Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 10 April 2018 [1]

Case C-122/17

David Smith
v
Patrick Meade,
Philip Meade,
FBD Insurance plc,
Ireland,
Attorney General

(Request for a preliminary ruling from the Court of Appeal, Ireland)

(Reference for a preliminary ruling — Approximation of laws — Insurance against civil liability in respect of the use of motor vehicles — Third Directive 90/232/EEC — Article 1 — Liability for personal injury caused to all passengers other than the driver — Compulsory insurance — Direct effect of directives — Obligation to disapply national legislation contrary to a directive — Whether the State may rely on a directive against an individual)

1. This request for a preliminary ruling concerns the interpretation of 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. [2]

2. The request has been made in the context of a dispute initially between Mr David Smith, one the one hand, and Mr Patrick Meade, Mr Philip Meade, FBD Insurance plc ('FBD'), Ireland and the Attorney General, on the other, concerning compensation for injuries suffered by Mr Smith as a result of a road traffic accident involving a vehicle driven by Mr Patrick Meade and owned by Mr Philip Meade.

3. In its judgment of 19 April 2007, *Farrell* (C-356/05, EU:C:2007:229), the Court held that Article 1 of the Third Directive was to be interpreted as precluding national legislation whereby compulsory motor vehicle civil liability insurance does not cover liability for personal injuries to persons travelling in a part of a motor vehicle which has not been designed and constructed with seating accommodation for passengers. [3] The Court also held that Article 1 of the Third Directive satisfied all the conditions necessary for it to produce direct effect and, accordingly, conferred rights upon which individuals may rely directly before the national courts. [4]

1 Original language: French.

2 OJ 1990 L 129, p. 33, 'the Third Directive'.

3 Judgment of 19 April 2007, *Farrell* (C-356/05, EU:C:2007:229, paragraph 36).

4 Judgment of 19 April 2007, *Farrell* (C-356/05, EU:C:2007:229, paragraph 44).

4. The Court is called upon to clarify the consequences of its judgment of 19 April 2007, *Farrell* (C-356/05, EU:C:2007:229), in the following context: although the initial dispute was between Mr Smith, on the one hand, and Messrs Meade, joined by FBD, Ireland and the Attorney General as defendants, on the other, the parties at the stage of the proceedings at which the present question was referred for a preliminary ruling are FBD, which is subrogated to the rights of Mr Smith, and the Irish State. In that context, the Irish State considers, as a defence, that the Third Directive is capable of imposing on FBD the obligation to compensate Mr Smith. This therefore raises the general issue, which is certainly not new, but which arises in particular procedural circumstances, of whether a directive can have the effect of imposing obligations on an individual in a situation where the State has transposed that directive incorrectly.

5. In the present Opinion, I shall set out, first, the reasons why I consider that, in the context of a dispute between, on the one hand, an insurance company, which is subrogated to the rights of a victim to whom it has paid compensation, and, on the other hand, the State, the national court is required to disapply the provisions of its national law whereby compulsory motor vehicle civil liability insurance does not cover liability for personal injuries to persons travelling in a part of a motor vehicle which has not been designed and constructed with seating accommodation for passengers, such provisions having been found to be contrary to Article 1 of the Third Directive by the judgment of 19 April 2007, *Farrell* (C-356/05, EU:C:2007:229).

6. Next, I shall explain why I consider that such a disapplication of the provisions of national law that are contrary to Article 1 of the Third Directive cannot have the consequence of imposing on the insurer, who has complied with such provisions, the responsibility for compensating the victim for injuries or damage not covered by the approved insurance policy.

I. Legal framework

A. EU law

7. Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability [5] repealed Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability [6] as well as 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 [7] and the Third Directive. Nevertheless, in the light of the material time in the main proceedings, it is appropriate to have regard to the repealed directives.

8. Under Article 3(1) of the First Directive:

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

5 OJ 2009 L 263, p. 11.

6 OJ, English Special Edition 1972(II), p. 360, 'the First Directive'.

7 OJ 1984 L 8, p. 17, 'the Second Directive'.

9. Article 1(1) of the Second Directive provided:

'The insurance referred to in Article 3(1) of [the First Directive] shall cover compulsorily both damage to property and personal injuries.'

10. The first subparagraph of Article 2(1) of that directive provided:

'Each Member State shall take the necessary measures to ensure that any statutory provision or any contractual clause contained in an insurance policy issued in accordance with Article 3(1) of Directive 72/166/EEC, which excludes from insurance the use or driving of vehicles by:

– …

– persons who are in breach of the statutory technical requirements concerning the condition and safety of the vehicle concerned,

shall, for the purposes of Article 3(1) of [the First Directive], be deemed to be void …'

11. The first paragraph of Article 1 of the Third Directive provided:

'… the insurance referred to in Article 3(1) of [the First Directive] shall cover liability for personal injuries to all passengers, other than the driver, arising out of the use of a vehicle.'

