

Compulsory Liability Insurance from a European Perspective

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Compulsory Liability Insurance and European Union Law

I. Introduction

‘Compulsory Liability Insurance and European Union Law’ is a broad topic. 1 Therefore, it should be specified right from the start: This report deals with obligations to take out (liability) insurance in the light of European Union law. To be more precise, we speak about the *duty to conclude an insurance contract with a private insurance company* (eg as a prerequisite for the undertaking of a certain business). The field of social security (where compulsory membership is common) remains untouched by this report.¹

A duty to conclude an insurance contract can derive from *European Union law* itself (ie EU directive or EU regulation). In these cases, European law has a *regulatory effect*. This analysis is restricted to an overview of the respective duties in secondary law (see no 6 ff). As to be shown, the number of such provisions in European law is relatively small² and the most prominent obligations can be found in EU directives (which have to be transposed by the Member States). Most of the duties to take out insurance derive from the autonomous *national laws* of the Member States. The influence of European law on such provisions is twofold:

First, existing secondary law contains conflict of laws provisions (ie the Rome I 3 Regulation) which determine the law applicable. European Union law, therefore, has a *coordinating effect* on the law of compulsory liability insurance (see no 10 ff).

Second, the effect of primary law on national provisions setting out a duty 4 to take out insurance has to be taken into account. This is because such rules could be seen as a restriction of the freedom to provide services and the freedom of establishment (see no 16 ff). Should a national duty to take out insurance be qualified as an infringement of EU primary law, it is inapplicable.³ In these cases, European law has a *deregulatory effect* on national laws.⁴

1 Cf the similar approach by *W-H Roth*, *Pflichtversicherung*, in: *Hamburger Gesellschaft zur Förderung des Versicherungswesens* (ed), *Pflichtversicherung – Segnung oder Sündenfall* (2005) 141, 143.

2 *KS Hedderich*, *Pflichtversicherung* (2011) 83 ff; *Roth* (fn 1) 153 f.

3 Cf only *D Chalmers/G Davies/G Monti*, *European Union Law* (2nd edn 2010) 203 ff.

4 However, liberalisation by abolishing obstacles for the cross-border provision of services is not restricted to primary law. Instead, the *establishing of an internal market* has been the core aim of EU legislation since its foundation. Therefore, provisions of a deregulatory nature can be

5 In recent years, the European Union has developed from a purely economic community into a political union.⁵ The peak of this development was the entry into force of the *Charter of Fundamental Rights of the European Union* with the Lisbon Treaty in 2009.⁶ The duty to take out insurance interferes with some of the freedoms granted under the Charter (especially the freedom of economic activities, property rights, and equal treatment).⁷ Private persons (eg an insurance company or a service provider) can rely on the Charter and Member States are bound by it when ‘implementing’ Union law (art 51 para 1 of the Charter). Therefore, the influence of fundamental rights in the field of compulsory insurance is a topic also affected by European Union law. However, all of the aforementioned basic rights are also enshrined in the European Convention on Human Rights and ‘the meaning and scope of those rights shall be the same as those laid down by the said Convention’ (art 52 para 3 of the Charter). Therefore, reference can be made to the separate special report on constitutional law which also deals with the influence of the ECHR.⁸

II. Duties to Take Out Insurance in European Secondary Law

6 As mentioned above (no 1 ff), European secondary law establishes duties to take out insurance only in few cases.⁹ One of the reasons for this restraint of the European legislator is the *limited law-making competence of the European Union* (cf art 5 para 2 TEU: principle of limited singular competence).¹⁰ Secondary law has to be based on a specific competence in the Treaties. According to prevailing opinion, there is no such general legal basis in the field of insurance law.¹¹ However, where the functioning of the internal market is affected by different

found in EU directives. In the field of (compulsory) insurance, the Solvency II Directive 2009/138/EC and its predecessors have to be highlighted. For instance, European secondary law led to the abolition of monopolies, coordinated the rules on supervision (home country control) and prohibited the requirement of the ex ante-control of terms and conditions.

