34-Driver insurance compulsory	S35-Direct settlement of claims OR S20 coverage through third party insurance of Victim	S38-Unify insurance products
Impact on courts and lawyers	Important impact because this leads to less litigation and especially less cross-border litigation as, if the insured has an issue, he or she will sue his or her insurance company. The Victim's insurer will then negotiate any reimbursement with faulty party insurance but this seldom leads to litigation.	Little impact unless faulty party's insurer fails to reply. In that case similar impact as Solution 35.	Little impact unless faulty party insurer fails to reply. In case of no reply, similar solution to Solution 18 (lex damni or Victim's country of residence)	Little impact	Little impact as direct settlement of claims does not necessarily mean higher levels of compensation than currently in practice. Although, if Victim's insurer is compensating, it can be assumed that Victim's local circumstances will be taken into consideration.	Little impact
Impact on the Victim's country of residence	Impact in as far as issues relating to Victim's accidents are mainly dealt with in the Victim's country of residence	Victim can use contract with own insurer to claim directly.	The law of the Victim's country of residence apply in the event of faulty party's insurance failing to respond to claim.	With respect to driver, driver will be able to sue his or her insurance in his or her country of residence to obtain full compensation.	Victim's circumstances more likely to be taken into consideration	Impact on all insurance contracts
Impact on the country of the location of the accident or injury	Fewer potential litigations	Victim's insurer acts against faulty party's insurer	Country of location of accident or injury risks having its law not apply to case. This in effect creates an exception to lex laesionis and rules pertaining to jurisdiction.	Fewer potential litigations	Less litigation	Impact on all insurance contracts

Solutions to issues on level of compensation	S28- Imposing comprehensive insurance	S30-Allow Victim to claim from own insurer if faulty party insurer fails to reply	S31-Allow Victim to sue in own country under own law if faulty party insurer fails to respond	S34-Driver insurance compulsory	S35-Direct settlement of claims OR S20 coverage through third party insurance of Victim	S38-Unify insurance products
Impact on compensation levels	Victim compensated by his or her own insurance based on insurance contract. This should guarantee compensation based on practice in Victim's country of residence.	No impact as such except that claim to own insurer will facilitate taking into account Victim's specific circumstances.	Advantage given to Victim if faulty party's insurance at fault.	Driver Victim compensated by his or her own insurance based on insurance contract. This should guarantee compensation based on practice in Victim's country of residence. Provides good coverage for death, disability and precium doloris.	Little impact on compensation although Victim's circumstances more likely to be taken into consideration	Little impact
Impact on limitation periods	Victim compensation by his or her own insurance based on insurance contract. Contractual limitation periods would apply in general.	No impact	Impact on limitation periods in as far as faulty party's insurer does not reply within deadline.	Driver Victim compensated by his or her own insurance based on insurance contract. Contractual limitation periods would apply in general.	Little impact on limitation periods	No impact

Solutions to issues on level of compensation	S28- Imposing comprehensive insurance	S30-Allow Victim to claim from own insurer if faulty party insurer fails to reply	S31-Allow Victim to sue in own country under own law if faulty party insurer fails to respond	S34-Driver insurance compulsory	S35-Direct settlement of claims OR S20 coverage through third party insurance of Victim	S38-Unify insurance products
<p>Policy and implementation costs</p>	<p>One could imagine the creation of a “blue card” for those who are travelling across borders in the EU. Blue card holders would be covered for serious accidents. Differentiating between Green Card and Blue card holders would enable better statistics gathering and better assessment of issues pertaining to EU cross-border travellers.</p>	<p>From a policy perspective, it provides for an efficient solution for Victims where they otherwise would feel powerless.</p>	<p>The Victim would have to demonstrate that it has not received a reply within the applicable time-frame. Creating a rebuttal of jurisdiction and applicable law may be appropriate to sanction a behaviour that places the Victim in a situation where it has no other choice than to sue in a court that it has no familiarity with and under a law that it has no knowledge of.</p>	<p>Minimal implementation cost if automatically included in the third party insurance policy.</p> <p>From a policy perspective this would address the main issue of under compensation for drivers who, it is assumed, are more often involved in road traffic accidents than passengers.</p>	<p>From a policy perspective direct settlement is a necessity at the EU level. Technologies exist now that enable fast settlement between insurers. An agreement between insurers should be reached as soon as possible to start implementing direct settlements across the EU so that the system exists prior to the issues that will arise with the increasing number of EU citizen travelling across borders.</p> <p>The costs of implementation are important but the basic infrastructure already exists.</p>	<p>A set of insurance products that are equivalent across the EU would facilitate understanding by EU citizens of the coverage that they are acquiring. This is not obvious unless these insurance products automatically cover the insured on the whole EU territory.</p> <p>The costs of implementing this would fall on insurers and translate in higher premiums.</p>

