

OPINION OF ADVOCATE GENERAL ALBER

delivered on 24 October 2002¹

I — Introduction

1. The present reference for a preliminary ruling submitted by the High Court of Justice of England and Wales, Queen's Bench Division, raises questions concerning the interpretation and application of the directives governing compulsory insurance against civil liability in respect of motor vehicles. The question in particular arises as to whether interest and costs are to be included in the compensation for injuries caused by an untraced vehicle which is provided by a body designated by a Member State for that purpose. Clarification is also sought as to whether the solution adopted in Great Britain satisfies Community-law requirements as to effective legal protection, whether the body responsible for compensation can be regarded as having been properly authorised within the meaning of the relevant directive, and whether possible shortcomings in the transposition of the relevant directive may constitute such a sufficiently serious breach of a Member State's obligations as to found a claim for compensation against the defaulting State in accordance with principles of Community law.

II — Legal framework

A — *Provisions of Community law*

Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability² ('the First Directive')

2. Article 3(1) of the First Directive provides:

'Each Member State shall, subject to Article 4, take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its

1 — Original language: German.

2 — OJ, English Special Edition 1972 (II), p. 360.

territory is covered by insurance. The extent of the liability covered and the terms and conditions of the cover shall be determined on the basis of these measures.'

Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles³ ('the Second Directive')

3. Article 1(1) and (4) of the Second Directive provides:

'1. The insurance referred to in Article 3(1) of Directive 72/166/EEC shall cover compulsorily both damage to property and personal injuries.

2. ...⁴

...

3 — OJ 1984 L 8, p. 17.

4 — Article 1(2) sets out the minimum amounts for compensation cover.

4. Each Member State shall set up or authorise a body with the task of providing compensation, at least up to the limits of the insurance obligation, for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in paragraph 1 has not been satisfied. This provision shall be without prejudice to the right of the Member States to regard compensation by that body as subsidiary or non-subsidiary and the right to make provision for the settlement of claims between that body and the person or persons responsible for the accident and other insurers or social security bodies required to compensate the victim in respect of the same accident.

The victim may in any case apply directly to the body which, on the basis of information provided at its request by the victim, shall be obliged to give him a reasoned reply regarding the payment of any compensation.

...

Member States may limit or exclude the payment of compensation by that body in the event of damage to property by an unidentified vehicle.

They may also authorise, in the case of damage to property caused by an uninsured vehicle, an excess of not more than 500 ECU for which the victim may be responsible.

Furthermore, each Member State shall apply its laws, regulations and administrative provisions to the payment of compensation by this body, without prejudice to any other practice which is more favourable to the victim.'

B — *Rules of the Member State*

4. In view of the lack of cover for personal injuries caused by uninsured or untraced drivers, the Motor Insurers' Bureau was established in 1946 in Great Britain by insurers providing compulsory motor vehicle insurance in agreement with the Ministry of Transport. The Motor Insurers' Bureau ('the MIB') is a private-law entity whose members are private-law insurance companies offering motor-vehicle insurance.

5. The obligation to pay compensation for injuries caused by uninsured or untraced drivers results from agreements concluded between the MIB and the Secretary of State

for the Environment, Transport and the Regions.⁵ The agreements have been frequently amended or adapted over the course of the years. Reference should be made at this point to the Motor Insurers' Bureau (Compensation of Victims of Uninsured Drivers) Agreement⁶ of 21 December 1988 and to the Motor Insurers' Bureau (Compensation of Victims of Untraced Drivers) Agreement of 22 November 1972, in its 1977 amended version, which is the agreement in issue in the present case. This latter agreement will hereinafter be referred to as 'the Agreement on Untraced Drivers' or simply as 'the Agreement'.

6. The 1972 Agreement material to the present dispute provides essentially as follows:

- The Agreement is to apply to any case in which an application is made to the MIB for a payment in respect of the death of or bodily injury to any person caused by or arising out of the use of a motor vehicle on a road in Great Britain where, subject to certain conditions which are not relevant to this case, the applicant for the payment is unable to trace any person responsible for the death or injury (clause 1).

5 — Hereinafter also referred to as 'the Secretary of State for Transport'.

6 — Hereinafter also referred to as 'the Agreement on Uninsured Drivers'.