5 See *S Perner*, Grundfreiheiten, Grundrechte-Charta und Privatrecht (2013) 13 ff.

6 Cf art 6 para 1 of the Treaty on the European Union (TEU).

7 *F Merli*, Compulsory Liability Insurance and Constitutional Law (in this book) nos 2, 5.

8 See *Merli* (fn 7).

9 For an overview of other provisions in European secondary law see *Hedderich* (fn 2) 83 ff.

10 Cf also *Hedderich* (fn 2) 88.

11 Cf only *W-H Roth*, Rechtsetzungskompetenzen für das Privatrecht in der Europäischen Union (2008) *Europäisches Wirtschafts- und Steuerrecht (EWS)* 401.

legal standards in the Member States, measures can be based on art 114 of the Treaty on the Functioning of the European Union (TFEU). Moreover, the European legislator may issue directives to facilitate the taking up and pursuing of activities by self-employed persons as well as the cross-border provision of services (arts 53, 62 TFEU). The European legislator has based duties to take out insurance on both provisions.

The probably most prominent example of a duty to take out insurance in European secondary law is enshrined in art 3 of the *Motor Insurance Directive*.¹² The provision, which is based on [the predecessor of] art 114 TFEU, states that 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’. As the Annexes to the country reports (at the end of this book) show, the respective Member States have in principle fulfilled their obligation to transpose the directive.

Another example of a duty to take out insurance deriving from secondary law is art 4 no 3 of the *Insurance Mediation Directive* (IMD).¹³ The provision, which is based on [the predecessors of] arts 53 and 62 TFEU, states that intermediaries ‘shall hold professional indemnity insurance’ or ‘some other comparable guarantee’ against liability arising from professional negligence. A similar provision will be included in the revised *Insurance Distribution Directive* (IDD) which replaces the current IMD.¹⁴ The duty set out in the aforementioned Directive shows that compulsory insurance is not the only means of protecting the victim against the insolvency of the injuring party (‘comparable guarantee’). However, it lies within the margin of appreciation of the (European) legislator how to shape the level of protection.¹⁵

Secondary law on compulsory liability insurance can also be found in *EU regulations*. As regulations are binding and directly apply in all Member States (art 288 para 2 TFEU), no transformation by Member States is needed. Such duties exist in the case of the *shipment of certain waste* (duty of the person who in-

¹² Directive 2009/103/EC 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, Official Journal of the European Union (OJ) L 263, 7.10.2009, 11–31.

¹³ Directive 2002/92/EC of 9 December 2002 on insurance mediation, OJ L 9, 15.1.2003, 3–10.

¹⁴ The text has not yet been published in the Official Journal of the European Union.

¹⁵ Cf only *Merli* (fn 7) no 5: As for comparative equality, constitutional courts do not ask for coherence of the entire legal system: They are unlikely to question an insurance duty just because there is no such duty in a situation of comparable or even greater risk in another field of law.

tends to carry out a shipment)¹⁶ as well as for *air carriers and aircraft operators*¹⁷. The latter obligations are rather comprehensive¹⁸ as they comprise a minimum insurance sum, enforcement measures and sanctions.

III. Conflict of Laws

- 10 The previous remarks have shown that the level of harmonisation in the field of the law of compulsory insurance is rather low. However, the reports indicate that Member States establish numerous different duties in various areas of the law. There is no common core of European duties to take out insurance. A reference to the Annexes to the country reports may serve as evidence.
- 11 As national laws differ from another, the focus lies even more on the rules of *international private law*. In principle, the law applicable to insurance contracts which are concluded in order to fulfil the duty to take out insurance is determined by the ordinary rules for insurance contracts.¹⁹
- 12 However, the Rome I Regulation takes into account that, in cases of compulsory insurance, the national legislator often aims at an application of the duty to take out insurance regardless of the law applicable to the insurance contract. In other words, such duties established by national laws are *overriding mandatory provisions*.²⁰ Taking this into account, it does not come as a surprise that art 7 para 4 lit a Rome I states that ‘the insurance contract shall not satisfy the obligation to take out insurance unless it complies with the specific provi-

16 Art 4 no 5 and art 6 of the Regulation (EC) No 1013/2006 of 14 June 2006 on shipments of waste, OJ L 190, 12.7.2006, 1–98.