Solutions to issues on level of compensation	S28-Imposing comprehensive insurance	S30-Allow Victim to claim from own insurer if faulty party insurer fails to reply	S31-Allow Victim to sue in own country under own law if faulty party insurer fails to respond	S34-Driver insurance compulsory	S35-Direct settlement of claims OR S20 coverage through third party insurance of Victim	S38-Unify insurance products
<p>Costs benefits analysis</p>	<p>Insurance to cover travels abroad is an option that is as such easy to implement since the appropriate insurance products exist.</p> <p>Creating a new “card” system would not be costly because of the existence of the green card system and this would facilitate the identification of those who are not properly insured.</p> <p>Blue cards could be delivered for one year for those who travel regularly or for a couple of months for those who wish to go on holiday abroad. A small premium would be added to the regular insurance policy.</p> <p>Because, as stated before, there are few road traffic accidents involving Visiting</p>	<p>This solution aims at providing a solution to Victims where the faulty party or their insurer fails to reply. It creates a right to direct settlement in a specific circumstance. As such it is narrower in scope than Solution 35. It only aims at effectively ensuring that the Victim is not ignored by the faulty party’s insurer.</p>	<p>There is little evidence that insurers reply late. However, in order to avoid such risks allowing the Victim to sue in his or her own country and have that country’s law apply would provide a satisfactory outcome for the Victim. Basically, the law and jurisdiction on the location of the injury applies unless the faulty party or their insurer is uncooperative.</p>	<p>Driver’s insurance policies appear to exist in most Member States. They are sometimes even automatically included in the third party liability insurance. The costs of including these automatically in all insurance contract as part of third party liability coverage should thus not be excessive. This solution would obviously only address Victims who are drivers.</p>	<p>Direct settlement of claims exists in many countries already and allow for very efficient management of claims through the existence of clearing-houses using modern technologies.</p> <p>This could be extended to include all EU countries.</p> <p>The benefits are prompt payments, quick settlements, Victim’s insurer payment based on Victim losses.</p> <p>The costs are important but the technology exists.</p>	<p>Although more uniformity in insurance products might be desirable, generally it would only lead to similar levels of compensation if the ceilings and minimum covered by insurance policies are the same everywhere. Even then people would always be able to insure themselves for more than as set in the basic insurance products.</p> <p>Further, even today people can find adequate insurance products and insurers are always keen to sell complementary insurance.</p>

Solutions to issues on level of compensation	S28- Imposing comprehensive insurance	S30-Allow Victim to claim from own insurer if faulty party insurer fails to reply	S31-Allow Victim to sue in own country under own law if faulty party insurer fails to respond	S34-Driver insurance compulsory	S35-Direct settlement of claims OR S20 coverage through third party insurance of Victim	S38-Unify insurance products
	<p>Victims this would address the problem precisely. It would also enable the compilation of better statistical information on cross-border traffic.</p> <p>Compulsory complementary insurance would only aim at ensuring that, in case of important injuries, the Victim is adequately compensated. The third party liability insurance system would still exist and be the normal system for accidents that are below a certain amount of losses or gravity of injuries.</p> <p>Victims would be protected adequately without having to overhaul the EU legal systems.</p>					

5.14.4 Compensation level solutions focuses on the creation of EU bodies

Solutions involving the creation of EU specialised bodies have been identified to address the issues pertaining to compensation levels. They are assessed below.

Solutions to issues on level of compensation	S21-Creation of EU fund	S37-European assessment body	S40-European Court
<p>Issues and Objectives</p>	<p>Issues</p> <p>Compensation levels differences between countries may lead to under/over compensation and the expiry of limitation periods.</p> <p>A European Fund would not have to be institutionalized. Guarantee Funds already exist in ALL Member States and an ad hoc umbrella fund could be created to deal with special issues when they arise.</p> <p>A European Fund could act post compensation for Victims who feel that they have been undercompensated. They would not be an extra degree of jurisdiction but would have the ability to offer extra compensation if they feel that the level of compensation provided does not take into account the situation of the Victim adequately.</p>	<p>Issues</p> <p>Victims should be adequately compensated. A European Assessment Body could be set up to evaluate the level of injuries, determine losses and the extent of damages based on harmonized tables or on tables provided by each Member State. Courts would refer Victims to it and would then determine quantum based the European Body’s assessment.</p> <p>A European assessment body’s action could in effect be limited to providing recommendations to national courts under a system that could work in the same way as prejudicial questions currently referred to the ECJ by national courts.</p> <p>Objectives</p> <p>Rehabilitation</p> <p>Limiting the risk of under compensation</p> <p>Limiting the risk of over compensation</p>	<p>Issues</p> <p>Compensation levels differences between countries may lead to under/over compensation. A European court created to assess compensation would resolve this.</p> <p>Objectives</p> <p>Eliminating the risk of under compensation</p> <p>Eliminating the risk of over compensation</p> <p>Ensure effective compensation</p> <p>Fast compensation and settlement of claims</p>

Solutions to issues on level of compensation	S21-Creation of EU fund	S37-European assessment body	S40-European Court
	Objectives Restitutio in integrum in Victim's country of residence Limiting the risk of under compensation Limiting the risk of over compensation Limiting risk of expiry of limitation periods Ensuring effective compensation	Enhancing the management of injury-related information and claims	
Impact on Visiting Victims	Visiting Victims would be able to apply directly to a European compensation fund which would compensate based on the Victim's specific circumstances.	This would impact the Victim as a specialized body would assess the injuries and damage.	Would take into account the Victim's specific circumstances as its existence would derive from the fact that specific circumstances exist in cross-border cases.
Impact on defendants	This may lead to a no fault system with the issues that arise under such system in terms of behaviour by drivers.	Little impact.	
Impact on insurers and their customers	There would be little impact on insurers except that the fund would be funded by insurance companies in the same way as national guarantee funds are already funded.	The impact on insurers should be neutral.	
Impact on public health services	Adequate compensation for Victims has a positive impact on public health services.	Little direct impact	
Impact on the taxpayer	Little impact	The creation of a European assessment body involves a cost that would be paid for by tax payers.	The creation of a European court system involves a cost that would be paid for by tax payers.
Impact on courts and lawyers	Issues will arise as to the competent court or law to be applied if the Victim is not satisfied with the compensation offered by the European Fund.	Courts would be invited to follow the recommendations formulated by the European assessment body and determine quantum based on these recommendations.	National court would lose cases involving cross-border accidents.

