DARIUSZ FUCHS
https://doi.org/10.33995/wu2024.2.1
date of receipt:08.05.2024
date of acceptance: 10.08.2024

Considerations on insurance recourse and the status of the consumer in motor third-party liability insurance – comments on the background of the preliminary inquiry submitted to the Court of Justice of the EU by the rajonen sad in Sofia, Bulgaria, on June 26, 2023 – ZD 'BUL INS' AD vs PV (Case C-387/23, BUL INS)[1]

The article is an attempt to provide a doctrinal answer to the first question posed by the national court in the form of a preliminary question to the CJEU in the case ref. C-387/23. At the same time the text contains considerations on the essence of motor insurance, the construction of atypical recourse of the insurer, as well as, to the extent necessary, refers to the qualification of the consumer in civil and insurance law. Attention was also paid to the stature of the uniform law on the insurance contract using the example of PEICL. Reference is also made to the regulations of national law and final conclusions are made.

Keywords: insurance law, consumer, European law, interpretation insurance secondary law in domestic legal order; European judgments

1. Request for a preliminary ruling from the rayonen sad in Sofia, Bulgaria, filed on June 26, 2023 – ZD 'BUL INS' AD vs PV (Case C-387/23, BUL INS), OJ EU C.2023.321.26.

Introduction

This document attempts primarily to provide a doctrinal answer to the first question posed by the national court in the form of a preliminary inquiry to the CJEU regarding case C-387/23:

'Is Article 13 of Directive 2009/103/EC of the European Parliament and of the Council of September 16, 2009 on insurance against civil liability for damage arising out of the use of motor vehicles and the enforcement of the obligation to insure against such liability to be interpreted as meaning that cases initiated on the basis of a claim for recourse, by the insurer under drivers' liability insurance in accordance with national law, fall within the scope of European Union law in connection with the prohibition on the insurer limiting its own liability?'

In the author's opinion, this question, however puzzling it may sound, cannot be legitimately decided[2] if one does not make a general reflection on the subject of the insurance recourse claim and its *ratio legis* about both the concept of the insurance contract and the construction of motor third-party liability insurance.

In the text, the purpose of answering Question 1 of the preliminary inquiry was based primarily on the example of the presentation and analysis of the Polish legislation as a typical regulation of an EU member state about the issue of typical and atypical, *scilicet* not typical, insurance recourse. The conclusion concerning the first question, due to the peculiarities of the construction of the preliminary inquiry formulated by the Bulgarian court, is also expected to affect the answer to the second question posed by the Bulgarian court, i.e.:

In the event that the answer to the first question is that Union law applies, should the aforementioned provision and Article 38 of the Charter of Fundamental Rights of the European Union be interpreted to mean that in the case of such claims, asserted by or against an individual, that individual should be considered a 'consumer', taking into account the principle of effectiveness and the requirements of consumer protection?

However, the author's point of view is that Question 2 is fundamental and self-contained in nature, which means that it can also be considered a separate issue, no less important than the first question. It can only be noted at the outset that the supposition of the Bulgarian court that an individual can address such a recourse claim finds no basis in the legal and factual solutions known to the author since at most it is the individual (the driver) who can be passively legitimised if the prerequisites justifying the insurer to direct such a claim precisely against the driver of the vehicle are met. In theory, a different situation would be possible if a country's legal system allowed for the formulation of an insurance recourse claim by an insurer which would be a sole proprietor since the applicable law would allow such a possibility in its regulation of the public

2. As the CJEU undoubtedly rightly pointed out in the text of the order of the Court (Eighth Chamber) of January 9, 2024 (request for a preliminary ruling from Sofiyski rayonen sad —Bulgaria) – ZD 'BUL INS' AD vs PV (Case C-387/23, BUL INS), *Reference for a preliminary ruling – Articles 53(2) and 94 of the Rules of Procedure of the Court – Requirement to state the reasons justifying the need for the Court to reply – Insufficient explanation – Manifest inadmissibility,* (C/2024/2403) Language of the case: Bulgarian (EU C of 8 April 2024) that with regard to 'Article 13 of Directive 2009/103, it is undisputed that this provision relates to possible limitations on insurance coverage for third-party liability of accident victims, and not to recourse actions brought by the insurer after compensation has been awarded to the injured party.' (clause 24 of the order).

insurance activity. Since this is unprecedented, this aspect of Question 2 of the Bulgarian court's preliminary inquiry and possible answer will be ignored.

However, due to the formulation of the question posed by the national court, less attention has been given to the response to Question 2. Therefore, the author refers the reader to the existing literature. According to the author, the importance of the issues raised by the Bulgarian court in the inquiry is not diminished by the fact that the CJEU found that the request for a preliminary ruling was (and rightly so) declared manifestly inadmissible on formal grounds[3]. Furthermore, efforts have been made to consider the *ratio legis* of Article 13 of Directive 2009/103/EC to the fullest extent possible.

1. The idea of insurance recourse

1.1. What is recourse claim referred to in preliminary inquiry 1?

The question posed in the heading of this section of the article should not be considered merely rhetorical because the notion of a recourse claim in insurance is commonly found in legal systems and it manifests itself in at least two contexts.

It should be noted that in private insurance there are two types of the insurer's recourse. The first, more common in practice, is called typical insurance recourse. It consists in the insurer making a claim to a third party in relation to the insurance agreement. Most often this refers to the person who caused the damage and when the insurer has paid the policyholder or the insured. It also consists in identifying the entity, in a legal way, responsible for the damage and demonstrating a separate basis for the third party's liability. A good example of this is demonstrated in *the Project of European Insurance Contract Law* (PEICL, also known as *Restatement of European Insurance Contract Law),* in the section on insurance of loss, specifically in Chapter 10, Article10:101 (Subrogation): '(1) Subject to para. 3 the insurer shall be entitled to exercise rights of subrogation against a third party liable for the loss to the extent that it has indemnified the insured; (2) To the extent that the insured waives a right against such a third party in a way that prejudices the insurer's right of subrogation, they shall forfeit their entitlement to indemnity in respect of the loss in question; (3) The insurer shall not be entitled to exercise rights of subrogation against a member of the household of the policyholder or insured, a person in an equivalent social relationship to the policyholder or insured, or an employee of the policyholder or insured, except when it proves that the loss was caused intentionally or recklessly by such a person and

3. Primarily due to the enigmatic and even deficient demonstration of the reasons for the need for a preliminary ruling by the CJEU; cf. Order of the Court (Eighth Chamber) of January 9, 2024 (Reference for a preliminary ruling from Sofiyski rayonen sad – Bulgaria) – ZD 'BUL INS' AD/ PV (Case C-387/23 1, BUL INS) [Reference for a preliminary ruling – Articles 53(2) and 94 of the Rules of Procedure of the Court – Requirement to state the reasons justifying the need for the Court to reply – Insufficient explanation – Manifest inadmissibility] (C/2024/2403) Language of the case: Bulgarian (OJ EU C of 8 April 2024), https://sip.lex.pl/akty-prawne/dzienniki-UE/sprawa-c-387-23-bul-ins-postanowienie-trybunalu-osma-izba-z-dnia-9-stycznia-72294940 (30.04.2024); full text of the reasons for the order (available in French) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62023C00387 (30.04.2024).

with the knowledge that the loss would probably result; (4) The insurer shall not exercise its rights of subrogation to the detriment of the insured[4].'

It is necessary to emphasise that the solutions proposed in PEICL were preceded by thorough legal and comparative work. It can be concluded that the power of subrogation in some jurisdictions is structured in such a way that the insurer acts on behalf of the insured and in some jurisdictions it takes the form of *cesio legis* when the insurer acts for its own benefit[5]. The latter seems more appropriate to the author as it prevents, even potentially the unjust enrichment of the insured as a result of the injury suffered.

The standard example of a variation of such a solution*, scilicet* the form of typical insurance recourse based on the construction of *cessio iuris*, is—in the case of existing EU national orders[6], Article 828 of the Polish Civil Code[7]—*cf.* comments in section 1.2.

The second type of insurance recourse, also known as atypical recourse, is the insurer's right to seek reimbursement from the insured, in third-party liability insurance, for the compensation paid to the injured party.

The example of motor insurance illustrates a situation that is closely regulated by each national legislator. Failure to do so could undermine the economic purpose of mandatory insurance for the insured, essentially delaying the responsibility to face the repercussions of events such as a traffic accident[8].