17 Art 4 ff of the Regulation (EC) No 785/2004 of 21 April 2004 on insurance requirements for air carriers and aircraft operators, OJ L 138, 30.4.2004, 1–16.

18 See *Hedderich* (fn 2) 86.

19 In detail see *C Armbrüster* in: J von Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch* (2011) Vorbemerkungen zu Art 7 Rom I-VO and Art 7 Rom I-VO; *M Fricke*, *Das Internationale Privatrecht der Versicherungsverträge nach Inkrafttreten der Rom-I-Verordnung* (2008) *Versicherungsrecht (VersR)* 443; *UP Gruber*, *Insurance Contracts*, in: F Ferrari/S Leible (eds), *Rome I Regulation. The Law Applicable to Contractual Obligations in Europe* (2009) 109; *C Heinze*, *Insurance Contracts under the Rome I Regulation* (2009) *Nederlands Internationaal Privaatrecht (NIPR)* 445; *H Heiss*, *Insurance Contracts in Rome I: Another Recent Failure of the European Legislator* (2008) *Yearbook of Private International Law* 261; *D Looschelders/K Smarowos*, *Das Internationale Versicherungsvertragsrecht nach Inkrafttreten der Rom-I-Verordnung* (2010) *VersR* 1; *D Martiny* in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Band 10 (5th edn 2010) Art 7 Rom I; *S Perner*, *Das Internationale Versicherungsvertragsrecht nach Rom I* (2009) *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 218.

20 See *Perner* (2009) *IPRax* 218, 221; *Heinze* (2009) *NIPR* 445, 451.

sions relating to that insurance laid down by the Member State that imposes the obligation'. According to the cited provision, where 'the law of the Member State in which the risk is situated [read as: the law applicable to the insurance contract²¹] and the law of the Member State imposing the obligation to take out insurance contradict each other, the latter shall prevail'. This is, for example, relevant if the minimum insurance sums of the duties set out by the states differ.

Article 7 para 4 lit a Rome I does not lead to an overall application of the insurance law of the Member State imposing the duty to take out insurance. Only the mandatory provisions on compulsory insurance are applicable. Therefore, the situation created by the cited provision can lead to a *law mix* in a manner similar to art 6 para 2 Rome I (mandatory provisions in the field of consumer protection) and art 9 para 2 Rome I (overriding mandatory provisions).²² Article 7 para 4 lit b allows Member States to avoid the *law mix*: '... a Member State may lay down that the insurance contract shall be governed by the law of the Member State that imposes the obligation to take out insurance.' If a Member State takes advantage of this option, the whole insurance contract is governed by the law of the Member State which imposes the obligation to take out insurance.

What if a *non-EU country* requires compulsory insurance? From the wording of the provision, art 7 para 4 does not apply. However, the distinction between EU and non-EU compulsory insurance appears inadequate for a regulation which aims at universal application.²³ According to prevailing opinion, the loophole has to be overcome either by an analogous application of art 7 para 4 Rome I²⁴, by applying the escape clause (art 4 para 3 or art 7 para 2 third subparagraph Rome I) in favour of the law of the country establishing the duty to take out insurance²⁵ or by applying the third-state rules as overriding mandatory provisions (art 9 Rome I).²⁶ All these suggestions lead to an application of the third-state provisions establishing a duty to take out insurance.

The above outlined legal framework in international private law shows that it is impossible for the insurer to shape one single policy which can be used in all Member States and it obliges the insured person to meet different standards in different Member States. This conclusion is of double importance: *De lege ferenda*, it underlines the need for a harmonisation or (even better) unification of the laws on compulsory insurance. *De lege lata*, it shows that different legal

²¹ Heiss (2008) Yearbook of Private International Law 279 fn 74.