Solutions to issues on level of compensation	S21-Creation of EU fund	S37-European assessment body	S40-European Court
Impact on the Victim's country of residence	The applicable law and court to litigation against the fund have to be defined.	Little impact.	Decisions by the European Courts would have to be enforceable.
Impact on the country of the location of the accident or injury	The applicable law and court to litigation against the fund have to be defined.	Competence in this area would be transferred to a specialized European body	Decisions by the European Courts would have to be enforceable.
Impact on compensation levels	The European Fund would be created to ensure that the focus is placed on the rehabilitation of the Victim wherever the Victim chooses to live.	A European assessment body would be more inclined to take into account the system that the Victim would have to live in with the sustained injuries.	A European Court would be able to determine quantum based on the Victim's specific circumstances and the costs of living in his or her own country of residence with the sustained injuries.
Impact on limitation periods	Special limitation periods would have to be defined.	No impact	The impact will depend on whether EU limitation periods apply or the country of the location of where the injury is sustained applies.

Solutions to issues on level of compensation	S21-Creation of EU fund	S37-European assessment body	S40-European Court
Policy and implementation costs	<p>The creation of a European Fund to address issues in respect to compensation of Victims of cross-border related accidents could enable a better understanding of the particular circumstances surrounding cross-border issues. A European Fund does not have to be limited to road traffic accidents but can also concern other types of accidents if these have the cross-border component.</p> <p>If independent, a European Fund would also resolve the important conflicts of interest that can arise between the “insurer indemnifier” and the “insurer policy provider”. As the insurance sector consolidates, the level of conflict of interest is bound to increase.</p>	<p>From a policy perspective a European assessment Body for cross-border road traffic accidents would enable the development of European principles of assessment that could then influence Member States.</p> <p>Implementation costs would be important. However, such bodies already exist in a number of Member States and have proven their worth.</p>	<p>From a policy perspective, it may be useful for the EU to evaluate whether the creation of a European Court system may not help resolve many issues that arise in cross-border cases especially with the growing number of people travelling across border lines. The US has created a Federal Court System. The Federal Court System functions alongside state court.</p> <p>Implementation costs would be high although the creation of a European Court system would not just serve cross-border road traffic accident cases but also other cross-border issues in the EU.</p>
Costs benefits analysis	<p>The costs of setting up such a fund might not be that important given that guarantee funds already exist in most Member States. The European Fund could be an emanation of the National Guarantee Fund. Its function would be to deal exclusively with accidents that involve a cross-border component.</p> <p>The benefit of setting up a European Fund would be multiple. The source of compensation would be easier to identify. Compensation could be awarded relatively quickly. A European Fund would be more impartial in its compensation practice than insurance companies. The</p>	<p>Experts exist in all Member States that regularly assess injuries and damage.</p> <p>An institutionalized body could be set up. This would be a costly exercise but may prove useful over the long term to influence Member States.</p> <p>The advantage would be that this body would take into account the specific circumstances of the Victim in assessing injuries and losses.</p>	<p>Creating a European Court system to resolve issues related to cross border road traffic accident would not be a proportionate response to the issues at stake. However, if a European Court system were create to resolve all issues of conflicts of jurisdiction and conflicts of laws in the EU and generally provide information to parties, this may not be so costly and could bring about various benefits, including enabling Victims to make their case to a neutral Court that would weigh the interests of both parties.</p>

Solutions to issues on level of compensation	S21-Creation of EU fund	S37-European assessment body	S40-European Court
	<p>issue of applicable law would remain though if the Victim is not satisfied with the compensation offered.</p>		<p>A European Court may be too formal a setting. One could also imagine a European mediation system or arbitration system to resolve cross border issues.</p>

5.14.5 Compensation level solutions focuses on harmonization, restitutio in integrum and lex damni

Solutions involving either harmonization, *lex damni* or the law of the Victim’s country of residence to ensure adequate compensation have been identified to address the issues pertaining to compensation levels. They are assessed below.