One example underlying the question posed by the Bulgarian court was a situation where the person driving a motor vehicle refused to take a breathalyser test. According to the Bulgarian law this refusal justifies a recourse claim made by the insurer, providing appropriate compensation is given to the injured party[9]. However, it should be mentioned that in order to avoid disrupting the enforcement of compulsory insurance (including motor insurance) for social reasons,

4. Cf. language versions of the project are included in: *Principles of European Insurance Contract Law (PEICL),* ed. J. Basedow, J. Birds, M. Clarke, H. Cousy, H. Heiss, L. Loacker, Koln, 2016; English version Article 10:10,1 p. 468; with the Polish translation contained therein (the text was based on this language version): D. Fuchs, Ł. Szymański, M. Boguska, *Zasady europejskiego prawa ubezpieczeń (ZEPU)*, ibid, p. 675; more on the subject of PEICL see: Fuchs D., *Restatement of European Insurance Contract Law a koncepcja polskiego kodeksu ubezpieczeń* in: *O potrzebie polskiego kodeksu ubezpieczeń*, ed. E. Kowalewski, Toruń 2009; idem, *Nowelizacja kodeksu cywilnego w zakresie wybranych przepisów ogólnych o umowie ubezpieczenia w świetle przepisów ogólnych o umowie ubezpieczenia w świetle prac Project Group on a Restatement European Insurance Contract Law*, 'Wiadomości Ubezpieczeniowe', 2007/7—8 and idem, *Refleksje o prawie wspólnotowym w związku z seminarium Project Group on a Restatement of European Insurance Contract Law – Saloniki* (4—7.02.2009), 'Rozprawy Ubezpieczeniowe', 2009/6.
5. *Principles of European Insurance Contract Law (PEICL),* ed. J. Basedow, J. Birds, M. Clarke, H. Cousy, H. Heiss, L. Loacker, Koln 2016, p. 262 et al.
6. Other examples: ibid, p. 256.
7. Civil Code of April 23, 1964, i.e., Polish Journal of Laws 2023, item 1610, 1615, 1890, 1933.
8. This is analysed in: Długosz Z., *Wpływ funkcji przepisów o regresie nietypowym w ubezpieczeniu OC posiadaczy pojazdów mechanicznych na ich interpretację* in: *Ubezpieczenie OC posiadaczy pojazdów mechanicznych – nowe spojrzenie na znaną instytucję*, ed. M. Orlicki, J. Pokrzywniak, A. Raczyński, Poznań 2021, pp. 52—53.
9. Cf. clause 6 of the order of the Court (Eighth Chamber) of January 9, 2024 (request for a preliminary ruling from Sofiyski rayonen sad – Bulgaria) – ZD 'BUL INS' AD vs PV (Case C-387/23 1 , BUL INS), OJ EU C of April 8, 2024, which also cited Article 500(1) of the Bulgarian Insurance Code, which explicitly provides such a basis for recourse.

the *ratio legis* is that the insurer should be entitled to this type of recourse only in exceptional cases. This also applies to the legal systems of each EU member state and it essentially refers to the type of a claim for redress mentioned in Question 1 in which the case became the focal point of the preliminary inquiry.

Question 1 of the preliminary inquiry essentially raises the concern that any potential recourse of the insurer against the insured (the driver) can restrict the rights of the injured party to some degree. This is how the author of this text interprets the underlying purpose of initiating this inquiry (see section 1.3 of the considerations).

In order to understand the various types of insurance recourse, it is important to present them separately. This can be achieved by analysing the common solutions found in most EU member states, the solutions which are also applicable under Polish law.

1.2. The interpretation of Article 828 of the Polish Civil Code – the example of typical insurance recourse within the substantive law of an EU member state

Article 828 of the Civil Code, in its wording, states as follows:

'§ 1. Unless otherwise agreed, on the day of payment of indemnity by the insurer, the claim of the policyholder against the third party responsible for the loss passes by operation of law to the insurer up to the amount of the indemnity paid. If the company has covered only part of the loss, the policyholder shall have priority of satisfaction over the insurer's claim for the remaining part.

§ 2. Claims of the Policyholder against persons with whom the Policyholder remains in a common household shall not be transferred to the Insurer, unless the perpetrator of the damage has caused the damage intentionally.

§ 3. The rules resulting from the preceding paragraphs shall apply mutatis mutandis when the contract is concluded for the account of a third party.'

In this way, the legislator explicitly refers to the concept of a third party (cf. clause 1.1 of the Article). The third party is not a party to the contract for obvious reasons, *i.e.,* the policyholder but also is not, especially given the wording of Article 828 § 3 in connection with Article 808 of the Polish Civil Code, the individual for whose benefit the contract was concluded, i.e., the insured.

The issue of recourse claims of the insurer derived from Article 828 of the Civil Code against the liable party is in practice an important issue to which the Polish Supreme Court has repeatedly devoted attention and has established that the admissibility of a recourse claim depends on the fulfilment of two essential prerequisites below:

1) the payment of the due benefit by the insurer, and
2) the substantive legal basis for the liability of the entity in question (responsible for the loss) in a situation where the insurer asserts a recourse claim for the loss from the party against whom the insurer's recourse claim is made[10].

De lege lata, unless otherwise agreed, the policyholder's claim against the third party responsible for the loss is transferred by operations of law to the insurer up to the amount of compensation paid and it takes place on the date of payment of compensation by the insurer. In rare cases,

10. For example, the rulings of the Polish Supreme Court cited by Ciepła H. in: *Komentarz do kodeksu cywilnego. Księga trzecia. Zobowiązania*, Volume 2, Warszawa 2005, pp. 595–998.

an insurer can either waive its right of recourse or modify its contractual scope to the disadvantage of its own interests.

At this point it is worth pointing out another viewpoint from the jurisprudence of Polish common courts: 'The very literal interpretation of Article 828 (1) of the Civil Code should leave no doubt that insurance recourse does not create a new, distinct claim, but rather serves as the legal basis for transferring the existing claim of the injured party against the liable third party to the insurer up to the amount of compensation paid. The concept of insurance recourse does not involve filing a new claim. Instead, it refers to the statutory process through which a claim for compensation is transferred to the insurer responsible for the loss. In essence, it governs the legal shift of the claimant rather than a change in the nature of the claims themselves'[11].

Based on the points mentioned above, the insurance company is entitled to a claim for damages only if the injured party held previously a claim against the third party responsible for the damage. Unfortunately, this is often overlooked because insurers focus on claiming compensation under Article 828 of the Civil Code. This aspect has also been recognised in legal practice: 'Undoubtedly, the accession of a third party to the rights of a satisfied creditor occurs here. The prerequisites for acquisition are the liability of the perpetrator of the damage and the payment of the insurance compensation. The situation of the person liable for the loss to the policyholder cannot be changed by the transfer of his claim to the insurer. The upper limit of the liability of the perpetrator in a recourse suit is what they would be obliged to provide directly to the injured party under civil law'[12]. The transfer of a claim to an insurer does not change the liability of the person responsible for the loss to the policyholder. In a recourse suit, the upper limit of the liable party's responsibility is determined by what they would be required to provide directly to the injured party under civil law. Additionally, it is important to note that the insurer may not be able to assert a claim if the compensation paid does not fully cover the loss suffered by the policyholder. In such a case, the policyholder retains priority of their claim up to the value not covered by the insurance indemnity. This situation can arise when the insurer pays a claim according to the insurance coverage, but the loss is not fully compensated due to factors such as underinsurance.

In the second scenario, there is a partial denial to settle the injured party's claim due to the insured's breach of the principle of utmost good faith. For example, failure to promptly notify about risks or non-compliance with the deadlines outlined in the insurance terms and conditions, for example notifying of an accident or providing the insurer with documents. Regardless of the cause, the lawmaker prioritises the claims of the directly affected injured party rightly while considering the ethical and goal-oriented interpretation.