- On any application in a case to which the Agreement applies, the MIB is to award payment of an amount which is to be assessed in the same way as a court, applying as appropriate the laws in force in Great Britain, would assess the damages which the applicant would have been entitled to recover from the untraced person (clause 3).
- Before lodging an appeal, the applicant may make comments to the MIB on its decision and may supply further evidence relating to the application. The MIB may investigate that new evidence and must inform the applicant of the result of such investigation and of any change in its decision (clause 13).
- The MIB must cause any application for a payment under the Agreement to be investigated and decide whether to make an award (clause 7).
- On appeal, the arbitrator is to decide whether the MIB should make an award under the Agreement and, if so, the amount which it should award to the applicant (clause 16).
- Where the MIB decides to make an award, it must notify the applicant of the amount it proposes to pay and the way in which that amount has been calculated. Where the applicant decides to accept the award, the MIB must pay to the applicant the amount of the award (clauses 9 and 10).
- The arbitrator is to be selected from two panels of Queen's Counsel appointed respectively by the Lord Chancellor and the Lord Advocate (clause 18).
- The applicant is to have a right of appeal to an arbitrator against any decision of the MIB (clause 11).
- The arbitrator is to decide the appeal on the documents submitted to him, although he may ask the MIB to make any further investigation which he considers desirable, and the applicant may submit comments on the findings of such investigation (clause 17).

— Each party to the appeal is to bear its own costs (clause 21). The MIB is to pay the arbitrator's fees, except where it appears to the arbitrator that there were no reasonable grounds for the appeal, in which case he may decide that his fee ought to be paid by the applicant (clause 22).

claimant on 11 January 1996 that it had decided to set compensation at GBP 50 000. The claimant appealed to an arbitrator against that decision in accordance with the procedure set out in the Agreement.

7. The Agreement makes no express provision for payment of interest on the compensation awarded or for reimbursement of costs incurred in the proceedings before the MIB.

10. On 27 August 1996 the arbitrator gave her decision. She decided that the claimant's damages on a full liability basis should be GBP 58 286. In view of the victim's contributory negligence — presumably being on the road side when removing items from his vehicle — those damages were to be reduced by 20%, resulting in an award of GBP 46 629. Taking into account certain evidence, specifically video footage subsequently taken by a private detective purporting to show that the claimant's impediment in walking was not so significant, the arbitration decision proceeded on the basis that the claimant had been dishonest and for that reason ordered him to pay the arbitrator's fees (reference is made in this connection to clause 22, cited in paragraph 6). No interest was payable on the compensation.

III — Facts and procedure

8. The claimant in the national proceedings, Samuel Sidney Evans ('the claimant'), was injured in a road traffic accident on 25 December 1991. He was struck by a car while bending down on the road side into his parked car in order to locate and remove a parcel. The driver of the vehicle which struck him could not be traced.

9. On 11 June 1992 the claimant applied for compensation from the MIB on foot of the Agreement. The MIB informed the

11. The MIB paid to the claimant the amount of GBP 46 629 together with GBP 770 for the costs of his legal representation and an *ex gratia* payment of GBP 150 and value added tax.

12. The claimant applied on 16 September 1996 to the Commercial Court for leave to appeal against the arbitration decision. He was granted leave to appeal on 16 December 1996 in regard to the question whether the arbitrator had jurisdiction to award interest. His appeal was dismissed on 29 July 1997. A further appeal brought by the claimant was dismissed by the Court of Appeal on 30 September 1998. The Court of Appeal stated that what the United Kingdom had done by way of implementation of the Second Directive ‘did not bring into existence any entity or relationship which enabled the Directive to be enforced against anybody (save possibly in the *Francovich* sense against itself)’. On 18 January 1999 the House of Lords refused leave for a further appeal.

13. On 25 February 1999 the claimant commenced proceedings against the Secretary of State for the Environment, Transport and the Regions, that is to say, the Ministry responsible, on grounds of failure to implement, or defective implementation of, the First and Second Directives. The claimant first of all argues that the United Kingdom has failed to set up or authorise a body — at any rate in a form complying with the principle of legal certainty — with the task of providing compensation in accordance with Article 1(4) of the Second Directive. Had that directive been correctly implemented, no court could otherwise have ruled that the MIB was not under an obligation to award compensation in accordance with the First or Second Directives. The claimant further argued that the relevant Agreement between the MIB and the Secretary of State for Transport does not provide for compensation ‘at least up to the limits of the

insurance obligation’ — as is set out in the Directive —, that it confers no right on victims of untraced drivers to bring a claim against the MIB, and that it grants them no access to judicial bodies.