B. Irish law

12. Section 56(1) of the 1961 Road Traffic Act, in the version in force at the material time in the main proceedings ('the 1961 Act'), provided that a motorist could not drive a mechanically propelled vehicle on a public road without an approved policy of insurance in force covering negligent use of the vehicle resulting in a liability to pay damages to any person, exclusive of the excepted persons.

13. Section 56(3) of the 1961 Act provided that the use of a vehicle in contravention of the prohibition contained in section 56(1) constituted a criminal offence.

14. Under section 65(1)(a) of the 1961 Act, an 'excepted person', within the meaning of section 56(1) of that act, was:

'Any person claiming in respect of injury to himself sustained while he was in or on a mechanically propelled vehicle (or a vehicle drawn thereby) to which the relevant document relates, other than a mechanically propelled vehicle, or a drawn vehicle, or vehicles forming a combination of vehicles, of a class specified for the purposes of this paragraph by regulations made by the Minister, provided that such regulations shall not extend compulsory insurance in respect of civil liability to passengers to:

(i) any part of a mechanically propelled vehicle, other than a large public service vehicle, unless that part is designed and constructed with seating accommodation for passengers, or

(ii) a passenger seated in a caravan attached to a mechanically propelled vehicle while such a combination of vehicles is moving in a public place.'

15. Article 6(1)(a) of the Road Traffic (Compulsory Insurance) Regulations 1962, in the version in force at the material time in the main proceedings ('the 1962 Regulations'), provided:

'The following vehicles are hereby specified for the purpose of [section 65(1)(a) of the 1961 Act]:

(a) all vehicles, other than cycles, designed and constructed with seating accommodation for passengers.'

II. The facts in the main proceedings and the question referred for a preliminary ruling

16. On 19 June 1999 Mr Smith was very seriously injured when the van in which he was travelling, as a passenger in the rear of the vehicle, collided with another vehicle also on the public road, near Tullyallen (Ireland). At the time of the accident, that van was being driven by Mr Patrick Meade and was owned by Mr Philip Meade. The van was not fitted with fixed seating accommodation for passengers travelling in the rear of the vehicle.

17. Mr Philip Meade's motor insurance policy with FBD was in force at the time of the accident and was approved in accordance with the applicable Irish legislation. That policy contained an exclusion clause relating to passengers travelling in the rear of the van, which stipulated that liability to the 'passenger' covered only a passenger seated on fixed seating accommodation in the front of the vehicle.

18. Mr Smith sued Messrs Meade for negligence and fault.

19. Following the notification of the claim for compensation made by Mr Smith, FBD, by letter of 13 August 2001, refused to provide an indemnity to Mr Philip Meade in respect of the personal injuries suffered by Mr Smith. That insurance company invoked the exclusion clause contained in the insurance policy and maintained that that policy did not cover personal injuries to persons being carried as passengers in a part of the vehicle which is not designed and constructed with seating accommodation for passengers.

20. On 19 April 2007 the Court delivered its judgment in *Farrell* (C-356/05, EU:C:2007:229) in which it held, in respect of the Irish legislation at issue in the main proceedings, in essence, that Article 1 of the Third Directive must be interpreted as precluding national legislation whereby compulsory motor vehicle civil liability insurance does not cover liability for personal injury to persons travelling in a part of a motor vehicle which has not been designed and constructed with seating accommodation for passengers, and that that provision satisfies all the conditions necessary for it to produce direct effect and, accordingly, confers rights upon which individuals may rely directly before the national courts. The Court held, however, that it was for the national court to determine whether that provision might be relied upon against a body such as that concerned in the case which gave rise to that judgment.

21. On hearing the dispute between Mr Smith and Messrs Meade, FBD, Ireland and the Attorney General at first instance, the High Court (Ireland) concluded, in a judgment of 5 February 2009, that it was possible to interpret section 65(1)(a) of the 1961 Act and Article 6 of the 1962 Regulations in a manner consistent with the Third Directive.

22. On 10 February 2009 the High Court approved a settlement agreed between FBD and Mr Smith following the judgment of 5 February 2009. In accordance with that settlement, FBD paid to Mr Smith, on behalf of Mr Philip Meade, the amount of EUR 3 million. Mr Smith was then made a ward of court. FBD is subrogated to the rights of Mr Smith as a result of that payment.