In the scenario described above, if the injured party receives compensation for the damage from another source, such as directly from the responsible party or through a separate warranty or insurance contract, the insurer is entitled to pursue reimbursement from the responsible party. This situation presents some type of a paradox as the insurer, thanks to the prevention

11. Judgment of the Court of Appeals in Warsaw of March 17, 2017, I ACa 26/16, LEX No. 2433262.
12. Judgment of the Court of Appeals in Szczecin dated September 29, 2016, I ACa 310/16, LEX No. 2300259 , which is further supported by additional jurisprudence: 'The upper limit of the liability of the perpetrator of the damage to the insurer in a recourse suit is what he would be obliged to provide directly to the injured party under the provisions of civil law', Judgment of the Court of Appeals in Gdansk dated November 7, 2013. I ACa 479/13 LEX No. 1415888.

of the injured party, can fulfil its interest in being reimbursed for the compensation paid, which it could not achieve through its own actions, despite exercising utmost diligence[13].

It is important to note that only when the policyholder's claims are fully satisfied, can the insurer effectively pursue reimbursement for the compensation paid under the recourse claim formula. This impacts the maturity of the recourse claim and subsequently affects the statute of limitations for such a claim. However, this only applies to the insurer's exercise of these powers and consequently affects its maturity in the relationship between the insurer and the liable party[14]. It should be emphasised that the term 'recourse' in this context refers to seeking reimbursement from a third party responsible for the loss, not from the policyholder or the insured, as explicitly stated in the CJEU's order and in sections 828 and 10:101[15].

1.3. Recourse of the insurer against the insured driver (so-called atypical recourse) in motor liability insurance

To discuss the possibility of a lawsuit in motor insurance, which involves the insurer's recourse claim against the party responsible for the damage, specific prerequisites must be met. These prerequisites essentially indicate the wrongdoing of the insured individual (cf. clause 1.1 of the text). For instance, Article 43 of the Polish Compulsory Insurance Act[16] (hereinafter PCIA) outlines that in cases of automobile insurance, the insurer may pursue a recourse claim against the driver if at least one of the following situations has occurred:

1) The driver caused the damage intentionally, while under the influence of alcohol, drugs or other substances as defined by regulations on countering drug addiction.
2) The driver obtained possession of the vehicle as a result of committing a crime.
3) The driver did not have the required authorisation to operate a motor vehicle, except in cases involving immediate response to a crime, rescue efforts or protection of life or property.
4) The driver fled the scene.

According to the logic of such a regulation, the burden of proof is on the plaintiff (the insurer) to gather some evidence for the purpose of recourse.

13. A special case of this situation will be the circumstance when the insurer pays a goodwill benefit, *scil*., *Dei gratia, ex gratia* benefit, to "complement" the value of full insurance. The question then arises whether the insurer then has the right to direct a recourse claim against the liable party. This will depend on whether there is a dispensational or marketing goodwill in the case. Cf. Fuchs D., *Postanowienia umowy ubezpieczenia dotyczące cesji wierzytelności a ich skutki dla roszczeń regresowych z art. 828 k.c.*, 'Wiadomości Ubezpieczeniowe', 2012/4; idem, *Uwagi dotyczące roszczeń regresowych ubezpieczyciela wobec odpowiedzialnego za szkodę na przykładzie roszczeń wobec zarządcy nieruchomości wspólnej*, 'Rozprawy Ubezpieczeniowe', 2009/2(7); and also idem, *Dopuszczalność roszczeń regresowych instytucji zabezpieczenia społecznego z państw Unii Europejskiej wobec polskiego ubezpieczyciela OC ubezpieczonego – odpowiedzialnego za szkodę*, 'Zeszyty Prawnicze UKSW', 2010/10.1.
14. Cf. Fuchs D., *Postanowienia umowy ubezpieczenia dotyczące cesji wierzytelności a ich skutki dla roszczeń regresowych z art. 828 k.c.*, 'Wiadomości Ubezpieczeniowe', 2012/4.
15. Cf. clause 6 and 19 of the reasons for the order of the Court (Eighth Chamber) of January 9, 2024 (request for a preliminary ruling from Sofiyski rayonen sad – Bulgaria) – ZD 'BUL INS' AD vs PV (Case C-387/23, BUL INS), OJ EU C of April 8, 2024.
16. *The Act on Compulsory Insurance, Insurance Guarantee Fund and Polish Motor Insurers' Bureau of 22 May, 2003*, i.e., Polish Journal of Laws 2023, item 2500.

It is important to note the particularity of the regulation outlined in clause 4 of Polish law and to underscore that the assertion of the recourse claim mentioned in the provision requires evidence that the perpetrator knowingly left the scene of the incident without fulfilling their obligations under Article 16 of the Compulsory Insurance Act and with the intention of evading responsibility for the damage caused[17]. As emphasised consequently in the the jurisprudence of the Polish Supreme Court, which in turn was supported by the legal doctrine, leaving the scene must be related to the desire to avoid responsibility and to prevent the identification of the perpetrator's identity[18].

Additionally, pursuant to Article 16 (1) of the Compulsory Insurance Act, individuals involved in events covered by compulsory insurance are obliged to:

1) Take all measures to ensure safety at the scene of the incident, try to mitigate the consequences of the incident and provide medical assistance to the injured as well as secure the property of the injured, if possible.
2) Prevent the escalation of the damage as much as possible.
3) Immediately notify the Police of the incident in the event of an accident resulting in human casualties or under circumstances that can suggest the commission of a crime.

The legislation also establishes additional requirements for the vehicle driver, specifically in the case of an insurance incident:

1) Providing the other parties involved in the incident with the necessary information to identify the insurance company, including details of the insurance policy, and
2) Immediately notifying the insurance company of the incident and providing it with the necessary information[19].

17. Judgment of the Regional Court in Siedlce of 26.08.2013, ref. no. V Ca 387/13, Lex No. 1718216; Judgment of the Administrative Court in Rzeszów of 11.10.2012, I ACa 240/12, LEX No. 1254472; Judgment of the District Court in Olsztyn, file I C 515/15 The essence of compulsory motor insurance in the context of the insurer's recourse to the perpetrator – LEX No. 2089486 – judgment of July 11, 2016. 'The essence of compulsory motor insurance is that the pertinent insurance contract does not, in principle, give rise to recourse of the insurance company against the insured perpetrator of the traffic damage – the driver or owner of the motor vehicle. The effect of a motor vehicle liability insurance contract extends to the parties to the contract as well as to any driver of a motor vehicle, and its meaning and essence lies in the definitive assumption by the insurance company of its obligation to compensate for the loss, which means that once the compensation benefit has been fulfilled, the insurer cannot demand its return from the insured'; Judgment of the Court of Appeals in Rzeszów of October 11, 2012 ref. I ACa 240/12 Atypical recourse in compulsory insurance. Lex no LEX No. 1254472, 'The claim under Article 43 of the 2003 Act on Compulsory Insurance, the Insurance Guarantee Fund and the Polish Motor Insurers' Bureau called atypical recourse is not the same as the recourse claim under Article 828 § 1 of the Civil Code and has an independent and special nature. This is due to the fact that under it, the insurance company seeks reimbursement of the compensation paid not from the third-party perpetrator, but from the entity insured against third party liability, under the terms set forth in the act.'
18. Cf. Supreme Court ruling of March 15, 2001, III KKN492/99, also cited in Polish doctrine: Wojciechowski J., *Ubezpieczeniowy regres nietypowy na podstawie art. 43 ustawy o ubezpieczeniach obowiązkowych, Ubezpieczeniowym Funduszu Gwarancyjnym i Polskim Biurze Ubezpieczeń Komunikacyjnych*, 'Prawo Asekuracyjne', 2022 nr 3(112), pp. 66–67; the premise of atypical recourse found in the Compulsory Insurance Act is also broadly referred to.
19. More widely in: Fuchs D., *Prewencja i ratownictwo w ubezpieczeniach odpowiedzialności cywilnej, czyli jaki jest ogląd świata w ubezpieczeniach obowiązkowych w świetle interpretacji art. 439 k.c.*, 'Prawo Asekuracyjne', 2021 nr 1 (106), p. 68 et seq.

It is worth noting that the legislator requires the insured individual as well as the individual making a claim under the above compulsory insurance maintain the utmost loyalty both to the insurer and the injured party.

Thus, the violation of the concept of an *uberrimae fidei* in the insurance contract justifies further the insurer's use of a recourse claim against the insured driver.