Solutions to issues on level of compensation	S18- Application of lex damni for compensation	S23- Harmonization of types of losses and injuries levels	S24-Harmonize with table to calculate lump sum and periodic payments (including various criteria taken into account to determine quantum)	S36-Apply restitutio in integrum	S39-Minimum awards in EU
<p>Issues and Objectives</p>	<p>Issues</p> <p>Applying the law of the Victim’s country of residence has been suggested as a solution to over and under compensation issues. This would involve a “depeçage” between the applicable law on compensation and that on limitation periods.</p> <p>Objectives</p> <p>Restitutio in integrum</p> <p>Limiting the risk of under compensation</p> <p>Limiting the risk of over compensation</p>	<p>Issues</p> <p>The recognition of different types of losses constitutes either a source of distortion between Member States or of confusion as some Member States include varieties of losses under general headings.</p> <p>It should also be noted that recognizing different types of losses will not prevent countries from continued use of headings as long as those headings include the recognized types of losses.</p> <p>Similarly different systems for the assessment of injuries levels create the risk of distortions.</p> <p>Objectives</p> <p>Rehabilitation</p>	<p>Issues</p> <p>Compensation levels differences between countries may lead to under/over compensation and the expiry of limitation periods.</p> <p>Objectives</p> <p>Eliminating the risk of under compensation</p> <p>Eliminating the risk of over compensation</p> <p>Ensure effective compensation</p> <p>Fast compensation and settlement of claims</p>	<p>Issues</p> <p>Compensation levels differences between countries may lead to under/over compensation and the expiry of limitation periods.</p> <p>The application of the basic principle of restitutio in integrum should eliminate distortions.</p> <p>Objectives</p> <p>Eliminating the risk of under compensation</p> <p>Eliminating the risk of over compensation</p> <p>Ensure effective compensation</p> <p>Fast compensation and</p>	<p>Issues</p> <p>Minimum awards for a particular type of loss based on a specific level of injury could limit distortions that exist between Member States.</p> <p>Objectives</p> <p>Eliminating the risk of under compensation</p> <p>Eliminating the risk of over compensation</p> <p>Ensure effective compensation</p> <p>Fast compensation and settlement of claims</p>

Solutions to issues on level of compensation	S18- Application of lex damni for compensation	S23- Harmonization of types of losses and injuries levels	S24-Harmonize with table to calculate lump sum and periodic payments (including various criteria taken into account to determine quantum)	S36-Apply restitutio in integrum	S39-Minimum awards in EU
		Limiting the risk of under compensation Limiting the risk of over compensation Enhancing the management of injury-related information and claims		settlement of claims	
Impact on Visiting Victims	This provides the Victim with compensation that is based on the practice in the Victim's country of residence	More certainty for Victims.	More predictability	Little impact	Minimum guarantee for Victim
Impact on defendants	Defendant	Little impact	Little impact	Little impact	Little impact

Solutions to issues on level of compensation	S18- Application of lex damni for compensation	S23- Harmonization of types of losses and injuries levels	S24-Harmonize with table to calculate lump sum and periodic payments (including various criteria taken into account to determine quantum)	S36-Apply restitutio in integrum	S39-Minimum awards in EU
Impact on insurers and their customers	Neutral in the sense that this limits over and under compensation across the EU. The impact is more important however from an individual Members State perspective as insurers present in Member that have low levels of compensation will end up paying higher compensation than would normally apply.	More predictability should lead to better management of cases.	More predictability should lead to better management of cases.	Little impact	More predictability
Impact on public health services	There is less strain on public health services when Victim is fully compensated	Public health services will undertake to treat all levels of injuries. If different levels of injuries are adequately compensated, the strain on public health services is lessened.	With people living longer and the population aging the strain on public health services is set to increase. Ensuring that losses incurred following an accident are effectively taken into account over time is essential for public health services.	Little impact	There is an impact to the extent that minimum award diminish the risk of under compensation.
Impact on the taxpayer	Little impact	Similar to solution S24.	Ensuring that the time factor is adequately addressed in compensation lessens the strain on public health services and in turn benefits the tax payer.	Little impact	Similar to S 24.

Solutions to issues on level of compensation	S18- Application of lex damni for compensation	S23- Harmonization of types of losses and injuries levels	S24-Harmonize with table to calculate lump sum and periodic payments (including various criteria taken into account to determine quantum)	S36-Apply restitutio in integrum	S39-Minimum awards in EU
Impact on courts and lawyers	<p>Important impact as courts have to apply the complex and sometimes not uniform compensation system in force in another country and have to recognize losses that they are not familiar with.</p> <p>Important risk of over reliance by courts on Victim's lawyer's assertions.</p> <p>Local lawyers have to be assisted by foreign lawyer to understand foreign law to base arguments on.</p>	<p>Simplification for courts and lawyers in general.</p> <p>Harmonization of the different types of recognized losses would facilitate the implementation of Recital 33 by courts.</p>	<p>Simplification for courts and lawyers in general.</p> <p>Better ability by courts located in country of accident to apply foreign law as the interest/discount rates applied and the criteria used to take into account mortality and career prospects and chances of finding a job after injury are one of the main sources of distortion between Member States.</p>	Little impact	Courts would retain an important level of discretion.
Impact on the Victim's country of residence	Important impact as the law of that country becomes applicable.	Leads to approximation between harmonized losses and levels of injuries and current practice in country	Leads to approximation between harmonized criteria and table with current situation in country.	Little impact	May change current practice

Solutions to issues on level of compensation	S18- Application of lex damni for compensation	S23- Harmonization of types of losses and injuries levels	S24-Harmonize with table to calculate lump sum and periodic payments (including various criteria taken into account to determine quantum)	S36-Apply restitutio in integrum	S39-Minimum awards in EU
Impact on the country of the location of the accident or injury	Law of country of the location of the accident or injury not applicable to compensation.	Leads to approximation between harmonized losses and levels of injuries and current practice in country	Leads to approximation between harmonized criteria and table with current situation in country.	Little impact	May change current practice
Impact on compensation levels	Eliminates under and over compensation that may result from the cross-border aspect of the accident.	Limits differences in compensation levels as a result of same losses and evaluation of injuries.	Limits differences in final compensation levels as a result of same criteria applied to take into account cost over time.	Little impact	Limits differences in compensation levels
Impact on limitation periods	No impact	No impact	No impact	No impact	No impact