23. The proceedings against, on the one hand, Messrs Meade and, on the other, Ireland and the Attorney General, were adjourned.

24. FBD brought an appeal against the judgment of the High Court before the referring court, the Court of Appeal (Ireland), claiming that the High Court misapplied the case-law resulting from the judgment of 13 November 1990, *Marleasing* (C-106/89, EU:C:1990:395), in interpreting the national legislation in a manner which was *contra legem*, and that that court's judgment had the effect of conferring on the Third Directive a form of retroactive horizontal direct effect against it, a private insurance company. FBD stated, moreover, that if its appeal was upheld, it would seek to recover from the State the amount it paid to Mr Smith.

25. The Court of Appeal notes that, at the material time in the main proceedings, persons travelling in a van without fixed seating accommodation were 'excepted persons' for the purposes of both section 65(1)(a) of the 1961 Act, as amended, and the 1962 Regulations, and that there was no legal obligation to insure them under Irish law. That court states, furthermore, that motorists who had an approved insurance policy were not committing any criminal offence by driving a vehicle with no cover for persons travelling without fixed seating accommodation. Finally, the referring court notes that the wording of section 65(1)(a) of the 1961 Act was such that, even if the competent Minister had wanted to adopt regulations in order to extend compulsory insurance to such persons, he would have been acting *ultra vires* had he done so.

26. The referring court notes, moreover, that the question which arises in the context of the appeal brought before it is a question as to the consequences of the judgment of 19 April 2007, *Farrell* (C-356/05, EU:C:2007:229). It states, in that regard, that, in the case giving rise to that judgment, the driver was uninsured, so that the obligation to cover was incumbent on the Motor Insurers Bureau of Ireland ('the MIBI'). By contrast, in the present case, FBD is a private body, which cannot be regarded as an emanation of the State. Furthermore, contrary to the case that gave rise to the judgment of 19 April 2007, *Farrell* (C-356/05, EU:C:2007:229), the owner of the vehicle, Mr Philip Meade, was insured, albeit that the terms of the insurance policy expressly excluded cover in the case of passengers, such as Mr Smith, travelling otherwise than in fixed seating in the rear of the vehicle.

27. The referring court starts from the premiss that the national legislation at issue cannot be interpreted in a manner consistent with the first paragraph of Article 1 of the Third Directive.

28. Accordingly, the Court of Appeal concluded, contrary to the view of the High Court, that both national provisions at issue were in themselves 'pellucidly clear and … entirely free from any ambiguity whatever' and that both provisions 'expressly [excluded] cases such as the present one where the passenger was travelling in a part of a mechanically propelled vehicle which did not have fixed seating'.[8] The Court of Appeal took the view that this was a legislative policy choice, and stated that it disagreed with the High Court on that issue of interpretation, stating that it was 'not possible to interpret these provisions in a manner which would be compatible with the requirements of the Third Directive, as to do otherwise would be to adopt an interpretation which would be *contra legem* and which would do violence to the actual wording of both provisions'.[9]

29. The referring court is uncertain, therefore, what a national court should do in a case involving private parties, where the relevant national legislation is manifestly contrary to the requirements of a directive and where it is impossible to interpret that legislation in a manner which is consistent with those requirements.

30. The Court of Appeal considers, in that regard, that it follows from the judgment of 19 April 2016, *DI* (C-441/14, EU:C:2016:278), that where a consistent interpretation is not possible, the national court must, where possible, disapply the national legislation, even in disputes between individuals.

8 See order for reference (paragraph 32).

9 See order for reference (paragraph 34).

31. The Court of Appeal concludes that section 65(1)(a) of the 1961 Act and Article 6 of the 1962 Regulations must be disapplied in so far as those provisions contain an exclusion from insurance cover in respect of passengers not travelling in fixed seating accommodation.

32. In that regard, the Court of Appeal considers that, if the words 'designed and constructed with seating accommodation for passengers', appearing in Article 6 of the 1962 Regulations, were disapplied, all vehicles other than cycles would be specified for the purposes of section 65(1)(a) of the 1961 Act, which would give rise to a legal obligation to insure all vehicles. As regards the latter provision, the wording which should be disapplied is that of section 65(1)(a)(i) of that act.

33. The disapplication of that wording would have a retroactive effect. It would follow that the insurance policy at issue in the main proceedings would no longer be considered an 'approved policy', within the meaning of section 62(1)(a) of the 1961 Act. According to the referring court, the driver and the owner of the vehicle at issue in the main proceedings would, under those circumstances, have been committing, in theory, a criminal offence, the first by driving that vehicle on a public road without an approved policy of insurance, and the second by allowing that vehicle to be so driven.