In turn, the violation of those responsibilities by the individuals on whom they are imposed will lead to the statutory sanctions outlined in Article 17 of the Compulsory Insurance Act[20]. According to this provision, 'If an individual covered by compulsory liability insurance or a claimant failed to comply with the obligations listed in Article 16 through wilful misconduct or gross negligence, and which affected the determination of the existence or extent of their liability or increased the extent of the damage, the insurance company may claim from these persons the return of a part of the compensation paid to the claimant or limit the compensation paid to these individuals. The burden of proving the facts justifying the reimbursement of part of the compensation or limitation of indemnity to the insurance company is on the insurance company.'

An analogy should be made with the solution provided by Bulgarian law, which formed the material legal basis for the preliminary inquiry, which provides for recourse in the event of a refusal to take a breathalyser test in the event of an accident and damage done by the driver[21].

Thus, it should be stated that under the circumstances so axiologically justified, it would be wrong to conclude that allowing the insurer to make a recourse claim would violate the interests of the injured party (however, cf. the objections in the conclusions part of the text)[22].

Question 1 of the preliminary inquiry, in its essence, implies a doubt that the existence, even to a limited extent, of a basis for recourse for the insurer against the insured (c.f. clause 1.3) may not lead to a limitation of the rights of the injured party. This is how the author of this text sees the purpose of submitting this inquiry in Question 1[23].

1.4 Jurisdictional guidance – discussion on Article 14 and Article 13 of Brussels I bis regulation

It is also crucial to pay attention to the EU regulation on insurance jurisdiction contained in the Regulation of the European Parliament and of the Council (EU) No. 1215/2012 of 12.12.2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the so-called Brussels I bis regulation)[24]. The reason behind that is that the legal state of affairs

20. This subject is discussed in detail in: Orlicki M., *Ubezpieczenia obowiązkowe*, Warszawa 2011, p. 419 et seq; cf. also Krajewski M., *Umowa ubezpieczenia. Art. 805–834 KC. Komentarz*, Warszawa 2016, pp. 589–590.

21. Article 500(1) of the Bulgarian Civil Code, cf. clause 6 of the reasons for the order of the Court (Eighth Chamber) of January 9, 2024 (request for a preliminary ruling from Sofiyski rayonen sad — Bulgaria) — ZD 'BUL INS' AD vs PV (Case C-387/23 1 , BUL INS), OJ EU C of April 8, 2024.

22. More broadly on the subject in: Fuchs D., *Obowiązki (powinności) prewencyjne w świetle prawa prywatnego i publiczngo scilicet spei permultum sed rei paulum,* 'Prawo Asekuracyjne', 2020 nr 2(103), p. 51 et seq., and also idem, *Prewencja i ratownictwo ubezpieczeniach odpowiedzialności cywilnej, czyli jaki jest ogląd świata w ubezpieczeniach obowiązkowych w świetle interpretacji art. 439 k.c.,* 'Prawo Asekuracyjne', 2021 nr 1(106), pp. 70–73.

23. Otherwise one would have to repeat the conclusion of clause 24 of the order of CJEU, cited in footnote 3 of this text, and not to carry out considerations in this regard.

24. OJ EU L.2014.351, p. 1; amended: OJ EU L. 2014.163, p. 1; OJ EU L.2015.54, p. 1; recast version.

underlying the preliminary inquiry concerned the question of the court's local jurisdiction and the dilemma of whether this jurisdiction is affected by the possible status of the consumer if , for example, the driver responsible for the traffic damage is considered as such[25]. Since, by its very nature, the EU law regulates cross-border civil disputes, it will be appropriate to address precisely the issue of jurisdiction. Regulation No. 1215/2012 dated 12.12.2012 contains separate regulations on the subject of insurance recourse, but they are expressed on the level of the standard defining jurisdiction over disputes brought in the interest of the insurer, regardless of whether, for example, they concern unpaid insurance premium in full or any of its instalments. As a side note, the author would like to point out that if the claim of the insurer, which is the substantive basis for the litigation, were based on the construction of unjust enrichment (in the event, for example, of the return of wrongly paid compensation), then the provisions of Section 3 on jurisdiction over insurance disputes could not apply because they are a claim without a legal basis, and not under a specific contract, including the insurance contract. The above implies that a case brought by the insurer to recover incorrectly paid compensation due to, for example, a breach of the utmost good faith rule[26], is considered a civil case and therefore is subject to the regulation of the general rules on jurisdiction outlined in the Brussels I bis Regulation[27]. Article 14 (1) of the Brussels I bis Regulation is paramount here because it states that: 'Notwithstanding the provisions of Article 13 (3), an insurer may sue only in the courts of the member state in whose territory the defendant is domiciled, regardless of whether the defendant is a policyholder, insured or beneficiary under the insurance.'

In principle, one should agree with the already well-established view of the doctrine, based on the literal interpretation of Article 14 (1) of the Regulation, that the EU legislator in order to safeguard the interests of the insurer's counterparty stipulated that the latter may sue only before the courts of the Member State in whose territory the defendant is domiciled, regardless of whether they are the policyholder, insured or beneficiary under the insurance[28].

At the same time, it should be noted that if the motor liability insurance contract in question was concluded in the form of co-insurance (although this is a subject not covered extensively in the literature available to the author as it is in the case of reinsurance), the provisions of Section 3 would not apply to the issue of jurisdiction in the event of litigation between co-insurers for essentially similar reasons[29]. At least three of those reasons are worth mentioning here[30].

25. In particular, cf. clauses 8 to 18 of the reasons for the order of the Court (Eighth Chamber) of January 9, 2024 (request for a preliminary ruling from Sofiyski rayonen sad — Bulgaria) — ZD 'BUL INS' AD vs PV (Case C-387/23 1 , BUL INS), OJ EU C of April 8, 2024.
26. Cf. Comparative Legal Analysis in: Fuchs D., *Komentarz do art. 805 kc* in: D. Fuchs, K. Malinowska, D. Maśniak, *Kontrakty na rynku ubezpieczeń*, Warszawa 2020, p. 58 et seq., and also idem, Wprowadzenie in*: Komentarz do ustawy z dnia 7 lipca 1994r. o ubezpieczeniach gwarantowanych przez Skarb Państwa*,, Warszawa 2024, pp. 27–29 (in print)
27. Cf. Fuchs D. in: D. Fuchs, K. Malinowska, D. Maśniak, *Kontrakty na rynku ubezpieczeń*, Warszawa 2020, p. 1162 et al.
28. Cf., for example, Jaffey A.J.E., *Introduction to the Conflict of Laws,* London 1988, p. 115.
29. More on the exclusion of reinsurance contracts in: Fuchs D. in: *Kontrakty na rynku ubezpieczeń,* ed. D. Fuchs, K. Malinowska, D. Maśniak, Warszawa 2020, pp. 1183–1186; (with the literature on the subject cited therein and in jurisprudence).
30. Leaving aside a practical argument that, to the author's knowledge, most of the possible conflicts between co-insurers do not lead to litigation but are most often resolved through amicable means such as contractual mediation or out-of-court negotiations.

Firstly, it is widely accepted in the literature and jurisprudence that the provisions of Section 3 (contained in Chapter 2) of Regulation 1215/2012 of 12.12.2012 are made by the EU legislator in order to protect primarily the interests of the service recipient under the insurance contract. Axiologically, that is why there is no reason to differentiate the status of an equal partner which for the insurer (one co-insurer) is the (other) co-insurer. In relation to each other, co-insurers are *de facto* professional participants in the insurance market to the same extent.

Secondly, if the above-mentioned argument were not enough, usually co-insurance takes the form of internal co-insurance and, thus, the contract between co-insurers *per se* is not *de iure et facto* an insurance contract but rather a consortium agreement. It is usually the latter that most often constitutes the substantive legal basis for a possible dispute between the co-insurers rather than an insurance contract. Under this contract, an external co-insurer assumes the motor TPL risk on behalf of all the co-insurers, in accordance with the internal division, in exchange for a premium[31].

Thirdly, the EU legislator does not mention the concept of a co-insurer in both Article 14 of the Brussels I bis Regulation and in the whole of Section 3 of Chapter II.

Also, according to the paremia: 'Lege non distinguente nec nostrum est distinguere', the author, in view of the above arguments and reflecting on Regulation No. 1215/2012 in the context of co-insurance[32], should remain silent at this point[33].