Solutions to issues on level of compensation	S18- Application of lex damni for compensation	S23- Harmonization of types of losses and injuries levels	S24-Harmonize with table to calculate lump sum and periodic payments (including various criteria taken into account to determine quantum)	S36-Apply restitutio in integrum	S39-Minimum awards in EU
Policy and implementation costs	See S2 without impact on limitation periods.	<p>There is a benefit in recognizing that throughout the EU, EU citizens, when injured, suffer similar injury levels.</p> <p>There is a benefit in recognizing that throughout the EU, EU citizens, when the injured party, suffer similar losses.</p> <p>The difficulty in harmonizing different types of losses is that in some countries losses come under general heading whilst in other each loss is individualized and is compensated as such.</p> <p>In terms of injury levels some examples already exist, in particular the CEREDOC tables of injury levels adopted for European civil servants in 2005.</p>	<p>From a policy perspective this solution would address concerns that people have when dealing with the longer term consequences of injuries.</p> <p>Implementing a set of criteria such as those developed in many countries should be relatively straight forward. Examples already exist in many Member States.</p>	<p>No implementation costs as most Member States abide by the principle.</p> <p>From a policy perspective reference to the principle may not be appropriate anymore. A reference to “rehabilitation” might be more productive in facilitating the taking into account of the Victim’s specific circumstances.</p>	<p>From a policy perspective minimum award for different types of injuries could signify a will to create a EU standard on awards.</p> <p>This type of solution goes beyond cross-border issues.</p> <p>Setting minimum awards would require adopting S23.</p>
Costs benefits analysis	See S2 without impact on limitation periods.	Tables already exist and can be readily used throughout the EU as they result from cooperation between recognized experts in many Member States.	Defining generally applicable criteria in the calculation of lump sums and periodic payments should help avoid the use of “intuition” in determining how and provide uniformity.	The issue with this principle is that it is not applicable as such to non-pecuniary damages.	The benefits would be that Victims are guaranteed a minimum award for a type of loss based on a level of injury.

Solutions to issues on level of compensation	S18- Application of lex damni for compensation	S23- Harmonization of types of losses and injuries levels	S24-Harmonize with table to calculate lump sum and periodic payments (including various criteria taken into account to determine quantum)	S36-Apply restitutio in integrum	S39-Minimum awards in EU
			<p>The table would include specificities from each Member States as mortality statistics are different from one Member State to the other for example.</p> <p>As a result if harmonization is possible with respect to applicable criteria, one table for the whole of the EU will not reflect the reality in each Member State.</p>		<p>Not all types of losses will lend themselves to the application of minimum awards.</p> <p>This solution will not prevent under or over compensation or the risk of limitation periods expiring.</p>

5.15 Conclusions

Given that the number of people concerned is relatively limited, the most appropriate solutions would be those that do not lead to overhauling the whole legal framework of Member States. Targeted solutions would better meet the needs in this case although any chosen solution would have to take into account the increasing number of cross-border traffic within the EU.

Among the solutions that could address the issues in a proportional manner to the numbers concerned are:

- S1 - Do nothing (at the EU level) and evaluate in a couple of years the impact of Rome II;
- S3 - Provide better information for people in cross-border situations or for European citizens who wish to travel to other Member States;
- S8 - Create a European Court or a European Mediator for compensation issues only could also be envisaged but more likely in a mediation form;
- S21 - Create an ad hoc European compensation fund or commission for victims of cross-border road traffic accidents or creation of fund for Victims who feel that they have been under compensated;
- S32 - Obligate insurance companies to provide information to their clients to try and foster better coverage;
- S37 - Create a European body to give recommendations on the average sums of compensation for personal injury/damage to property (such as the Road Traffic Accident Damage Board “Liikennevahinkolautakunta” in Finland) but only in a system where a question would be asked by the national court (similar to a prejudicial question), to help it determine quantum in cross-border cases.

Other solutions could be relevant but only to address a number of cross-border issues as does Rome II.

TABLE OF CONTENTS

GLOSSARY	13
PRELIMINARY NOTE	20
PRESENTATION OF THE STUDY AND METHODOLOGY	23
REPORT	36
INTRODUCTION	37
EXECUTIVE SUMMARY	42
1 Background	42
1.1 The Motor Insurance Directives	42
1.2 Regulation (EC) N° 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II)	43
2 The main issues in terms of access to compensation (avoiding expiry of limitation period) for EU residents involved in road traffic accidents in a Member State other than the Member State of their habitual residence (“Visiting victims”)	44
2.1 Issues related to limitation periods.....	44
2.2 Distortions in levels of Compensation due to differences in limitation periods and procedures.....	45
2.3 Importance of the risk of distortion	45
2.4 Importance of the level of distortion	47
2.5 Difficulties encountered by Visiting Victims	47
2.6 Solutions to issues related to limitation periods.....	48
3 The main issues in terms of the level of compensation (risks of under-compensation or over-compensation) for EU residents involved in road traffic accidents in a Member State other than the Member State of their habitual residence.....	50
3.1 Distortions in levels of Compensation for damage to property	50
3.1.1 Claims amounts in the EU.....	50
3.1.2 Determination of compensation levels.....	51
3.1.3 Different types of losses taken into account.....	51
3.1.4 Risks of over or under compensation.....	52
3.2 Compensation for personal injury	52
3.3 General levels of compensation in the different EU countries.....	54
3.3.1 General differences in compensation practices	54
3.3.2 Some countries provide higher levels of compensation depending on the type of loss	56
3.3.3 Predictability and cross-border specificity	58