34. The Court of Appeal considers, however, that if the exclusion clause regarding passengers not travelling in fixed seating accommodation were itself removed from the insurance policy at issue in the main proceedings, on the ground that it is incompatible with EU law, that policy would automatically revert to the status of an approved policy within the meaning of section 62(1)(a) of the 1961 Act, and the problem of criminal liability on the part of Messrs Meade would disappear.

35. According to that court, the question then arises as to whether a declaration of inapplicability can or should extend this far and whether such a declaration amounts, in substance, to a form of horizontal direct effect of the Third Directive as against the private party insurer, FBD.

36. The referring court, therefore, takes the view that the present case raises difficult and heretofore unresolved issues concerning the extent to which the motor insurance directives can be considered to produce direct effect as against a purely private party such as FBD, following the necessary disapplication of the relevant provisions of section 65(1)(a) of the 1961 Act and Article 6 of the 1962 Regulations in the light of the judgment of 19 April 2007, *Farrell* (C-356/05, EU:C:2007:229).

37. The referring court states that, if it is obliged to disapply the exclusion clause in the insurance policy, it follows that Mr Smith would rightly have sued Messrs Meade and that FBD would in turn have been obliged to indemnify these defendants. On the other hand, the referring court states that, if it is not obliged to disapply the exclusion clause in the insurance policy, FBD would be free to seek to recover from the State the EUR 3 million it paid to Mr Smith by way of settlement, by means of the appropriate legal procedures, which might include a *Francovich* action for damages. [10]

38. In those circumstances, the Court of Appeal decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Where:

(i) the relevant provisions of national law provide for an exclusion for compulsory motor insurance in respect of persons for whom no fixed seats in a mechanically propelled vehicle have been provided,

10 Judgment of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428).

(ii) the relevant insurance policy provides that cover will be confined to passengers travelling in fixed seating and this policy was, factually, an approved policy of insurance for the purposes of that national law at the time of the accident,

(iii) the relevant national provisions providing for such an exclusion from cover have already been adjudged to be contrary to EU law in an earlier decision [the judgment of 19 April 2007, Farrell, C-356/05, EU:C:2007:229] and, accordingly, required to be disapplied, and

(iv) the language of the national provisions is such that it does not permit of an interpretation conforming to the requirements of EU law,

then, in litigation between private parties and a private insurance company concerning a motor accident involving a serious injury to a passenger in 1999 who was not travelling in a fixed seat, where, by consent of the parties, the national Court joined the private insurance company and the State as defendants, is the national court when disapplying the relevant provisions of national law also obliged to disapply the exclusion clause contained in the motor insurance policy or otherwise preclude an insurer from relying on the exclusion clause which was in force at the time so that the injured victim could then have recovered directly as against the insurance company on foot of that policy? Alternatively, would such a result amount in substance to a form of horizontal direct effect of a Directive against a private party in a manner prohibited by EU law?'

III. My assessment

39. By the question referred for a preliminary ruling, which should, in my opinion, be reformulated so as to adapt it to the circumstances and subject of the dispute in the main proceedings, the referring court seeks to establish, in essence, first of all, whether, in the context of a dispute between, on the one hand, an insurance company, which is subrogated to the rights of a victim to whom it has paid compensation, and, on the other hand, the State, the referring court is required to disapply the provisions of its national law whereby compulsory motor vehicle civil liability insurance does not cover liability for personal injury to persons travelling in a part of a motor vehicle which has not been designed and constructed with seating accommodation for passengers, such provisions having been found to be contrary to Article 1 of the Third Directive by the judgment of 19 April 2007, *Farrell* (C-356/05, EU:C:2007:229).

40. Secondly, the referring court asks the Court to indicate whether such a disapplication of provisions of its national law has the consequence that the exclusion clause contained in the insurance policy at issue must also be disapplied, which would mean imposing on the insurer the obligation to compensate the victim.

41. In order to set out the background to the procedural circumstances in which the present reference for a preliminary ruling has been made, it should be noted that, as was confirmed at the hearing, the parties to the dispute in the main proceedings, at the stage of the proceedings which gave rise to this reference, are FBD and the Irish State. It is therefore a 'vertical' dispute.

42. In that respect, the present case differs, therefore, from that which gave rise to the judgment of 19 April 2016, *DI* (C-441/14, EU:C:2016:278), which the referring court mentions more than once. I would add that that judgment concerned whether, in the context of a dispute between individuals, it is possible to rely on a general principle of EU law to exclude national legislation, in that case, the principle of non-discrimination on grounds of age, whereas what is at issue in this case is the determination of the effects of a directive. Having regard to the specific features of the EU secondary

legislation that is a directive, which have been often highlighted by the Court, I do not think, in any case, that the guidance to be obtained from the judgment of 19 April 2016, *DI* (C-441/14, EU:C:2016:278), can automatically be transposed to a case raising the issue of the effects of one directive taken in isolation.