In the end, Article 14 of the EU Brussels I bis Regulation leads to the conclusion that the issue of the insurer's recourse to the perpetrator of the damage is irrelevant to the interests of the injured party in a traffic accident in relation to the regulation devoted to jurisdiction for two main reasons.

Firstly, the fact that, under Article 14 of the same regulation, an insurer may sue the insured, e.g., the driver who caused an accident, in the court which has jurisdiction to try the case because of the insured's location, but this does not, in any way, diminish the power of the *actio directa* of the injured party, in accordance with the provisions of Article 13.

Secondly, it is essential to acknowledge the existing position in case law and legal doctrine which states that Article 13 of the Brussels I bis Regulation does not cover a claim brought by an insurance company on behalf of the injured party against the insurance company of the party at fault. This is primarily attributed to the protective nature of the provisions of Chapter Three which aims to broaden jurisdictional grounds for the plaintiff-injured party rather than the insurance company. This undoubtedly makes sense in the case of recourse which had a solution analogous to Article 828 of the Civil Code (i.e., *cessio iuris*, which is also an example of typical insurance recourse) as its substantive legal basis. Thus, this confirms the validity of the concept formulated some time ago in the Polish doctrine (under the influence of the constatation present in the European literature) that the rules on jurisdiction in insurance cases do not apply when it is the insurer who is neither

31. Cf. more extensively in: Fuchs D., *Regulacja koasekuracji w prawodawstwie Unii Europejskiej*, 'Radca Prawny', 1999/2.

32. Details on co-insurance agreement in Polish and European law: Fuchs D.,, *Umowa koasekuracji – stan obecny i postulowany* in: *Europeizacja prawa prywatnego*, ed. M. Pazdan, W. Popiołek, E. Rott-Pietrzyk, M. Szpunar, vol. 1, Warszawa 2008.

33. Cf. Fuchs D., *Umowa koasekuracji a regulacja rozporządzenia UE Bruksela I bis*, reproduced typescript, Katowice 2024, passim.

the policyholder nor the insured in the process of asserting a recourse claim against the perpetrator of the damage.[34]. This has also been noted in domestic jurisprudence[35].

Being interpreted in this manner, the regulations of the Regulation will not apply directly to the situation of atypical recourse under Article 14 of Regulation No. 1215/2012. If, under this interpretation, the insurer's right to sue under Article 14 of the Brussels I bis Regulation is refused, then in practice the largely prevailing substantive legal basis would be the failure to pay the premium. However, such limitation or distinction is not stated in Article 14. In other words, such an interpretation would be contrary to the literal wording of the regulation and would expose an individual to the charge of inference *contra legem* because it would also conflict with a teleological interpretation that takes into account the *aquis communautaire*.

At the same time, in such a situation, there is no basis for applying Article 17 (see Section 4 et seq.) for two main reasons. First, even if one were to consider that the addressee of a recourse claim in third-party liability insurance is a potential consumer under the same Article of the Brussels I bis Regulation[36], this would not hold true. The author is convinced that the rule is that special provisions of alternate jurisdiction are not duplicated, which consequently means that since Article 14 applies, there is no need to apply Article 17 et seq. of the Regulation. Secondly, there is no possibility of granting to the driver, to whom the atypical recourse is directed, the status of a consumer because there is no legal act at the source of this claim. For more details, please see clause 3 of the Regulation. However, this is only a side aspect because the basic substantive legal rule of insurance recourse, as the previous discussion shows (cf. clause 1.1 and 1.2), is the idea that will become satisfied if:

1) the due benefit is paid to the injured party (in a traffic accident), and
2) the entire damage suffered by the injured party is appropriately compensated.

Only when both of these prerequisites are met, should the construction of recourse, including atypical recourse, be allowed.

The preventive function of this construction should give way to the compensatory function due to the interest of the injured party. If the insurer has compensated the injured party partially, the author believes that it can secure its claim to counteract the statute of limitations, but cannot effectively enforce it until the injured party is fully compensated under the applicable law. To do otherwise would risk jeopardizing the interests of the injured party.

34. This is how the author interprets the position of Weitz K., Europejskie prawo procesowe *cywilne*, in: *Stosowanie prawa Unii Europejskiej przez Sądy*, ed. A. Wróbel, Zakamycze 2005, p. 522 (citing the view present in the literature on the subject), approved, by the way, by the author Fuchs D., *Jurysdykcja w sprawach z zakresu obowiązkowych ubezpieczeń komunikacyjnych w świetle rozporządzenia Bruksela I bis na tle rozwoju europejskiego prawa ubezpieczeniowego* in: ed. M. Orlicki, J. Pokrzywniak, A. Raczyński, *Ubezpieczenie OC posiadaczy pojazdów komunikacyjnych – nowe spojrzenie na znaną instytucję*, Poznań 2021, p. 102.).

35. Cf., for example, the ruling of the French Cour de Cassation, Chambre civile 1, du 2 février 1999, 96–22.285. https://www.legifrance.gouv.fr/juri/id/JURITEXT000007397625 (6.05.2024).

36. *Explicite*: Article 17(1) '*If the subject matter of the proceeding is a contract or claims under a contract entered into by a person, a consumer, for a purpose which cannot be regarded as a professional or business activity of that person, jurisdiction shall be determined under this section (...)*'.

2. Interpretation of Article 13 of Directive 2009/103/EC

It should be emphasised that according to the relevant recitals of the preamble to the Directive: '(...)(3) Each Member State should take all useful measures to ensure that in its territory third-party liability for damage caused by the user of motor vehicles is insured[37]. The scope of covered liability and the terms and conditions of insurance contracts shall be determined on the basis of these measures. (...)(15) It is in the interest of victims that the effects of certain exclusion clauses be limited to the relationship between the insurance company and the person responsible for the accident. However, in the case of vehicles stolen or obtained as a result of violence, Member States may provide for compensation to be paid by the aforementioned institution. (...)(29) In order to ensure adequate protection for victims of traffic accidents, Member States should not allow insurance companies to invoke deductibles against victims.'

In connection with the above, the content of Article 13[38], where the EU legislator refers to the problem of the so-called 'exclusion clauses' of the insurer's liability in the case of motor third-party liability insurance, should also be interpreted in this context. Consequently, each EU member state is obliged to take appropriate legal measures to ensure that any legal provision or contractual provision contained in the insurance policy is declared ineffective against the claims of injured third parties who have been injured in an accident if that legal provision or that contractual provision excludes the movement or driving of the vehicle from insurance coverage when the individual

(a) is neither explicitly nor implicitly authorised to drive the vehicle;
(b) does not have a driver's license allowing them to drive the vehicle in question;
(c) does not comply with the statutory technical requirements for the condition and safety of the vehicle in question.

However, the provision or stipulation referred to in subparagraph (a) of the first paragraph may be invoked against the individual who voluntarily drove/came into possession of the vehicle that caused the damage if the insurance company proves that the individual knew that the vehicle was stolen. However, the directive allows for the fact that member states may, with respect to accidents occurring in their territory, not apply the first paragraph if the injured person can obtain

37. E.g., in the Polish legal system, such a guarantee is provided by Article 35 of the Compulsory Insurance Act: 'Third-party liability insurance for motor vehicle owners shall cover the third-party liability of any person who, while driving a motor vehicle during the period of insurance liability, caused damage in connection with the movement of the vehicle.' Possible restrictions are contained in the text of Article 38 of the same act, namely Article 38:
'The insurance company is not liable for damages:
1) consisting of damage, destruction or loss of property, caused by the driver to the holder of the motor vehicle; this also applies if the holder of the motor vehicle in which the damage was caused is the owner or co-owner of the motor vehicle in which the damage was caused;
2) arising in cargo, shipments or baggage transported for a fee, unless the owner of a motor vehicle other than the vehicle transporting the items is responsible for the resulting damage;
3) involving the loss of cash, jewelry, securities, documents of all kinds, and philatelic, numismatic and similar collections;
4) involving pollution or contamination of the environment.'

38. The current version of this article is the result of changes caused by Article 1 point 12 of Directive No. 2021/2118 of November 24, 2021 (OJ.EU.L.2021.430.1) amending the present Directive as of December 22, 2021.

compensation for the damage suffered from a social security body[39]. Nevertheless, in the case of vehicles stolen or obtained as a result of violence, member states may stipulate that a special institution, referred to in Article 10 (1) of the Directive[40], pay compensation, other than an insurance company, under the conditions provided for in section 1 of this Article. If the vehicle is used normally in another member state, the institution has no recourse against any institution in that member state.