²² Heinze (2009) NIPR 445, 451.

²³ Ibid.

²⁴ Staudinger/*Armbrüster* (fn 19) Art 7 Rom I no 22.

²⁵ See Heinze (2009) NIPR 445, 450 f.

²⁶ Heiss (2008) Yearbook of Private International Law 261, 281.

standards can impede the cross-border provision of services (for the insurer as well as for the insured person). This brings European primary law into focus.

IV. Primary Law (Four Freedoms)

1. General remarks

- 16 As mentioned above, the national standards in the field of compulsory insurance differ from one Member State to another. At first sight, this observation raises no concerns in the light of European law. To the contrary, the Treaties accept *different legal standards* set by Member States (cf art 5 TEU). A closer look that takes the *free movement provisions* into account paints a different picture. As to be shown (nos 19 ff and 24 ff), duties to take out insurance could be seen as an infringement of the right to free movement granted by the Treaties.
- 17 As the Annexes to the country reports reveal, obligations to take out insurance can not only be found in situations linked to the exercise of an *economic or professional activity*. Such duties exist, for instance, for holders of dogs or dog owners²⁷, private persons using firearms against certain species of birds²⁸, hunters²⁹ or fishermen³⁰.³¹ If no economic or professional activity is exercised, arts 49 and 56 TFEU are inapplicable. However, arts 18 TFEU (general principle of non-discrimination) and 21 TFEU (citizenship of the union) extend the scope of the free movement provisions to cross-border situations regardless of the exercise of an economic or professional activity. Therefore, the results which are found in this report are also relevant for such duties as the aforementioned.
- 18 On closer examination, *two case groups* have to be distinguished. First, it has to be analysed whether duties to take out insurance are an infringement of the right to free movement (establishment, service provision) of the *person who*

27 *D Rubin*, Annex: Rules on Compulsory Liability Insurance in Austria (at the end of this book) II.2; *R Koch*, Annex: Rules on Compulsory Liability Insurance in Germany (at the end of this book) II.1; *D Cerini/A Memola*, Annex: Rules on Compulsory Liability Insurance in Italy (at the end of this book) I.1.

28 *H Cousy/C Van Schoubroeck*, Annex: Rules on Compulsory Liability Insurance in Belgium (at the end of this book) II.2.

29 *P Dobiáš*, Annex: Rules on Compulsory Liability Insurance in the Czech Republic (at the end of this book) I.2; *Koch*, Annex: Germany (fn 27) I.2; *P Takáts*, Annex: Rules on Compulsory Liability Insurance in Hungary (at the end of this book) I.1.

30 *Koch*, Annex: Germany (fn 27) II.2.

31 The duty to take out insurance of a motor vehicle owner (see no 7 above) who uses a car for private purposes also belongs to this group.

has to take out insurance. For instance: Does a national duty that obliges a lawyer to take out insurance if he or she represents clients in the respective Member State infringe primary law? Second, obligations to take out insurance could also be seen as a *restriction of the insurer's business* as such duties often set out mandatory contents for the insurance contracts and, therefore, limit the contractual freedom of the insurer.

2. Free movement of the insured person

Certain duties to take out insurance infringe the right to free movement of the person who has to take out insurance. This observation needs no further explanation insofar as *discriminatory rules* are concerned. For instance, an obligation to take out insurance only for foreign – not for domiciled – undertakings would be discriminatory and, therefore, incompatible with European primary law.³² Certainly, such discriminatory provisions are rare. However, it is common knowledge that European primary law not only prohibits any discrimination but also ‘restrictions’ of free movement by Member States. Therefore, non-discriminatory duties will have to be reviewed in the light of the case law of the Court of Justice of the European Union (CJEU).