43. In the context of the 'vertical' dispute in the main proceedings, the question raised, in essence, is whether a directive is capable of directly imposing an obligation on a private party — in this case, FBD. That question has been raised because it is the defence relied on by the Irish State to avoid being held responsible for compensating Mr Smith.

44. However, it was confirmed at the hearing that, in the context of the proceedings pending before the Court of Appeal, between FBD and the Irish State, no action seeking to establish the liability of that State for an infringement of EU law, on the basis of the case-law arising from the judgment of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428), has been brought. That is confirmed by the information provided by the referring court, according to which, in the course of the hearing before that court, counsel for FBD made it clear that, if their client's appeal were upheld, FBD would then seek to recover from the State through the appropriate legal mechanisms (which might include a *Francovich* action for damages) [11] the amount it paid out to Mr Smith. [12]

45. I conclude from those considerations that whether any further action will be brought by FBD to obtain from the State the equivalent of the amount which it paid to Mr Smith will depend on the answer to the question referred for a preliminary ruling by the national court.

46. Accordingly, in this litigation strategy, the parties to the main proceedings seek to establish in advance, as is reflected by the question which the national court has referred to the Court for a preliminary ruling, what obligations are imposed, respectively, on FBD and on the Irish State by EU law in a situation such as that at issue in the main proceedings.

47. It is clear that, if the Court were to hold that, in spite of the incorrect transposition of Article 1 of the Third Directive by the Irish State, the responsibility for compensating Mr Smith did fall to FBD, that insurer might be inclined not to take legal action to recover from that State the amount paid out to Mr Smith, either by challenging the liability of that State in the context of a *Francovich* action for damages, [13] or, where appropriate, through other procedural mechanisms permitted under Irish law.

48. In the context of the action pending before the Court of Appeal, FBD is subrogated to the rights of the victim, Mr Smith. [14] The issue at this stage of the procedure is to determine whether, under EU law, the obligation to compensate the victim is incumbent on the insurer or on the State. One means to determine on which party liability for that claim for compensation falls is to ascertain whether the High Court's reasoning was well founded, namely, that section 65(1)(a) of the 1961 Act and Article 6 of the 1962 Regulations could be interpreted in a manner consistent with the Third Directive and that it followed that the exclusion clause in the insurance policy at issue had to be declared void.

49. As I have stated, that premiss is called into question by the referring court. This is why that court is now considering the dispute from the perspective of the direct effect of the Third Directive.

50. According to the Court's settled case-law, every national court must, in a case within its jurisdiction, apply EU law in its entirety and protect the rights which EU law confers on individuals, disapplying any provision of national law which may conflict with EU law. [15]

11 Judgment of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428).

12 See order for reference (paragraph 9).

13 Judgment of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428).

14 See order for reference (paragraphs 8 and 25).

15 Judgment of 9 March 1978, *Simmenthal* (106/77, EU:C:1978:49, paragraph 21).

51. I would point out that, under Article 3(1) of the First Directive, 'each Member State shall … take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance'. Moreover, the first paragraph of Article 1 of the Third Directive provides that '... the insurance referred to in Article 3(1) of [the First Directive] shall cover liability for personal injuries to all passengers, other than the driver, arising out of the use of a vehicle'.

52. In its judgment of 19 April 2007, *Farrell* (C-356/05, EU:C:2007:229), the Court ruled that Article 1 of the Third Directive was to be interpreted as precluding national legislation whereby compulsory motor vehicle civil liability insurance does not cover liability for personal injuries to persons travelling in a part of a motor vehicle which has not been designed and constructed with seating accommodation for passengers. [16]

53. The Court also ruled that Article 1 of the Third Directive satisfied all the conditions necessary for it to produce direct effect and accordingly conferred rights upon which individuals may rely directly before the national courts. [17]

54. The Court pointed out, in that regard, that it has consistently held that a provision in a directive has direct effect if it appears, as far as its subject matter is concerned, to be unconditional and sufficiently precise. [18]

55. The Court held that those criteria were satisfied by Article 1 of the Third Directive, pointing out that that article allowed both the obligation of the Member State and the beneficiaries to be identified, and that its provisions were unconditional and precise. [19] The Court held that Article 1 of the Third Directive could accordingly be relied upon in order to set aside provisions of national law which exclude from the benefit of the guarantee provided by compulsory insurance cover persons travelling in any part of a vehicle which is not designed and constructed with seating accommodation for passengers. [20]

56. As regards the question whether that provision might be relied upon against the guarantee body provided for in Article 1(4) of the Second Directive, the answer was outlined in the judgment of 19 April 2007, *Farrell* (C-356/05, EU:C:2007:229), and expanded on in the judgment of 10 October 2017, *Farrell* (C-413/15, EU:C:2017:745).