14. The claimant contends that he has suffered loss as a result of the defects in implementation and that those defects constitute a sufficiently grave and manifest breach of Community law to found a right for him to recover damages from the Secretary of State.

15. It was against this background that the High Court, by order of 17 May 2000, referred the following questions to the Court for a preliminary ruling:

- ‘1. On the proper interpretation of Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (“the Second Motor Insurance Directive”):
 - (a) must the arrangements concerning the provision of compensation by the body established or authorised pursuant to Article 1(4) include

provision for the payment of interest on the sums found to be payable for the damage to property or personal injuries?

he finally recovers, which offer the victim declined to accept?

- (b) if the answer to question (a) is yes, from what date and on what basis should such interest be calculated?
2. On the proper interpretation of Article 1(4) of the Second Motor Insurance Directive, in circumstances where the compensating body itself has an obligation to investigate the victim's injury and loss (and to incur the costs thereof, including the cost of medical and other reports):
 - (a) must the arrangements concerning the provision of compensation by the body include provision for the payment of the costs incurred by a victim in preparing and making his application to that body for compensation?
 - (b) if the answer to question (a) is yes, on what basis are those costs to be calculated in a case where that body has made an offer to the victim in excess of the amount that
 3. On the proper interpretation of Article 1(4) of the Second Motor Insurance Directive, if the victim's application for compensation is determined by a body that is not a court, must he have a full right to appeal against that determination to a court, on both the facts and the law, rather than an appeal to an independent arbitrator having the following principal characteristics:
 - (i) the victim may appeal to the arbitrator on both the facts and the law;
 - (ii) when giving notice of appeal, the victim may make further representations and adduce further evidence to the compensating body upon which the compensating body may alter its award prior to the appeal;

- (iii) the victim is provided in advance with a copy of all the material to be provided to the arbitrator and is given the opportunity to add any material that he wishes in response;
 - (iv) the arbitrator makes an award, without an oral hearing, in which he or she decides what award the compensating body ought to make and gives reasons for that decision;
 - (v) if the victim is dissatisfied, he is entitled to appeal from the arbitrator to the Courts but he may do so only on the grounds of serious irregularity affecting the arbitration or on a question of law (including whether there was any evidence to support any particular conclusion of the arbitrator or whether any particular conclusion was one to which no arbitrator could reasonably come upon the evidence), and in the case of an appeal on a question of law, permission to appeal must be obtained from the Court which will not be given unless the decision of the arbitrator is obviously wrong and it is just and proper in all the circumstances for the Court to determine the question.
- 4. If the answer to questions 1(a) and/or 2(a) and/or 3 is Yes, has a Member State duly authorised a body under Article 1(4) of the Second Motor Insurance Directive when an existing body has the task of providing compensation to victims pursuant only to an agreement with the relevant authority of the Member State that does not correspond to the Second Motor Insurance Directive in those respects, and:
 - (a) that agreement creates a legal obligation owed to the relevant authority of the Member State to provide compensation to victims which is directly enforceable by the relevant authority and does not give such victims a directly enforceable legal right to claim against that body, but the victim may apply to the Court for an order that the authority should enforce the agreement if the authority were to fail to do so; and
 - (b) that body carries out that obligation by accepting and paying claims from victims in accordance with that agreement; and

(c) the Member State considered in good faith that the provision of that agreement gave at least as good protection to victims as the requirements of the Second Motor Insurance Directive?

5. If the answer to any of questions 1(a) or 2(a) or 3 is Yes, and/or if the answer to question 4 is No, does a failure to comply with the Second Motor Insurance Directive in that respect constitute a sufficiently serious breach by the Member State to give rise to liability for damages as a matter of Community law if it is established that such damage was caused?’

16. The claimant, the United Kingdom Government, which is also representing the defendant in the main proceedings, the MIB, as intervener in the main proceedings in support of the form of order sought by the defendant, and the Commission took part in the procedure before the Court.

IV — Analysis

17. Counsel for the claimant pointed out during the oral procedure that, irrespective of the content and order of the questions submitted for preliminary ruling, the claimant’s view is that the United Kingdom has failed to implement, or failed correctly to implement, the Second Directive in its

national law. Central to the case, it is submitted, is the question whether a Member State is under an obligation to pay compensation to a private individual who belongs to the group of persons deriving entitlement under the Directive, in the case where the Member State has failed to take such steps as would enable those persons to invoke the Directive against any other party whomsoever.