According to consistent case law of the CJEU, primary law requires the removal of all restrictions – even if non-discriminatory – which are likely to *prohibit, impede or render less attractive* the establishment or the provision of services in another Member State.³³ This formula sounds rather vague and scholars have pointed out that it therefore seems difficult to assess whether a national provision is a restriction in the sense of the four freedoms.³⁴ However, in the field of compulsory liability insurance, the Court's view is clear. In an Austrian case,³⁵ the CJEU held that a national duty requiring *patent lawyers* wishing to

³² Cf also art 23 para 2 of the Directive 2006/123/EC of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, 36–68: ‘When a provider establishes himself in their territory, Member States may not require professional liability insurance or a guarantee from the provider where he is already covered by a guarantee which is equivalent ...’.

³³ Cf CJEU C-76/90, *Säger v Dennemeyer & Co Ltd* [1991] European Court Reports (ECR) I-4221, para 12; C-168/04, *Commission v Austria* [2006] ECR I-9041, para 36. For the free movement of goods see the leading cases 8/74, *Procureur du Roi v Benoît and Dassonville* [1974] ECR 837, para 5; 120/78, *Cassis de Dijon* [1979] ECR 649, para 8; joined cases C-267/91 and 268/91, *Criminal proceedings against Keck and Mithouard* [1993] ECR I-6097, para 11.

³⁴ Cf *G Bachmann*, *Nationales Privatrecht im Spannungsfeld der Grundfreiheiten* (2010) Archiv für die civilistische Praxis (AcP) 424, 428 ff.

³⁵ CJEU C-564/07, *Commission v Austria* [2009] ECR I-100.

provide services temporarily in Austria to take out professional liability insurance³⁶ constitutes a restriction in the sense of the four freedoms. In the view of the Court, this requirement establishes an additional financial burden for the service provider and is therefore likely to impede the temporary provision of services in Austria by a patent lawyer lawfully established in another Member State, or at least to render the provision of such services less attractive.³⁷

21 However, the CJEU acknowledges that *restrictions can be justified* if they fulfil the following requirements: They must be applied in a non-discriminatory manner, they must be justified by imperative requirements in the general interest, they must be suitable for securing the attainment of the objective which they pursue, and they must not go beyond what is necessary in order to attain it.³⁸ In the case at hand, the CJEU³⁹ held that the aim of protecting customers (potential victims) was a justification in the sense of the cited case law.⁴⁰ The Commission had argued that, by imposing a duty to take out insurance, the national legislator went beyond what was necessary to achieve the (in principle) justified purpose. According to the Commission, an obligation to inform the customer about the existence of (voluntary) liability insurance would be more appropriate. The Court discarded this argument and held that the *duty to take out liability insurance does not infringe primary law*.

22 The case law of the CJEU therefore shows that *compulsory liability insurance in principle complies with European primary law*. The Court acknowledges that such provisions – if non-discriminatory – are justified if they aim at protecting the victim. This finding is of the utmost importance as all country reports show that in fact the main aim⁴¹ – or at least a very important purpose⁴² – of national

36 Sec 2 para 1 lit g, sec 21a Austrian Patent Lawyers Act.

37 CJEU C-564/07, *Commission v Austria* [2009] ECR I-100, paras 22 ff, 28 ff.

38 CJEU C-55/94, *Gebhard v Consiglio degli Avvocati di Milano* [1995] ECR I-4165, para 37; C-564/07, *Commission v Austria* [2009] ECR I-100, para 31.

39 C-564/07, *Austria* [2009] ECR I-100, para 34 ff.

40 Art 23 of the Directive 2006/123/EC on services in the internal market (OJ L 376, 27.12.2006, 36–68) also gives an example for a justification: ‘Member States may ensure that providers whose services present a direct and particular risk to the health or safety of the recipient or a third person, or to the financial security of the recipient, subscribe to professional liability insurance appropriate to the nature and extent of the risk, or provide a guarantee or similar arrangement which is equivalent or essentially comparable as regards its purpose.’

