



EUROPEAN COMMISSION

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

A FOIL briefing paper
June 2009



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Under the current rules in Regulation (EC) 864/2007 ('Rome II') the normal rule on conflict of laws for RTAs within the EU (except Denmark) is that the law of the country where the damage occurred is applied. For RTAs this is the country where the actual injury is sustained. This is subject to exceptions:

- Where the parties involved in the RTA come from the same country the law of that country shall apply (Art 4.2);
- If all the circumstances of the case are more related to another country, the law of that country shall apply (Art 4.3).

This means that for people involved in an RTA in a country other than their own (so called 'visiting victims' under the 4th Motor Directive 2000/26/EC), unless they can bring themselves within one of the exceptions above, they will find that foreign law applies with regard to the award of compensation and the limitation period.

The aim of the European Commission's consultation is to obtain the views of all interested parties on the effects of this application of foreign law, particularly the risks that can arise from awards lower than would be awarded in the victim's own jurisdiction, and from unexpectedly short limitation periods in some jurisdictions.

Looking at the options presented in the consultation paper they tend to fall within one of three ideological camps;

- Do nothing, or just inform, leaving the risk with the individual
- Greater harmonisation or the setting of common minimum standards across the EU;
- Application of the law of the victim's country of residence to achieve the result they would have got at home.

We are asked to be as specific as possible when responding, indicating preferences amongst the options, giving reasons, and indicating why the chosen options are preferable to the others. Proposals on further options are also welcome.

Please forward any comments or thoughts to reach me by 19th June – shirley.denyer@foil.org.uk

The response must be submitted by 30 June 2009.

Compensation Awards

As might be expected different Member States apply very different principles regarding liability and compensation:

- Liability may be strict, fault based or a mixture of the two, and may vary depending upon the category of victim
- Injuries and losses such as whiplash, 'moral damage' caused to relatives in fatal accidents or spoiled holidays may not be recognised in some Member States
- The calculation and payment of damages for pain and suffering and loss of earnings varies enormously across the EU.
- Social security schemes play a varied role, especially when looking at the stage and the extent to which they intervene.

Due to all of the differences it is very difficult to say that one Member State has higher compensation levels than another: it can depend very much upon the type of claim being brought. In some countries there are no binding rules or guidance on compensation levels which can create inconsistency in awards even at a national level. Where there are exact rules this can lead to inflexibility.

It is not clear how many individuals each year receive a compensation award based on 'foreign' law. Estimates range from 1 to 7.5% of all RTA victims. Not all victims injured in a foreign jurisdiction will be affected. Foreign workers or commuters will often be protected under employment law, special insurance schemes and/or by their contract with their employer. Visitors travelling with tour operators are covered by additional insurance products. In all of these cases the law of the country where the accident occurs does not necessarily apply.

In the light of the above, several policy options have been identified:

Option 1

Await the impact of the application of 'Rome II' which came into force on 11 January 2009, which in the preamble calls for Member States to apply the "restitution in integrum" principle in RTA cases:

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

[FOIL Note – it was unclear when Rome II came into effect how courts would interpret this requirement. It is only included in the preamble and is not followed through into the provisions of the Regulation. It was unclear how national courts would balance with the requirement to apply the law of the country where the accident occurred. Has anyone had any experience of this since January? An Update on Rome II is available on the website www.foil.org.uk].

Option 2

Provide better information to people in cross border situations, perhaps by way of a standardised brochure, explaining how differences in compensation levels may affect them and the options that exist to minimise or eliminate the risk of under-

compensation. This could be distributed via motor insurers' bureaux, automobile clubs and victims' associations.

Option 3

Create European guidelines on types of compensatory items and the way they should be calculated, to be used by judges, to assist in moving over time to a more harmonised system.

Option 4

Set minimum EU standards for types of compensatory items and the way they are quantified. This would not stop Member States continuing to use headings not covered by the minimum standards and differences between regimes would remain. *[FOIL note – presumably awards above the minimum would still be permitted so whilst all victims would be guaranteed a basis package there would still be inconsistency].*

Option 5

Create an EU table detailing minimum pain and suffering awards for each type of injury. (Similar to Option 4 but only pain and suffering would be standardised).

Option 6

Apply the law of the victim's residence. Inconsistency would still exist where the victims of an accident came from several different countries.

Option 7

Introduce compulsory drivers' insurance (so-called first party insurance) also covering passengers. These policies already exist in most Member States but under this option would be obligatory.

Option 8

Introduce a system across the EU whereby victims would settle their claims with their own third-party insurers, and by applying the presumption that the accident happened in their own country of residence, receive compensation based on their own compensatory regime. This would require an agreement between insurers to determine apportionment of costs, and to allow effective settlement of accounts. Systems for direct settlement of claims already exist in many countries.

Limitation periods

There are as many limitation systems as there are countries in the EU.

Differences cover:

- The event triggering the run of the limitation period
- The events and circumstances which may interrupt or suspend limitation
- The length of the limitation period, often varying with the type of damage or category of victim
- Different limitation periods in contract and tort
- The court's discretion to extend the limitation period

The rules can be as difficult for residents to understand as for visitors and both are likely to depend upon professional advice. It appears from research that accident victims commonly rely upon insurers for advice, which may raise the possibility of conflict of interest.

The policy options are:

Option 1

Do nothing as relatively few people are affected.

Option 2

Provide better information such as a standardised brochure explaining the differences in limitation periods (see Option 2 above)

Option 3

Make it compulsory for third-party liability insurers and their claims representatives to inform claimants in cross-border cases about the applicable limitation period and related procedures. An insurer which failed to comply might then have responsibility if the right to bring a claim was lost.

Option 4

Create a rule setting the time frame within which the claim must be presented to the foreign liability insurer or its claims representative. The obligation must be complementary to the reasoned offer procedure stated in Directive 2000/26/EC (the Fourth Motor Directive).

Option 5

Increase the limitation period for visiting victims to reflect the fact that they have to organise legal action from their own country. This presumes partial harmonisation of national civil laws.

Option 6

Create a rule under which the limitation period would be suspended as soon as a claim is notified (to the liable party, his insurance company or to the national compensation body). This presumes partial harmonisation of national civil laws.

Option 7

Introduce a general European regulation on limitation periods which would provide for a harmonised legal framework, and which would deal with all important elements of limitation periods (start date, suspension, length, claimants under a disability).

Option 8

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

Option 9

Introduce an EU wide system under which visiting victims would settle with their own third-party insurer (see Option 8 for compensatory awards above). By applying the presumption that the accident happened in the victim's own country limitation according to the law of that country of residence would apply.