3.3.4	Increases in compensation levels over time.....	58
3.4	Solutions for issues relating to the level of compensation.....	58
4	Assessment of solutions.....	60
5	Road traffic accidents involving Visiting Victims.....	61
5.1	Gathering data on road traffic accidents.....	61
5.2	Narrowing down the numbers.....	66
5.3	The extent of the problem.....	67
6	Conclusions and recommendations.....	68
FINDINGS.....		71
1	Compensation Levels.....	71
1.1	Road traffic accidents involving Visiting Victims.....	71
1.1.1	Gathering data on road traffic accidents.....	71
1.1.2	Narrowing down the numbers.....	75
1.1.3	The extent of the problem.....	77
1.1.4	Avoiding under and over compensation or the expiry of limitation periods.....	78
1.2	The Green Card System.....	79
1.3	Levels of compensation in the different EU countries.....	80
1.3.1	General differences in compensation practices.....	80
1.3.2	Some countries provide higher levels of compensation depending on the type of loss.....	82
1.3.3	Predictability of compensation level.....	83
1.3.4	Cross-border specificity.....	85
1.3.5	Increases in compensation levels over time.....	86
2	Sources of distortions in compensation levels: compensation practice.....	86
2.1	Numerous Sources.....	86
2.2	The compensation system as a source of distortion.....	87
2.3	The courts' discretion: a source of distortion.....	88
2.3.1	The role of courts.....	88
2.3.1.1	Courts influence levels of compensation.....	89
2.3.1.2	Levels of compensation can vary within a Member State.....	91
2.3.1.3	Courts shape compensation.....	91
2.3.2	The discretion exercised by judges and compensation levels.....	92
2.3.3	Marked differences in the level of discretion.....	92
2.3.4	The impact of courts on the recognition of losses.....	93
2.3.5	The impact of the recognition of losses on compensation levels.....	94
2.3.6	The difficulties that too great a discretion may create.....	94

2.3.7	The limitations on discretion and the resulting effect on differences between Member States	96
2.3.8	The solutions aimed at canalizing discretion	96
2.3.9	A solution that may create new problems.....	99
2.3.10	The difficulties that judges may experience when taking into account the victims' situation in their country of residence.	99
2.4	The existence of different types of losses	100
2.4.1	Restitutio in integrum and losses	101
2.4.2	Restitutio in Integrum and lex loci	103
2.4.3	Types of damage taken into account.....	105
2.4.3.1	Criteria used to determine quantum	107
2.5	The existence of different types of methodologies to assess losses	107
2.5.1	Property damage	107
2.5.2	Personal injury Compensation calculation methods - capital v. periodic payments.....	109
2.5.2.1	Lump sums and periodic payments	109
2.5.2.2	Interim payments	109
2.6	The different parameters taken into account when calculating awards	116
2.7	The role of lawyers and academics.....	116
2.8	The role of medical expertise	117
2.8.1	Role of medical experts in evaluating and assessing non-economic losses .	118
2.9	The role of insurers	119
2.10	Insurers are one of the main sources of compensation.....	119
2.11	Taxation on compensation	120
2.12	Legal costs and practices	120
3	Compensation practices	120
3.1	Introduction	120
3.2	Multiple sources in all European countries	120
3.3	Multiple compensation systems	124
3.4	The “fault” systems	127
3.4.1	Common features in fault systems	127
3.4.2	Limitations of fault systems	128
3.4.3	Consequences of the limits of the fault system	129
3.5	The “no-fault” systems	130
3.5.1	The limits of no-fault systems.....	131

3.5.2	The social security and health care systems - sources of personal injury compensation.....	132
3.5.3	Guarantee Funds	133
3.5.4	Private insurance.....	134
3.5.4.1	Compulsory third party liability insurance	134
3.5.4.2	Efficiency of the system	135
3.5.5	Proceedings in Courts	138
3.5.5.1	The right to claim compensation in courts.....	138
3.5.5.2	Legal fees	139
3.5.5.2.1	Sources of fees for the victim.....	140
3.5.5.2.2	Mitigation of costs by the mechanisms of legal aid and reimbursement	145
3.6	Personal Injury	147
3.7	Economic losses for personal injury.....	147
3.7.1	Loss of income due to temporary/permanent incapacity to work	149
3.7.2	The temporary incapacity to work generally compensated on the basis of the actual earnings.....	150
3.7.3	Different types of compensation regarding permanent incapacity to work	152
3.7.3.1	Compensation based on the income of the victim before the accident..	152
3.7.3.2	Compensation based on a general tariff.....	154
3.7.3.3	The dual system in Belgium	155
3.7.3.4	Multiple criteria taken into account in Spain	155
3.7.4	Funeral expenses.....	155
3.8	Member States non economic losses in personal injury	157
3.8.1	Basic principles.....	157
3.8.2	Heads of recoverable non-economic losses: compensation under one single head of non-economic damage and compensation based on different sub-categories of non-economic loss	158
3.8.3	General compensation for medical expenses incurred by the victim	159
3.8.3.1	Bodily Harm/Injury to physical integrity	159
3.8.3.2	Aesthetic Damage.....	160
3.8.3.3	Sexual Damage	162
3.8.3.4	Mental Injury.....	163
3.8.3.5	Pain and Suffering (Pretium Doloris/Moral Damage).....	165
3.8.3.6	Loss of a chance.....	170
3.8.3.7	Social status	171