18. For reasons of clarity, however, the questions submitted for preliminary ruling will be examined according to their given order.

1. Payment of interest and reimbursement of costs — the first and second questions

Submissions of the parties

19. The arguments relating to the first and second questions are in large measure parallel, and may for that reason be set out together.

20. The *claimant* takes the view that a textual interpretation of Article 1(1) and (4) of the Second Directive in conjunction with Article 3(1) of the First Directive shows that, where personal injuries are caused by an untraced driver, the auth-

orised body must provide compensation — ‘at least up to the limits of the insurance obligation’ — in a similar amount and in accordance with the same conditions as the law of the Member State concerned provides in the case of injuries caused by an identified and insured driver. This interpretation is supported by the fact that where the Second Directive intends victims of untraced drivers to be treated differently from victims of uninsured drivers it does so expressly, as in the case of damage to property.

21. Moreover, even if the Second Directive had not itself required equal treatment for victims of untraced drivers, on the one hand, and victims of insured or uninsured drivers, on the other hand, that obligation would in any event follow from the principle of equal treatment. In the United Kingdom, however, victims of untraced drivers are not treated on an equal footing with victims of drivers who are insured or insufficiently insured. Unlike the latter, and without objective justification, they do not receive damages that include interest and costs and they do not enjoy the same procedural guarantees, including access to the courts.

22. Citing the Court’s judgment in *Marshall*,⁷ in which the Court ruled, with

regard to discriminatory dismissal, that the award of interest must be regarded as an essential component of compensation, the claimant submits that that principle must also apply to the compensation payable to victims of untraced drivers pursuant to the Second Directive.

23. The same considerations, he continues, apply equally to the award of costs. This is, moreover, supported by the case-law of the European Court of Human Rights, which has held that the European Convention for the Protection of Human Rights and Fundamental Freedoms (‘the ECHR’) is intended to guarantee rights that are practical and effective.⁸

24. The *United Kingdom Government* takes the view that the relevant provisions of the two directives demonstrate that their purpose is to provide specified minimum guarantees, but that they do not provide for uniformity in the legislation of Member States. Neither directive contains any provision relating to the financial components of compensation or provides that the body responsible for paying that compensation is required to pay the same amount as the victim of an insured driver would receive before the courts of the Member State. A difference in treatment

7 — Case C-271/91 *Marshall* [1993] ECR I-4367, paragraph 31.

8 — Eur. Court H.R., *Aerey v Ireland* judgment of 9 October 1979, Series A no. 32, § 24.

of the two groups of persons in national law is, it submits, objectively justified by the fact that the body required to provide compensation is not a tortfeasor, still less a tortfeasor wrongfully withholding money that ought to have been paid to the claimant. The final subparagraph of Article 1(4) of the Second Directive allows for a difference in treatment.

25. Citing the Court's judgment in *Sutton*,⁹ the United Kingdom Government argues that there is no general principle of Community law that a requirement to pay a monetary amount by way of compensation due under Community law necessarily entails a requirement to pay interest. The same considerations, it continues, must also apply to the reimbursement of costs.

26. The *MIB* essentially takes the same position as the United Kingdom Government. The *MIB* first points out, however, that in English law damages are assessed by the courts at the time of judgment. Section 35A of the Supreme Court Act 1981 broke with common law in giving courts the power, under certain conditions, to award interest on claims for damages. That power, however, can be exercised only in court proceedings.

27. The *Commission* argues in the first place that neither the First nor the Second

Directive contains any express rule on the payment of interest or reimbursement of costs. Nor do they contain any provision as to whether interest and costs form part of compulsory insurance.

28. The Commission goes on to examine whether Article 1(4) of the Second Directive allows a Member State to treat one category of victims less favourably than another. It takes the view in this regard that — subject to express exceptions — the Second Directive does, in the light of its overall objective, impose an obligation to ensure that victims of uninsured or untraced drivers are given the same degree of cover as victims covered by compulsory insurance.

29. The Commission concludes by examining whether a Member State's national rules which make no provision for the award of interest to victims of untraced drivers runs counter to the concept of 'adequate compensation' which is the objective of the Second Directive. In that regard, it refers, first, to the Court's case-law in favour of awarding interest in the contexts of non-contractual liability of the Community¹⁰ and equal treatment of men and women.¹¹ Second, the Commission

9 — Case C-66/95 *Sutton* [1997] ECR I-2163.