41 *D Rubin*, Compulsory Liability Insurance in Austria (in this book) no 18; *P Dobiáš*, Compulsory Liability Insurance in the Czech Republic (in this book) no 22; *R Koch*, Compulsory Liability Insurance in Germany (in this book) no 13; *D Cerini*, Compulsory Liability Insurance in Italy (in this book) no 33; *A Stäubli*, Compulsory Liability Insurance in Switzerland (in this book) no 18.

42 *H Cousy/C Van Schoubroeck*, Compulsory Liability Insurance in Belgium (in this book) no 23; *J Norio-Timonen*, Compulsory Liability Insurance in Finland (in this book) no 36; *P Takáts*,

provisions establishing compulsory liability insurance is to ensure that *victims will be adequately compensated*. Moreover, such duties, in principle, also pass the proportionality test.

As a result, this is convincing. However, it seems questionable whether such (non-discriminatory) provisions even qualify as ‘restrictions’ which need to be justified. A parallel to the case law on the free movement of goods could be drawn: In its famous *Keck* judgment, the Court distinguished between ‘product requirements’ and ‘selling arrangements’.⁴³ Whereas the first restricted the free movement of the trader, the latter did not qualify as a charge ‘having equivalent effect’ to ‘quantitative restrictions on imports’ (art 34 TFEU), meaning that a *justification was not even required*. In other words: Not every mandatory national rule restricts free movement. For instance, national provisions prohibiting the opening of a shop on Sunday do not restrict the free movement of the shop-owner, even if this would be permitted in his/her home country. The situation is similar in the case of a duty to take out insurance: The ‘product’ (eg legal advice by a patent lawyer) is not affected by the duty: the obligation only affects the ‘selling arrangement’ (manner of practice of the profession) and does not hinder the exercise of the profession. However, the CJEU has so far not clarified whether it is willing to transpose the distinction between product requirements and selling arrangements to the field of services.⁴⁴

3. Free movement of the insurer

Above (no 19 ff), restrictions of the free movement of the person who has to take out insurance have been examined. What about the free movement of the insurer? At first sight and in most cases, compulsory liability insurance seems to *promote the business of the insurer rather than to restrict it*.⁴⁵ Naturally, the specific design of a national provision has to be analysed in detail in order to give a final statement. For instance, an obligation to take out insurance from an insurer established in the territory of the Member State imposing the duty would not be compatible with European primary law⁴⁶ as foreign insurance companies would be discriminated. However, the remarks above (no 19 ff) have shown that

Compulsory Liability Insurance in Hungary (in this book) no 13; Ö Gürses, Compulsory Liability Insurance in the United Kingdom (in this book) no 13.

⁴³ CJEU joined cases C-267/91 and 268/91, *Keck* [1993] ECR I-6097, para 14 ff.

⁴⁴ See *Perner* (fn 5) 58.

⁴⁵ Cf *W-H Roth* (fn 1) 164.

⁴⁶ *Merli* (fn 7) no 7.

non-discriminatory provisions on compulsory liability insurance have to be analysed in the light of European primary law as well.

25 CJEU case law⁴⁷ provides a good example for a possible restriction of free movement: Italian national law sets out a duty to contract not only for the insured person (motor vehicle insurance) but also for the insurer.⁴⁸ Insurance undertakings were required to accept the proposals regarding compulsory insurance which were submitted to them (on the basis of the contract terms and insurance rates which they had to establish in advance for any risk in respect of the use of motor vehicles).⁴⁹ Does such an *obligation to contract* for the insurer qualify as a restriction of the free movement of the insurer?

26 In its judgment, the CJEU held that such a duty *restricted the freedom of establishment and the freedom to provide services* enshrined in arts 49 and 56 TFEU. In the view of the Court, such measures obstruct ‘access to the market, in particular where it subjects insurance undertakings not only to an obligation to cover any risks which are proposed to them, but also to requirements to moderate premium rates’.⁵⁰ The meaning of the notion of ‘market access’ has remained controversial among scholars so far.⁵¹ However, the Court seems to find the crucial argument in the classification of the provisions as *indirectly discriminatory*: ‘Inasmuch as it involves changes and costs for those undertakings, the obligation to contract renders access to the market of that Member State less attractive and, if they obtain access to that market, reduces the ability of the undertakings concerned to compete effectively, from the outset, against undertakings traditionally established there.’⁵² In the case at hand, the fact that *mandatory requirements for the insurance contract* exist was without a doubt pivotal. In other words: Whether an obligation to contract exists or not is less important, the restriction derives from the fact that the insurer has to design the product (insurance) in a specific manner.