In the case of vehicles which were stolen or obtained by violence, Member States whose legal systems provide that compensation shall be paid by the authority referred to in Article 10 (1), may establish, in respect of property damage, an excess not exceeding EUR 250 to be borne by the injured person. At the same time, the EU states are obliged under Article 13 of the directive to implement all the necessary measures to ensure that any legal provision or contractual clause in an insurance contract that denies coverage to a passenger because he or she knew or should have known that the driver of the vehicle was under the influence of alcohol or another intoxicant at the time of the accident, is declared invalid for the claims of that passenger.

3. Conclusion: answers to questions 1 and 2 of the preliminary inquiry

With regard to the first question of the preliminary inquiry, it should be reiterated that the fundamental principle of insurance recourse is that the insurer will ensure that

1) the due benefit is paid to the injured party (in a traffic accident), and
2) the entire damage suffered by the injured party is thus compensated.

Only when both of these prerequisites are met, the construction of recourse, including atypical recourse, should be allowed for. The preventive function of this construction should give way to the compensatory function due to the interest of the injured party.

The author believes that if the insurer has compensated the injured party partially, it can secure its claim to counteract the statute of limitations, but cannot effectively enforce it until the injured party is fully compensated under the applicable law.

If these specific conditions are met, the insurer's pursuit of atypical recourse against the driver at fault cannot be considered as harmful to the interests of the injured party, particularly in accordance with Article 13 of Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 on motor vehicle liability insurance, and enforcement of the obligation to insure against such liability would be violated or even threatened.

In other words, cases initiated on the basis for a recourse claim by a motor liability insurance insurer, in accordance with national law, do not fall within the scope of European Union law in relation to the prohibition of limitation of the insurer's own liability. However, they could only be considered as limiting the rights of the injured party if both of the above-listed prerequisites are not met.

39. For more on recourse of social security institutions under EU law, see: Fuchs D., *Dopuszczalność roszczeń regresowych instytucji zabezpieczenia społecznego z państw Unii Europejskiej wobec polskiego ubezpieczyciela OC ubezpieczonego – odpowiedzialnego za szkodę*, 'Zeszyty Prawnicze UKSW', 2010/10.1.

40. I.e. the institution responsible for compensation: 'Article 10.1. Each Member State shall create or authorize a body to compensate, at least within the limits of compulsory insurance, for property damage or personal injury caused by an unidentified vehicle or a vehicle for which the insurance obligation has not been fulfilled, (...)'.

In the author's viewpoint, Question 1 posed by the national court should be answered in the negative, within the specific boundaries mentioned above. Regarding Question 2 from the Bulgarian court, the author would like to articulate a position on the possibility of considering the victim of a traffic accident a consumer. Consequently, the author is in favour of the possibility of extending consumer protection to such victims in accordance with EU and national law.

The starting point, again, may be the example of the statutory definition of a consumer in Polish law, which is representative of the approaches of EU member states. Article 22^1 of the Polish Labour Code defines a consumer as 'a natural person engaging in a legal transaction with an entrepreneur that is not directly related to their economic or professional activity.'

With reference to the definition of a consumer in the Polish Civil Code, it should be emphasised that it is fundamentally consistent with the concept outlined in the Community law directives. However, it is possible for Poland, as a member state, to adopt a broader definition of a consumer. This aligns with the objective of the existing 'framework' of Community consumer law which protection to a minimum extent and allows member states to expand protection, provided that this does not unjustly impedes the functioning of treaty freedoms[41]. It should be borne in mind that it was the consumer protection that was the direct cause of the rulings in the so-called co-insurance cases, which gave rise to the development of the concept of the general (universal) good as a legitimate reason for restricting the Community's freedom to provide financial services[42]. This has been confirmed by CJEU jurisprudence, but there has been some substantial opposition to the trend of erasing the distinction between the entrepreneur and the consumer[43].

The above leads already to the conclusion that when an injured party files a claim against an insurer to receive compensation or benefits as part of their insurance coverage, this action does not constitute a legal act. Consequently, the insured individual will not be considered a consumer[44].

It could be noted that third-party liability insurance aims to protect the interests of the injured rather than to solely safeguard the insured party. When differentiating between the purpose and function of third-party liability insurance, it is plausible to argue that the purpose, of mainly compulsory insurance, is to shield the insured's assets from liabilities stemming from their civil liability, while its function is to protect the injured party from the repercussions of the incurred damage[45].

41. Cf. Fuchs D., Mogilski W.W., *Wypadek komunikacyjny nie czyni poszkodowanego konsumentem* in: *Odszkodowanie za ubytek wartości handlowej pojazdu oddanego naprawie*, ed. E. Kowalewski, Toruń 2012, in particular: pp. 158–160, and also: Bagińska E., Fuchs D., Mogilski W.W., *Poszkodowany dochodzący roszczeń z ubezpieczenia OC sprawcy wypadku drogowego nie jest konsumentem* in: *Odszkodowanie za niemożność korzystania z pojazdu uszkodzonego w wypadku komunikacyjnym (najem pojazdu zastępczego)*, ed. E. Kowalewski, Toruń 2014.
42. Cf. Fuchs D., *Regulacja koasekuracji w prawodawstwie Unii Europejskiej*, 'Radca Prawny', 1999 No. 2, p. 18 et al.
43. Cf. this has been confirmed in publications such as:. Łętowska E., *Prawo umów konsumenckich,* Warszawa 1999, pp. 40 – 41., Banasiński C., *Standardy wspólnotowe w polskim prawie ochrony konsumenta*, Warszawa 2004*,* p. 15.
44. For more on attempts to define the term 'legal action' in Polish law, see Radwański Z. in: *System Prawa Cywilnego*, in: ed. Radwański Z.Volume 2, Warszawa 2002, pp. 32–33.
45. See Raczyński A., *Sytuacja prawna poszkodowanego w ubezpieczeniu odpowiedzialności cywilnej,* Warszawa 2010, p. 132;, more broadly: Fuchs D., Mogilski W.W., *Wypadek komunikacyjny nie czyni poszkodowanego konsumentem* in: ed. E. Kowalewski, *Odszkodowanie za ubytek wartości handlowej pojazdu oddanego naprawie*, Toruń 2012.

Therefore there is no reason, either under EU law or national legal orders for example the Polish law, to conclude that the injured party can be a consumer, *de lege lata*[46].

In the author's opinion, an analogous case is when the recipient of the insurer's recourse claim will be the insured, for instance a driver who is also a perpetrator in a traffic accident.

At this point, it is worth citing one of the fundamental definitions in EU law, the definition found in Article 2 b of Directive 93/13: 'Consumer refers to any natural person who, in contracts governed by this Directive, is acting for purposes unrelated to trade, business or professional and commercial activities'[47].

In addition, it is necessary to highlight the extensive jurisprudence of both the CJEU and national courts, as mentioned earlier. According to this jurisprudence, the concept of consumer within the scope of EU law should be interpreted based on its functionality. At this point, the following statement is characteristic: 'Thus, the status of the person concerned as a "consumer" must be assessed by reference to a functional criterion, consisting in an assessment of whether the contractual relation at issue has arisen in the course of activities outside a trade, business or profession (judgment of 27 October 2022, *S.V. (Building in co-ownership)*, C-485/21, EU:C:2022:839, paragraph 25 and the case-law cited). The Court of Justice has also had occasion to state that the concept of "consumer", within the meaning of Article 2(b) of Directive 93/13, is objective in nature and is distinct from the concrete knowledge the person in question may have, or from the information that person actually has (judgment of 21 March 2019, *Pouvin and Dijoux*, C-590/17, EU:C:2019:232, paragraph 24 and the case-law cited)'[48].