10 — See Case 238/78 *Ireks-Arkady* [1979] ECR 2955, paragraph 20, and Case C-308/87 *Grifoni v EAEC* [1994] ECR I-341, paragraph 40.

11 — See *Marshall* (cited above in footnote 7), paragraph 31.

refers to the objectives of the Second Directive as set out in the preamble thereto. Article 1(4), it observes, defines the areas in which Member States have a discretion to limit compensation, none of which mentions excluding interest. In view of those factors, the Commission tends to the view that the award of interest in accordance with the applicable national rules must be regarded as an essential component of the compensation referred to in Article 1(4) of the Second Directive.

Appraisal

30. In order to examine whether interest and costs form part of the amount which a body within the meaning of Article 1(4) of the Second Directive must provide in respect of injuries caused by an untraced vehicle,¹² we must initially proceed on the basis of the wording of the First and Second Directives. Neither of those Directives makes express reference to interest and costs. Article 1(1) of the Second Directive refers, for the purpose of determining the subject-matter of the insurance, to Article 3(1) of the First Directive. This latter provision, however, also states merely that each Member State must 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. According to that provision, ‘the extent of the liability covered and the terms and conditions of the cover shall be determined on the basis of these measures’.

31. With regard to the scope of the claim to compensation against the body within the meaning of Article 1(4) of the Second Directive, this latter provision states that compensation must be provided ‘at least up to the limits of the insurance obligation’. With regard to the scope of compulsory insurance, the fifth recital in the preamble to the Second Directive states that ‘the amounts in respect of which insurance is compulsory must in any event guarantee victims *adequate compensation* irrespective of the Member State in which the accident occurred’.¹³ It is thus necessary to examine whether, in the light of the substance and purpose of the provisions, ‘compulsory insurance’ covers inclusion of interest and costs. It will in this connection also be necessary to consider whether a claim for compensation may, by its nature, possibly require payment of interest and costs.

32. One must first proceed on the assumption that determination of the scope of the obligation to provide cover on the basis of the First and Second Directives is in principle a matter for the Member States.¹⁴

¹² — In what follows, I shall refer to untraced vehicles as well as to untraced drivers. The differences in terminology are attributable to the fact that the Directives refer to vehicles, whereas the Agreements between the MIB and the Secretary of State for Transport make reference to drivers.

¹³ — Emphasis added.

¹⁴ — See Case C-348/98 *Mendes Ferreira and Delgado Correia Ferreira* [2000] ECR I-6711, paragraph 32. See also the order of 14 October 2002 in Case C-158/01 *Withers* [2002] ECR I-8301, paragraph 18.

Under the First Directive this task was left exclusively to the Member States. This is expressed not only in Article 3(1) of the First Directive, but also along the same lines in Article 3(2), which provides that each Member State must, for example, take all appropriate measures to ensure that a contract of insurance covers any loss or injury caused in the territory of the other Member States, *in accordance with the legal provisions of those States*.

determine the characteristics of a compensation claim. Article 1(4), final subparagraph, of the Second Directive also expressly states, with regard to the body providing compensation, that each Member State must apply *its laws, regulations and administrative provisions* to the payment of compensation by that body, without prejudice to any other practice which is more favourable to the victim.

33. The disparities in regard to the extent of the obligation of insurance cover in the Member States¹⁵ have resulted in that obligation being compulsorily extended, within the framework of the Second Directive, to cover also damage to property.¹⁶ Minimum amounts for the cover of persons and damage to property were also laid down.¹⁷ The Third Directive¹⁸ goes even further in this direction by imposing minimum requirements in regard to the group of persons to be covered by insurance.¹⁹

35. One might conduct a comparative-law study of the rules governing compulsory insurance in force in the Member States for the purpose of determining whether the award of interest and costs is normally included in compulsory insurance. Even if this were to indicate that interest and costs are generally included within the scope of compulsory insurance cover, this result need not necessarily apply for all Member States. The reference to Member States' own laws, regulations and administrative provisions would otherwise serve no purpose.