3.8.3.8	Physical discomfort	172
3.8.3.9	Loss of ability to attend to the ordinary activities carried out before the accident	172
3.8.3.10	Loss of life expectancy	173
3.8.3.11	Appropriate levels of medical expenses	174
3.8.3.12	Compensation through Third Party liability insurance.....	175
3.8.3.13	The nature of the accident	176
3.8.3.14	The obligation to mitigate costs	176
3.8.3.15	The success rate of the treatment	177
3.8.3.16	The burden of proof	178
3.8.3.17	The moment of compensation.....	178
3.8.3.18	Level of compensation linked to the liable party's financial situation	179
3.8.3.19	The case of the foreign victim	179
3.8.4	Damages awarded to third parties because of the victim's pain and suffering	180
3.9	Type of property damage taken into account (by insurance companies/courts in case of third party insurance coverage/in case of supplemental insurance policies)	183
3.9.1	Compensation for damage caused to the car and related expenses.....	183
3.9.1.1	Loss of Property	183
3.9.1.2	Damage to property	183
3.9.1.3	Consequential Loss.....	186
3.9.1.4	Experts' fees and legal costs	187
3.9.1.5	Compensation related to the car driver's fault.....	188
3.9.2	Loss of income for third parties.....	189
3.10	Compensation levels (general and per type of personal injury/damage to property and in case of multiple victims by insurance companies/courts in case of third party insurance coverage/in case of supplemental insurance policies)	190
3.11	Number of claims for compensation per annum (from 2002 to 2006).....	190
3.12	In which countries does application of the law lead to under-compensation for victims who are residents of your country?	190
3.13	Compensation levels for personal injury evolve over time	192
3.14	Difficulties in evaluating compensation levels accurately	192
3.15	For victims resident of which Member States would the application of your country's laws lead to under-compensation?	193

3.16	A case study to highlight the differences between Member States	195
3.16.1	Farandelle and Tartarin Case Study	196
3.16.2	The resulting compensation levels	202
3.17	Conclusions and recommendations	206
3.17.1	Conclusions.....	206
3.17.2	Recommendations.....	207
4	Limitation periods	213
4.1	Introduction	213
4.2	The table below provides the different main features of limitation periods in the EU.....	216
4.3	Interruption of limitation period: when is LP interrupted?.....	232
4.4	Interruption of limitation period: is the content of the claim important?...	236
4.5	Effect of interruption of the limitation period.....	238
4.6	Rules that may shorten limitation periods or end the right to make a claim	240
4.7	Limitation Periods on the right of the victim to claim from their own insurance company in case of the need to obtain compensation for damages not covered or compensation by third party	249
4.7.1	Limitation periods	250
4.7.2	Interruption of limitation period: when is LP interrupted?	254
4.8	Effect of interruption of the limitation period	255
4.9	Limitation periods for contracts	256
4.10	The effect of limitation periods in criminal cases on limitation periods in civil liability cases	257
4.11	Conflict of laws rules in respect of limitation periods	258
4.12	Evaluation of the number of claims that fail because of the limitation periods.	258
4.13	Conclusions and recommendations	259
5	Assessment of solutions.....	261
5.1	Introduction	261
5.2	Presentation of the proposed solutions	262
5.2.1	The General Solutions are as follows:.....	262
5.2.2	Solutions tailored to issues pertaining to limitation periods (“Limitation Periods Solutions”)	262
5.2.3	Solutions tailored to issues pertaining to levels of compensation (“Compensation Solutions”).....	263
5.3	The goals pursued by each solution	266

5.4	Proportionality of solutions	276
5.5	Assessment of Solution 1: S1 - Do nothing (at the EU level)	276
5.5.1	Issues and objectives	276
5.5.2	Impact on Visiting Victims	277
5.5.3	Impact on defendants	278
5.5.4	Impact on insurers and their customers	278
5.5.5	Impact on public health services	278
5.5.6	Impact on the taxpayer	279
5.5.7	Impact on courts and lawyers	279
5.5.8	Impact on the Victim’s country of residence	279
5.5.9	Impact on the country of the location of the accident or injury.....	280
5.5.10	Impact on compensation levels	280
5.5.11	Impact on limitation periods	280
5.5.12	Policy and implementation costs	281
5.5.13	Costs benefits analysis	281
5.6	Assessment of Solution 2: S2 - Law of habitual residence of the Victim (referred to here as lex damni)	282
5.6.1	Issues and objectives	282
5.6.2	Impact on Visiting Victims	282
5.6.3	Impact on defendants or faulty party	283
5.6.4	Impact on insurers and their customers	284
5.6.5	Impact on public health services	284
5.6.6	Impact on the taxpayer	284
5.6.7	Impact on courts and lawyers	285
5.6.8	Impact on the Victim’s country of residence	285
5.6.9	Impact on the country of the location of the accident or injury.....	286
5.6.10	Impact on compensation levels	287
5.6.11	Impact on limitation periods	288
5.6.12	Policy and implementation costs	288
5.6.13	Costs-benefit analysis	289
5.7	Assessment of Solution 3: S3 - Better information	291
5.7.1	Issues and objectives	291
5.7.2	Impact on Visiting Victims	291
5.7.3	Impact on defendants or faulty party	292
5.7.4	Impact on insurers and their customers	292
5.7.5	Impact on public health services	292