In conclusion, it is crucial to stress '(...) the peremptory nature of the provisions of Directive 93/13 and the specific consumer protection requirements associated with them require that a broad interpretation of the concept of a "consumer" within the meaning of Article 2 (b) of that directive be favoured to ensure the effectiveness of the act. Accordingly, a teleological interpretation of Directive 93/13 supports the approach indicated by the EU legislator in the same recitals and according to which an individual who has entered into a contract for purposes that are partly within the scope of their economic or professional activity is to be considered a consumer if the purpose of the economic or professional activity is limited in such a way that it is not predominant in the overall context of that contract'[49]. The widespread recognition of this approach is due to its universal application. Other EU legislation such as Regulation (EU) No. 524/2013 of the European Parliament and of the Council of May 21, 2013 concerning online dispute resolution for consumer disputes and which also amends Regulation (EC) No. 2006/2004 also makes reference to this definition[50].

46. More broadly on the subject: Fuchs D., Mogilski W. W., *Poszkodowany w wypadku drogowym w kontekście ubezpieczenia OC sprawcy, na tle pojęci konsumenta usługi ubezpieczeniowej* in: ed. E. Kowalewski, *Odszkodowanie za niemożność korzystania z pojazdu uszkodzonego w wypadku komunikacyjnym*, Toruń 2011, pp. 127 et al.

47. Council Directive 93/13/EEC of April 5, 1993 on unfair terms in consumer contracts, Official Journal L 095, 21/04/1993, pp. 0029 – 0034.

48. Clause 30 of the reasons of the JUDGMENT OF THE COURT (Fifth Chamber) of June 8, 2023, ECLI:EU:C:2023:456 , https://curia.europa.eu/juris/document/document.jsf?text=&docid=274418&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1611009, (30.04.2024).

49. Ibid, clause 46 of the ruling.

50. Regulation (EU) No. 524/2013 of the European Parliament and of the Council of May 21, 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (ODR Regulation), OJ L 165, 18.6.2013, p. 1–12: 'Article 4. Definitions 1. For the purposes of this Regulation: a) „consumer" means a consumer as defined in Article 4(1)(a) of Directive 2013/11/EU'.

At the outset of the discussion, it should have been noted that in cases where an insurance contract was concluded for the benefit of a third party with a consumer element, or had the form of a classic insurance contract for the account of another consumer, then also through a proactive directive of interpretation of, for example, Article 808 of the Polish Civil Code, it would have to be assumed that the insured person in such circumstances would pass the consumer test, if only because of the concept of insurance interest, which, regardless of whether it is property or personal insurance, is then vested in such a third party on equal terms as a party to the contract *per se.* This is further supported by the content of Article 808 § 5 of the Civil Code: 'If the insurance contract is not directly related to the business or professional activity of the insured natural person, Articles 385^1–385^3 apply accordingly to the extent that the contract relates to the rights and obligations of the insured.'

However, in the author's viewpoint, a comprehensive and functional understanding of the definition of the consumer is essential for the proper interpretation of EU law. Therefore, it is crucial to acknowledge and consider the emphasised qualification of the legal action underlying the definition. In other words, the fact is that the insurer's recourse claim is available *verba legis* not against the policyholder and the insured, but against the driver[51] and it is outlined in the legislation of the member states, for example the cited Bulgarian regulation and Article 43 of the Compulsory Insurance Act. So the atypical recourse is detached from the primary act that could be the source of the claim because it is always driver's reprehensible behaviour, and therefore not a legal act, but a factual one.

For this reason, the consumer protection of the driver against whom the recourse claim is made is not available and EU law should not, according to the author and also within the framework of the pro-EU teleological interpretation, adopt such measures thanks to which the driver against whom the recourse is directed is covered by the term consumer.

Finally, it is worth noting that the preliminary inquiries posed by the national court demonstrate the complexity of the practical matter of private insurance as well. In turn, due to the universality of the processes of realisation of the idea of achieving security through law, insurance, including motor third-party liability[52], is interdisciplinary by its nature and at the same time international, being a fit matter for harmonisation and unification processes. for example PRICL[53] and PEICL. Perhaps if at least the first of these drafts had become law, as an EU optional instrument for example, there would be no need for the interpretation of most of the law made herein.

The above conclusion to the preliminary inquiries in Case C-387/23 was formulated with the author's awareness of the practical importance of the same and the responsibility for the written

51. Aptly emphasised by Dybała G., Szpyt K. in: *Ustawa o ubezpieczeniach obowiązkowych, ubezpieczeniowym funduszu gwarancyjnym i polskim biurze ubezpieczycieli komunikacyjnych*, Komentarz, Warszawa 2022, pp. 227–228.

52. *Cf.* also Fuchs D., *Jurysdykcja w sprawach z zakresu obowiązkowych ubezpieczeń komunikacyjnych w świetle rozporządzenia Bruksela I bis na tle rozwoju europejskiego prawa ubezpieczeniowego* in: ed. M. Orlicki, J. Pokrzywniak, A. Raczyński, *Ubezpieczenie OC posiadaczy pojazdów komunikacyjnych – nowe spojrzenie na znaną instytucję*, Poznań 2021, pp. 102–104.

53. Cf. Fuchs D., *Ujednolicenie kontraktowego prawa reasekuracyjnego w skali międzynarodowej in statu nascendi – PRICL (Project of Reinsurance Contract Law)*, 'Wiadomości Ubezpieczeniowe', 2019 /1, p. 23 et al, and also idem, *Projekt prawa jednolitego o umowie reasekuracji (PRICL) jako propozycja dla polskiego prawodawcy* in: ed. E. Figura – Góralczyk, R. Flejszar, B. Gnela, P. Mostowik, *Prawne zagadnienia międzynarodowego obrotu cywilnego i handlowego*, Warszawa 2023, pp. 375–406.

word, which is still best expressed in the words of Horace: 'nescit vox missa reverti'[54]. One more paremia, however, will be appropriate at this point: 'Sit modus in rebus' (let there be moderation in all things), especially when interpreting EU insurance law, even in such an axiologically and practically momentous context as the question of the set of designations of the concept of the consumer and the scope of its protection under EU law.

Lectori benevolo salutem.

References:

Bagińska E., Fuchs D., Mogilski W.W., *Poszkodowany dochodzący roszczeń z ubezpieczenia OC sprawcy wypadku drogowego nie jest konsumentem* [in:] *Odszkodowanie za niemożność korzystania z pojazdu uszkodzonego w wypadku komunikacyjnym (najem pojazdu zastępczego)*, ed. E. Kowalewski, Toruń 2014

C. Banasiński in: Standardy wspólnotowe w polskim prawie ochrony konsumenta, Warszawa 2004

H. Ciepła in: Komentarz do kodeksu cywilnego. Księga trzecia. Zobowiązania, Volume 2. , Warszawa 2005,

J. Czubek, Q. Horatius Flaccus, Poezje. Pieśni-Jamby-Satyry-Listy, Listy w: Księga II, List do Pizonów Kraków 1924,

Z. Długosz, Wpływ funkcji przepisów o regresie nietypowym w ubezpieczeniu OC posiadaczy pojazdów mechanicznych na ich interpretację in: M. Orlicki, J. Pokrzywniak, A. Raczyński (ed.), Ubezpieczenie OC posiadaczy pojazdów mechanicznych – nowe spojrzenie na znaną instytucję, Poznań 2021

G. Dybała, K. Szpyt in: Ustawa o ubezpieczeniach obowiązkowych, ubezpieczeniowym funduszu gwarancyjnym i polskim biurze ubezpieczycieli komunikacyjnych. Komentarz, Warszawa 2022.

D. Fuchs, Ł. Szymański, M. Boguska, Zasady europejskiego prawa ubezpieczeń (ZEPU) in : *Principles of European Insurance Contract Law (PEICL)* ed.: J. Basedow, J. Birds, M. Clarke, H. Cousy, H. Heiss, L. Loacker, Koln 2016

D. Fuchs, *Restatement of European Insurance Contract Law a koncepcja polskiego kodeksu ubezpieczeń* [in:] *O potrzebie polskiego kodeksu ubezpieczeń*, ed. E. Kowalewski, Toruń 2009,

D. Fuchs, *Nowelizacja kodeksu cywilnego w zakresie wybranych przepisów ogólnych o umowie ubezpieczenia w świetle przepisów ogólnych o umowie ubezpieczenia w świetle prac Project Group on a Restatement European Insurance Contract Law*, „Wiadomości Ubezpieczeniowe" 2007/7–8

D. Fuchs, *Refleksje o prawie wspólnotowym w związku z seminarium Project Group on a Restatement of European Insurance Contract Law – Saloniki (4–7.02.2009* , „Rozprawy Ubezpieczeniowe" 2009/6.