34. Beyond these more stringent minimum requirements, however, it must be possible to proceed on the basis that it continues to be a matter for the Member States to

36. It is for that reason necessary to address the question whether the nature of the claim for compensation might possibly indicate whether interest and costs have to be awarded. It is in principle a civil-law claim to compensation that underlies compulsory insurance cover in respect of motor vehicles. The statutorily prescribed duty to have insurance cover is linked to this civil-law claim and serves as the economic safeguard for a well-founded claim to compensation.

15 — See the third recital in the preamble to the Second Directive.

16 — See the fourth recital in the preamble to, and Article 1(1) of, the Second Directive.

17 — See the fifth recital in the preamble to, and Article 1(2) of, the Second Directive.

18 — Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (OJ 1990 L 129, p. 33).

19 — See Article 1 of Directive 90/232.

37. A question may arise as to whether the legal nature of a claim changes in the case where the compensation for damage to property or personal injuries that have been suffered is to be provided by a body as defined in Article 1(4) of the Second Directive. One can imagine various possibilities as to how a Member State complies with its obligation to set up or authorise a body within the meaning of that provision. This could be an administrative body, a public entity or, as in the present case, an entity established under private law. The Member State must in any event confer the task on that body. It is thus conceivable that the nature of the claim will depend on the body against which it may be brought.

38. Article 1(4) of the Second Directive, however, expressly states that: 'This provision shall be without prejudice to the right of the Member States to regard compensation by that body as subsidiary or non-subsidiary and the right to make provision for the settlement of claims between that body and the person or persons responsible for the accident...'.²⁰

39. This wording indicates that the method of proceeding *vis-à-vis* the body cannot be considered in isolation from the original claim for compensation. This argues in favour of treating any derived claims as also being claims in civil law. This approach is further reinforced by the fact that in the present case the legal context is one of private law. Thus, the Agreements between the MIB and the Secretary of State for Transport are private-law agreements and the MIB is an entity established under private law. For the purposes of further examination, therefore, we should for the moment proceed on the assumption that

the case involves a private-law claim for compensation.

40. The Court's case-law provides some indications as to the degree to which interest constitutes a necessary component in a claim for compensation. The *Marshall* case,²¹ to which the parties refer, concerned 'adequate reparation'²² for the loss and damage sustained as the result of dismissal which discriminated on grounds of sex, and thus related to a claim for compensation in civil law. The legal system of the Member State concerned in that case laid down an upper limit for compensation of that kind. The courts, moreover, did not appear to have the power to award interest on the amounts of compensation.²³ The Court ruled in this regard 'that full compensation for the loss and damage sustained as a result of discriminatory dismissal cannot leave out of account factors, such as the effluxion of time, which may in fact reduce its value. The award of interest, in accordance with the applicable national rules, must therefore be regarded as an essential component of compensation for the purposes of restoring real equality of treatment.'²⁴

41. *Ireks-Arkady*²⁴ concerned the extent in principle of entitlement to interest in the context of a claim for compensation resulting from the Community's non-contractual liability under the second paragraph of Article 215 of the EEC Treaty. In a judgment confirming the duty to provide com-

20 — Case C-271/91 (cited in footnote 7).

21 — *Marshall* (cited in footnote 7), paragraph 30.

22 — *Marshall* (cited in footnote 7), paragraph 6.

23 — *Marshall* (cited in footnote 7), paragraph 31.

24 — Case C-238/78 (cited in footnote 10).

pensation, the Court derived the existence of entitlement to interest from the general principles of law common to the legal systems of the Member States.²⁵

42. The Court reached the same conclusion in *Grifoni*.²⁶ The event occasioning injury which led to the dispute in that case was an accident. The Court ruled: 'compensation for loss is intended so far as possible to provide restitution for the victim of an accident. Accordingly, it is necessary to take account of inflation since the event occasioning loss.'²⁷ The Court recognised a right to interest with effect from the pronouncement of the judgment.

43. The three cases just considered involved compensation claims resting on a variety of legal bases. Common to the judgments, however, is the fact that the Court in principle recognised, under conditions to be determined in more detail, interest as being a characteristic of a claim for compensation.