57. In the latter judgment, the Court ruled that provisions of a directive that are capable of having direct effect may be relied on against a private law body on which a Member State has conferred a task in the public interest, such as that inherent in the obligation imposed on the Member States by Article 1(4) of the Second Directive, and which, for that purpose, possesses, by statute, special powers, such as the power to oblige insurers carrying on motor vehicle insurance in the territory of the Member State concerned to be members of it and to fund it. [21]

58. Unlike the cases which gave rise to the two abovementioned judgments in *Farrell*, [22] the dispute in the main proceedings does not involve the Irish guarantee body, namely the MIBI. The reason for that appears to be that, unlike the owner of the vehicle in which Ms Elaine Farrell was seated, the owner of the vehicle (Mr Philip Meade) in which Mr Smith was travelling had taken out a motor insurance policy.

16 Judgment of 19 April 2007, *Farrell* (C-356/05, EU:C:2007:229, paragraph 36).

17 Judgment of 19 April 2007, *Farrell* (C-356/05, EU:C:2007:229, paragraph 44).

18 Judgment of 19 April 2007, *Farrell* (C-356/05, EU:C:2007:229, paragraph 37 and the case-law cited).

19 Judgment of 19 April 2007, *Farrell* (C-356/05, EU:C:2007:229, paragraph 38).

20 Judgment of 19 April 2007, *Farrell* (C-356/05, EU:C:2007:229, paragraph 38).

21 Judgment of 10 October 2017, *Farrell* (C-413/15, EU:C:2017:745, paragraph 42).

22 Judgments of 19 April 2007, *Farrell* (C-356/05, EU:C:2007:229), and of 10 October 2017, *Farrell* (C-413/15, EU:C:2017:745).

59. As I have already stated, the parties to the dispute in the main proceedings, at the stage of the proceedings which gave rise to this reference for a preliminary ruling, are FBD and the Irish State.

60. Once the direct effect of Article 1 of the Third Directive has been acknowledged, there is, therefore, no doubt as to whether FBD may rely on that provision against the Irish State in order to disapply the national provisions which are contrary to that directive. Where it is possible to rely on such a provision against an emanation of the State, such as the MIBI, the same must a fortiori be possible against the State, in its capacity as a public authority. The State must be prevented from taking advantage of its own failure to comply with EU law.[23]

61. It follows from the foregoing that, in the proceedings before the referring court, FBD is entitled to rely on Article 1 of the Third Directive in order to disapply section 65(1)(a) of the 1961 Act and Article 6 of the 1962 Regulations.

62. If, in the Irish system, the payment of subsidiary compensation by the guarantee body is not provided for where the owner of a vehicle has an insurance policy and that policy does not cover a particular risk,[24] which it ought nevertheless to cover if the State had correctly transposed Article 1 of the Third Directive, it falls to the State to bear the financial consequences.

63. Contrary to what Ireland seeks to have recognised, a disapplication of the national provisions that are contrary to Article 1 of the Third Directive cannot have the automatic consequence of imposing on the insurer the responsibility for compensating Mr Smith. I note that the exclusion clause in the insurance policy at issue constitutes the implementation of rules laid down by the national legislature for the purposes of establishing an approved insurance policy. In the context of the dispute in the main proceedings, the Irish State cannot rely on Article 1 of the Third Directive in order to disapply that contractual clause and infer from it an obligation on the insurer to assume responsibility for compensating Mr Smith.

64. To allow such a shift in the liability for the consequences of incorrect transposition of a directive would be contrary to the settled case-law of the Court, according to which the EU secondary legislation that is a directive is not capable, owing to its nature and characteristics, of imposing obligations directly on individuals.