27 However, the Court stated that the national legislator intends to achieve a ‘social protection objective, which amounts, essentially, to ensuring that such victims will be adequately compensated [and this] can be taken into account as an overriding imperative relating to the public interest.’⁵³ Moreover, the provisions in question are not only in principle *justified*; they also pass the *propor-*

47 CJEU C-518/06, *Commission v Italy* [2009] ECR I-3491.

48 Ibid, para 20 ff.

49 CJEU C-518/06, *Italy* [2009] ECR I-3491, para 20.

50 Ibid, para 67.

51 Cf *J Snell*, The Notion of Market Access: A Concept or a Slogan? (2010) *Common Market Law Review* (CML Rev) 437.

52 CJEU C-518/06, *Italy* [2009] ECR I-3491, para 70.

53 Ibid, para 1 (Summary of the Judgment).

tionality test. The Court acknowledged that the national law ‘is suitable for securing the attainment of the objective which it pursues and does not go beyond what is necessary to attain it. ... On the other hand, it is not indispensable, with regard to the proportionality criterion, that the restrictive measure laid down by the authorities of a Member State should correspond to a view shared by all the Member States concerning the means of protecting the legitimate interest at issue. Therefore, the fact that some Member States have chosen to establish a different system to ensure that every vehicle owner is able to take out third-party liability motor insurance for a premium that is not excessive does not indicate that the obligation to contract goes beyond what is necessary to attain the objectives pursued. Lastly, with regard to the criterion of proportionality, the obligation to insure does not prevent insurance undertakings from calculating a higher premium for a policyholder domiciled in an area characterised by a significant number of accidents than for a policyholder domiciled in an area where the risk is not so high.’⁵⁴

The judgment of the CJEU has to be put into perspective. The duty to take out motor insurance derives from European secondary law (see no 6 ff above) and is, therefore, without a doubt in principle compatible with European law. From the outset there is only the question whether the specific design of the national provisions – establishing an obligation to contract and specifying the content of the contract – infringe primary law. From this perspective, it seems understandable that the Court assumes a rather positive stance. The findings of the CJEU are nonetheless also highly relevant for duties to take out insurance which do not derive from secondary law. This is true especially for the justification test: As mentioned above (no 19 ff), the country reports show that the main – or at least a very important – aim of national provisions establishing compulsory liability insurance is to ensure that *victims will be adequately compensated*. Therefore, even if provisions on compulsory liability insurance qualify as ‘restrictions’ of the free movement of the insurer, they can in principle be justified according to the case law of the CJEU. 28

V. Summary

A duty to take out insurance can derive from *European Union law* itself (ie an EU directive or EU regulation). In these cases, European law has a *regulatory effect*. European secondary law establishes such obligations only in few cases. The most prominent example can be found in the *Motor Insurance Directive*. 29

⁵⁴ CJEU C-518/06, *Italy* [2009] ECR I-3491, para 1 (Summary of the Judgment).

- 30 Article 7 para 4 of the Rome I Regulation unifies the *international private law* of compulsory insurance (*coordinating effect* of European Union law). In principle, the European legislator acknowledges that such national rules are *overriding mandatory provisions*.
- 31 An analysis of the case law of the CJEU shows that national provisions establishing a duty to take out insurance qualify as a restriction of the freedom to provide services (art 56 TFEU) and the freedom of establishment (art 49 TFEU). The freedom of both the insurer and the person who has to take out insurance are affected (*deregulatory effect* of European Union law). However, the Court recognises that such duties aim at *protecting the victim*. Therefore, they are justified and in principle *do not interfere with European primary law*.