Fuchs D., *Postanowienia umowy ubezpieczenia dotyczące cesji wierzytelności a ich skutki dla roszczeń regresowych z art. 828 k.c.*, „Wiadomości Ubezpieczeniowe" 2012/4,

54. Translation (into Polish) by J. Czubek is *'a word out of the mouth never comes back'*, cf. Q. Horatius Flaccus, *Poezje. Pieśni-Jamby-Satyry-Listy, Listy* in: *Księga II, List do Pizonów* (commonly referred to as the *Ars poetica* or *De arte poetica*), Kraków 1924, p. 468.

D. Fuchs, *Uwagi dotyczące roszczeń regresowych ubezpieczyciela wobec odpowiedzialnego za szkodę na przykładzie roszczeń wobec zarządcy nieruchomości wspólnej*, „Rozprawy Ubezpieczeniowe" 2009/2(7).,

D. Fuchs,, *Dopuszczalność roszczeń regresowych instytucji zabezpieczenia społecznego z państw Unii Europejskiej wobec polskiego ubezpieczyciela OC ubezpieczonego – odpowiedzialnego za szkodę*, „Zeszyty Prawnicze UKSW" 2010/10.1

D. Fuchs, Wprowadzenie w: komentarz do ustawy z dnia 7 lipca 1994 r.o ubezpieczeniach gwarantowanych przez Skarb Państwa, Warszawa 2024, (in print)

Fuchs D., *Postanowienia umowy ubezpieczenia dotyczące cesji wierzytelności a ich skutki dla roszczeń regresowych z art. 828 k.c.*, „Wiadomości Ubezpieczeniowe" 2012/4.

D. Fuchs, Jurysdykcja w sprawach z zakresu obowiązkowych ubezpieczeń komunikacyjnych w świetle rozporządzenia Bruksela I bis na tle rozwoju europejskiego prawa ubezpieczeniowego in: M. Orlicki, J. Pokrzywniak, A. Raczyński (ed.), Ubezpieczenie OC posiadaczy pojazdów komunikacyjnych – nowe spojrzenie na znaną instytucję, Poznań 2021

D. Fuchs, *Dopuszczalność roszczeń regresowych instytucji zabezpieczenia społecznego z państw Unii Europejskiej wobec polskiego ubezpieczyciela OC ubezpieczonego – odpowiedzialnego za szkodę*, „Zeszyty Prawnicze UKSW" 2010/10.1.

D. Fuchs, ujednolicenie kontraktowego prawa reasekuracyjnego w skali międzynarodowej *in statu nascendi* – PRICL (*Project of Reinsurance Contract Law*), Wiadomości Ubezpieczeniowe 1/2019,

D. Fuchs, Projekt prawa jednolitego o umowie reasekuracji (PRICL) jako propozycja dla polskiego prawodawcy in: E. Figura – Góralczyk, R. Flejszar, B.Gnela, P. Mostowik (ed.), Prawne zagadnienia międzynarodowego obrotu cywilnego i handlowego, Warszawa 2023,

D. Fuchs, Prewencja i ratownictwo w ubezpieczeniach odpowiedzialności cywilnej, czyli jaki jest ogląd świata w ubezpieczeniach obowiązkowych w świetle interpretacji art. 439 k.c., Prawo Asekuracyjne nr 1 (106) 2021,

D. Fuchs, Obowiązki (powinności) prewencyjne w świetle prawa prywatnego i publicznego *scilicet spei permultum sed rei paulum,* Prawo Asekuracyjne, nr 2 (103) 2020, ,

Fuchs D., *Regulacja koasekuracji w prawodawstwie Unii Europejskiej*, „Radca Prawny" 1999/2.

D. Fuchs, *Umowa koasekuracji – stan obecny i postulowany* [in:] *Europeizacja prawa prywatnego*, ed. M. Pazdan, W. Popiołek, E. Rott-Pietrzyk, M. Szpunar, vol. 1, Warszawa 2008.

D. Fuchs, *Umowa koasekuracji a regulacja rozporządzenia UE Bruksela I bis*, reproduced typescript, Katowice 2024.

D. Fuchs, komentarz do art. 805 kc in: D. Fuchs, K. Malinowska, D. Maśniak, Kontrakty na rynku ubezpieczeń, Warszawa 2020,

D. Fuchs,

D. Fuchs, W.W. Mogilski, Wypadek komunikacyjny nie czyni poszkodowanego konsumentem in: E. Kowalewski (ed.), Odszkodowanie za ubytek wartości handlowej pojazdu oddanego naprawie, Toruń 2012,

D. Fuchs, W.W. Mogilski, poszkodowany w wypadku drogowym w kontekście ubezpieczenia OC sprawcy, na tle pojęci konsumenta usługi ubezpieczeniowej in: E. Kowalewski (ed.), Odszkodowanie za niemożność korzystania z pojazdu uszkodzonego w wypadku komunikacyjnym, Toruń 2011,

D. Fuchs, Jurysdykcja w sprawach z zakresu obowiązkowych ubezpieczeń komunikacyjnych w świetle rozporządzenia Bruksela I bis na tle rozwoju europejskiego prawa ubezpieczeniowego

in: M. Orlicki, J. Pokrzywniak, A. Raczyński (ed.), Ubezpieczenie OC posiadaczy pojazdów komunikacyjnych – nowe spojrzenie na znaną instytucję, Poznań 2021,
A.J.E. Jaffey, *Introduction to the Conflict of Laws*, London 1988,
E. Łętowska, *Prawo umów konsumenckich,* Warszawa 1999
M. Orlicki, Ubezpieczenia obowiązkowe, Warszawa
Principles of European Insurance Contract Law (PEICL) ed.: J. Basedow, J. Birds, M. Clarke, H. Cousy, H. Heiss, L. Loacker, Koln 2016
Z. Radwański (in:) System Prawa Cywilnego. Volume 2, Warsaw 2002,
A. Raczyński, *Sytuacja prawna poszkodowanego w ubezpieczeniu odpowiedzialności cywilnej, Warszawa 2010*
K. Weitz, *Europejskie prawo procesowe cywilne*, [in:] A. Wróbel (ed.), *Stosowanie prawa Unii Europejskiej przez Sądy, Zakamycze 2005,*
J. Wojciechowski, Ubezpieczeniowy regres nietypowy na podstawie art. 43 ustawy o ubezpieczeniach obowiązkowych, Ubezpieczeniowym Funduszu Gwarancyjnym i Polskim Biurze Ubezpieczeń Komunikacyjnych, Prawo Asekuracyjne nr 3 (112) z 2022,

Rozważania dotyczące regresu ubezpieczeniowego oraz statusu konsumenta w komunikacyjnych ubezpieczeniach OC – uwagi na tle zapytania prejudycjalnego złożonego to the Court of Justice of the EU przez Sofijski rajonen syd (Bułgaria) w dniu 26 czerwca 2023 r. – ZD „BULL INS" AD/PV(Sprawa C-387/23, BULL INS).

Artykuł jest próbą odpowiedzi doktrynalnej na pytanie pierwsze, zadane przez sąd krajowy w formie zapytania prejudycjalnego do TSUE w sprawie o syg. C-387/23. Zarazem tekst zawiera rozważania n.t. istoty ubezpieczenia komunikacyjnego, konstrukcji atypowego regresu zwrotnego ubezpieczyciela, jak i też w zakresie niezbędnym, odnosi się do kwalifikacji konsumenta w prawie cywilnym i ubezpieczeniowym. Zwrócono także uwagę na rangę prawa jednolitego o umowie ubezpieczenia na przykładzie PEICL. Odniesiono się także do regulacji prawa krajowego i sformułowano wnioski końcowe.

Słowa kluczowe: prawo ubezpieczeniowe, konsument, prawo europejskie, wykładnia wtórnego prawa ubezpieczeniowego w krajowym porządku prawnym; wyroki europejskie

DR HAB. DARIUSZ FUCHS – University professor, Head of the Department of Civil Law and Private International Law of the Faculty of Law and Administration of Cardinal Stefan Wyszynski University in Warsaw; member of the Project of European Insurance Contract Law and participant in the Project of Reinsurance Contract Law
e-mail: d.fuchs@uksw.edu.pl
ORCID: https://orcid.org/0000-0001-5853-2657