5.7.6	Impact on the taxpayer	293
5.7.7	Impact on courts and lawyers	293
5.7.8	Impact on the Victim’s country of residence	293
5.7.9	Impact on the country of the location of the accident or injury.....	294
5.7.10	Impact on compensation levels	294
5.7.11	Impact on limitation periods	294
5.7.12	Policy and implementation costs	294
5.7.13	Cost-benefit analysis	295
5.8	Assessment of Solution 4: S4 - Harmonizing regulation	295
5.8.1	Issues and objectives	295
5.8.2	Impact on Visiting Victims	295
5.8.3	Impact on defendants or faulty party	295
5.8.4	Impact on insurers and their customers	296
5.8.5	Impact on public health services	296
5.8.6	Impact on the taxpayer	296
5.8.7	Impact on courts and lawyers	296
5.8.8	Impact on the Victim’s country of residence	296
5.8.9	Impact on the country of the location of the accident or injury.....	296
5.8.10	Impact on compensation levels	296
5.8.11	Impact on limitation periods	297
5.8.12	Policy and implementation costs	297
5.8.13	Cost-benefit analysis	297
5.9	Assessment of Solution 5: S5 - Principle of ubiquity.	298
5.9.1	Issues and objectives	298
5.9.2	Impact on Visiting Victims	298
5.9.3	Impact on defendants or faulty party	299
5.9.4	Impact on insurers and their customers	299
5.9.5	Impact on public health services	299
5.9.6	Impact on the taxpayer	299
5.9.7	Impact on courts and lawyers	299
5.9.8	Impact on the Victim’s country of residence	299
5.9.9	Impact on the country of the location of the accident or injury.....	299
5.9.10	Impact on compensation levels	300
5.9.11	Impact on limitation periods	300
5.9.12	Policy and implementation costs	300
5.9.13	Costs benefits analysis	300

5.10	Assessment of Solution 6: S6 - Lex Conveniens.	300
5.10.1	Issues and objectives	300
5.10.2	Impact on Visiting Victims	301
5.10.3	Impact on defendants or faulty party	302
5.10.4	Impact on insurers and their customers	302
5.10.5	Impact on public health services	302
5.10.6	Impact on the taxpayer	302
5.10.7	Impact on courts and lawyers	302
5.10.8	Impact on the Victim's country of residence	302
5.10.9	Impact on the country of the location of the accident or injury.	303
5.10.10	Impact on compensation levels	303
5.10.11	Impact on limitation periods	303
5.10.12	Policy and implementation costs	303
5.10.13	Cost-benefit analysis	304
5.11	Assessment of Solution 7: S7 - First Party Insurance	304
5.11.1	Issues and objectives	304
5.11.2	Impact on Visiting Victims	304
5.11.3	Impact on defendants or faulty party	305
5.11.4	Impact on insurers and their customers	305
5.11.5	Impact on public health services	305
5.11.6	Impact on the taxpayer	305
5.11.7	Impact on courts and lawyers	305
5.11.8	Impact on the Victim's country of residence	306
5.11.9	Impact on the country of the location of the accident or injury.	306
5.11.10	Impact on compensation levels	306
5.11.11	Impact on limitation periods	306
5.11.12	Policy and implementation costs	306
5.11.13	Costs benefits analysis	306
5.12	Assessment of Solution 8: S8 - EU tribunal for cross-border issues	307
5.12.1	Issues and objectives	307
5.12.2	Impact on Visiting Victims	309
5.12.3	Impact on defendants or faulty party	309
5.12.4	Impact on insurers and their customers	309
5.12.5	Impact on public health services	310
5.12.6	Impact on the taxpayer	310
5.12.7	Impact on courts and lawyers	310

5.12.8	Impact on the Victim’s country of residence	310
5.12.9	Impact on the country of the location of the accident or injury.....	310
5.12.10	Impact on compensation levels	310
5.12.11	Impact on limitation periods	311
5.12.12	Policy and implementation costs	311
5.12.13	Costs benefits analysis	312
5.13	Assessment of solutions relating to limitation periods	312
5.14	Assessment of solutions relating levels of compensation	322
5.14.1	Compensation level solutions focusing on CFR and guidelines	322
5.14.2	Compensation level solutions focusing on information	327
5.14.3	Compensation level solutions focuses on insurance.....	330
5.14.4	Compensation level solutions focuses on the creation of EU bodies	338
5.14.5	Compensation level solutions focuses on harmonization, restitutio in integrum and lex damni.....	343
5.15	Conclusions.....	350