65. In that regard, it should be recalled that, in accordance with the third paragraph of Article 288 TFEU, the binding nature of a directive, which constitutes the basis for the possibility of relying on it, exists only in relation to 'each Member State to which it is addressed'.[25] It follows, according to settled case-law, that a directive cannot, of itself, impose obligations on an individual and cannot therefore be relied upon as such against such an individual before a national court.[26] According to the Court, the effect of extending the possibility of relying on directives that are not transposed to the sphere of relations between individuals would be to recognise a power invested in the European Union to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations.[27] It follows from that case-law that, even if an individual comes

23 Judgment of 10 October 2017, *Farrell* (C-413/15, EU:C:2017:745, paragraph 32 and the case-law cited).

24 As the Court held in its judgment of 11 July 2013, *Csonka and Others* (C-409/11, EU:C:2013:512),'the payment of compensation by such a body was therefore considered to be a measure of last resort, envisaged only for cases in which the vehicle that caused the injury or damage is uninsured or unidentified or has not satisfied the insurance requirements referred to in Article 3(1) of the First Directive' (paragraph 30 and the case-law cited). According to the Court, that applies to 'a vehicle in respect of which no insurance policy exists' (paragraph 31).

25 See judgment of 12 December 2013, *Portgás* (C-425/12, EU:C:2013:829, paragraph 22).

26 See, inter alia, judgment of 10 October 2017, *Farrell* (C-413/15, EU:C:2017:745, paragraph 31 and the case-law cited). As the Court ruled in its judgment of 8 October 1987, *Kolpinghuis Nijmegen* (80/86, EU:C:1987:431), 'a national authority may not rely, as against an individual, upon a provision of a directive whose necessary implementation in national law has not yet taken place' (paragraph 10). See also judgment of 27 February 2014, *OSA* (C-351/12, EU:C:2014:110, paragraph 47 and the case-law cited).

27 See, inter alia, judgment of 10 October 2017, *Farrell* (C-413/15, EU:C:2017:745, paragraph 31 and the case-law cited).

within the group of persons covered by a directive, the provisions of that directive may not be relied on as such against that individual before the national courts.[28] The provisions of a directive cannot, therefore, be recognised as having a downwards vertical direct effect, in so far as a Member State cannot rely, as against individuals, on its own failure to comply with EU law.[29]

66. Moreover, contrary to what Ireland has submitted in the present preliminary ruling procedure, the obligation on the part of FBD to bear the responsibility for compensating Mr Smith cannot be derived from an application by analogy of the line of case-law resulting from the judgments of 30 April 1996, *CIA Security International* (C-194/94, EU:C:1996:172), and of 26 September 2000, *Unilever* (C-443/98, EU:C:2000:496), both of which concerned the interpretation of Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations.[30] As the Court stated in paragraph 51 of the latter judgment, what is distinctive about that line of case-law is that it rests on the fact that 'Directive 83/189 does not in any way define the substantive scope of the legal rule on the basis of which the national court must decide the case before it. It creates neither rights nor obligations for individuals'.

67. Moreover, the judgment of 28 March 1996, *Ruiz Bernáldez* (C-129/94, EU:C:1996:143), cannot, in my view, be understood as having the effect of allowing the State to rely on Article 1 of the Third Directive against FBD in order that the latter should bear the burden of compensation, since the question of whether a directive may be relied upon against an individual is not addressed as such by the Court in that judgment.

68. Finally, I would point out that to impose upon FBD the responsibility for compensating Mr Smith in circumstances such as those at issue in the main proceedings would lead to an outcome which is inequitable and contrary to the principle of legal certainty. Indeed, as the referring court correctly states, it is clear that a private party such as FBD manifestly acted on the basis of the disputed national provisions that established the exclusion from cover, and did so in order to issue an approved insurance policy. FBD did not have any freedom of contract and the issuing of this policy was not the result of independent conduct on the part of the insurer, but conduct that was dictated by national legislation.

69. Furthermore, as the referring court rightly notes, 'there can … be little doubt but that the cost of the insurance policy written by FBD in the present case reflected what it legitimately understood to be the limits of its insurance risks and those risks did not extend to passengers travelling in vans which did not have fixed seats'.[31] Recognising Article 1 of the Third Directive as having a downward vertical direct effect would mean that the insurer would have to provide a service that was not stipulated in the contract.

70. In those circumstances, I cannot accept that the exclusion of provisions of national legislation that are contrary to EU law, namely Article 1 of the Third Directive, in the dispute between FBD and the Irish State, has the consequence of imposing directly on that insurer, with retroactive effect, the obligation provided for in that article, namely, to provide compensation 'for personal injuries to all passengers, other than the driver, arising out of the use of a vehicle'.

28 See judgment of 12 December 2013, *Portgás* (C-425/12, EU:C:2013:829, paragraph 25).

29 See, to that effect, Simon, D., *Le système juridique communautaire*, 3rd edition, Presses universitaires de France, Paris, 2001, § 317, particularly pp. 396 and 397.

30 OJ 1983 L 109, p. 8.

31 See the order for reference (paragraph 33).

71. Even if it is assumed that the obligation incumbent on the insurer arises not from Article 1 of the Third Directive, but from provisions of national law (from which all elements contrary to that article have been deleted), that does not change my opinion, which is based on the rule that the State may not, in any way, derive any advantage from the incorrect transposition of a directive by seeking to impose upon insurers the responsibility for covering risks which the State itself had expressly excluded from the obligation to cover.

72. I would recall, in that regard, that it is apparent from Article 3(1) of the First Directive and from the first paragraph of Article 1 of the Third Directive that it was incumbent on each Member State to take all appropriate measures to ensure that civil liability in respect of the use of vehicles and in respect of personal injuries sustained by passengers in a vehicle, such as Mr Smith, are covered by insurance. Where a Member State has not taken such measures and has even, as in the present case, taken measures that had the effect of excluding compensation in insurance contracts for that type of harm, it must, in my opinion, bear the financial consequences.

73. In short, the insurer has not infringed either the rule laid down in the first paragraph of Article 1 of the Third Directive or the provisions of national law which transposed that article. It is the State which has infringed that article by transposing it incorrectly. The State cannot take advantage of that incorrect transposition.

74. It is consistent with the case-law recognising the direct effect of directives that a private party such as FBD, which, it must be recalled, is subrogated to the rights of the victim, is able, in proceedings between it and the State, to require the latter to fulfil its obligations. I note, in that regard, that the theory of direct effect is based on the argument relating to 'the vigilance of individuals concerned to protect their rights'.[32]

75. To conclude my arguments, the situation at issue in the main proceedings may be summarised as follows: in agreeing a settlement with Mr Smith following the judgment of the High Court of 5 February 2009, in order to compensate the latter, FBD in fact fulfilled an obligation which was incumbent on the Irish State. Such an obligation cannot be legally transferred to FBD, as that would mean that the first paragraph of Article 1 of the Third Directive would have direct effect against that insurer in requiring the latter to bear a risk which had not been taken into account in the calculation of the insurance premium.

76. Thus, the situation at issue in the main proceedings can be regarded as an unjust enrichment of the Irish State and should therefore be remedied in order to ensure compliance with Article 3(1) of the First Directive and the first paragraph of Article 1 of the Third Directive.

77. It follows from the foregoing that, in the context of a dispute between, on the one hand, an insurance company, which is subrogated to the rights of a victim to whom it has paid compensation, and, on the other hand, the State, the referring court is required to disapply the provisions of its national law whereby compulsory motor vehicle civil liability insurance does not cover liability for personal injuries to persons travelling in a part of a motor vehicle which has not been designed and constructed with seating accommodation for passengers, such provisions having been found to be contrary to Article 1 of the Third Directive by the judgment of 19 April 2007, *Farrell* (C-356/05, EU:C:2007:229).

32 Judgment of 5 February 1963, *van Gend & Loos* (26/62, EU:C:1963:1, p. 25). I also refer to the Opinion of Advocate General Wahl in *Portgás* (C-425/12, EU:C:2013:623), in which he stated, referring to the judgment of 26 February 1986, *Marshall* (152/84, EU:C:1986:84, paragraph 47), that 'recognition of the direct effect of directives is based, ultimately, on two complementary objectives: the need effectively to guarantee the rights which individuals may derive from those measures and the desire to penalise national authorities which have failed to respect the binding effect of directives and to ensure their effective application' (point 30).

78. Such a disapplication of the provisions of national law that are contrary to Article 1 of the Third Directive cannot have the consequence of imposing on the insurer, who has complied with such provisions, the responsibility for compensating the victim for injury or damage not covered by the approved insurance policy.

IV. Conclusion

79. In the light of all the foregoing, I propose that the Court answer the question referred for a preliminary ruling by the Court of Appeal (Ireland) as follows:

(1) In the context of a dispute between, on the one hand, an insurance company, which is subrogated to the rights of a victim to whom it has paid compensation, and, on the other hand, the State, the referring court is required to disapply the provisions of its national law whereby compulsory motor vehicle civil liability insurance does not cover liability for personal injuries to persons travelling in a part of a motor vehicle which has not been designed and constructed with seating accommodation for passengers, such provisions having been found to be contrary to Article 1 of 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 by the judgment of 19 April 2007, *Farrell* (C-356/05, EU:C:2007:229).

(2) Such a disapplication of the provisions of national law that are contrary to Article 1 of Third Directive 90/232 cannot have the consequence of imposing on the insurer, who has complied with such provisions, the responsibility for compensating the victim for injury or damage not covered by the approved insurance policy.