44. In support, however, of the contention that interest is in fact not a necessary component of a claim for compensation, reference was made in the written pro-

cedure to the judgment in *Sutton*.²⁸ That judgment, however, concerned the question whether interest was payable on arrears of social-security benefits in the case where failure to pay them timeously was attributable to procedures that discriminated on grounds of sex. The Court ruled in this regard: 'amounts paid by way of social security benefit are not compensatory in nature',²⁹ with the result that payment of interest cannot be required on the basis either of Article 6 of Directive 76/207 or of Article 6 of Directive 79/7.³⁰ The Court left open the question whether entitlement to interest might follow from a claim under Community law establishing liability on the part of the Member State, referring in that regard to national law.³¹

45. As the present case, however, essentially involves a claim for compensation and not social-security benefits, the *Sutton* judgment cannot be adduced as an argument for excluding from the outset a claim for interest. Rather, it may be inferred from the case-law on compensation claims that has been set out³² that interest does indeed form part of a claim for compensation.

46. Before applying this principle to the present case, it is first necessary to consider whether the objectives of the directives support this view.

25 — See *Ireks-Arkady* (cited in footnote 10), paragraph 20 and paragraph 2 of the operative part.

26 — Case C-308/87 (cited in footnote 10).

27 — *Grifoni* (cited in footnote 10), paragraph 40.

28 — Case C-66/95 (cited in footnote 9).

29 — Emphasis added.

30 — *Sutton* (cited in footnote 9), paragraph 27.

31 — *Sutton* (cited in footnote 9), paragraph 33 and the operative part.

32 — See paragraphs 40 to 42 above.

47. The directives on compulsory insurance cover for motor vehicles lay down minimum standards to protect victims of traffic accidents. The First Directive initially dealt only with the scope of insurance protection. This must be considered in the context of the declared objective of '[liberalising] the rules regarding the movement of persons and motor vehicles travelling between Member States'.³³

48. It was not until the Second Directive that victims of untraced vehicles were made the subject of Community-law rules. Through the establishment or authorisation of a body having the task of providing compensation 'at least up to the limits of the insurance obligation',³⁴ clear reference is being made to the normal obligation to compensate those injured by insured vehicles. The criterion for the scope of compensation to be provided is thus to be the compensation payable in cases of injury occasioned by insured vehicles. In so far as the Directive makes exceptions to this rule, these are expressly mentioned and objectively justified.

49. Only the fourth subparagraph of Article 1(4) deals with the regulation of damage or injury caused by untraced vehicles. Member States may, under that

provision, limit or exclude payment of compensation by that body in the event of damage to property. As stated expressly in the preamble,³⁵ Member States are given this possibility in order to counter the 'danger of fraud'.

50. This exception aside, we must proceed on the assumption that victims of untraced vehicles are compensated to the same extent as victims of traced and insured vehicles. The fact that this is a minimum requirement is evident, first of all, from the use of the phrase '*at least* up to the limits of the insurance obligation'.³⁶ Second, the wording of the final subparagraph of Article 1(4) of the Second Directive — which states 'without prejudice to any other practice which is more favourable to the victim' — suggests that minimum protection must be afforded by the Directive to victims of untraced vehicles.

51. In order to be able to answer the question concerning award of interest and reimbursement of costs for the case in hand, the issue is thus how one proceeds in cases of damage or injury caused by insured vehicles. If interest and costs are paid as a matter of course in such cases, victims of accidents caused by untraced vehicles must also be entitled to receive such payments.

33 — See the fifth recital in the preamble to the First Directive.

34 — Article 1(4) of the Second Directive.

35 — Sixth recital in the preamble to the Second Directive.

36 — Article 1(4) of the Second Directive; emphasis added.

52. The United Kingdom Government has submitted that there are objective reasons for the disparities in the treatment of victims of insured vehicles, on the one hand, and those of untraced vehicles, on the other. Against this, one might argue that, even though the procedure for obtaining compensation may in principle be different, the scope of compensation still may not be below that accorded to victims of properly insured vehicles.

into the past.³⁸ Those principles state that proceedings to ensure the legal protection of rights which individuals derive from Community law must not be less favourable than the rules governing similar domestic actions and must not render virtually impossible or excessively difficult the exercise of rights conferred by Community law.³⁹

53. The United Kingdom Government's invocation of the final subparagraph of Article 1(4) of the Second Directive, which states that 'Furthermore, each Member State shall apply its laws, regulations and administrative provisions to the payment of compensation by this body', leads to no other conclusion. That provision does, it is true, refer to the laws, regulations and administrative provisions of the Member States. That said, however, the principles developed by the Court in its established case-law must be taken into account when giving effect to Community law, *in casu* the minimum protection afforded to victims of untraced motor vehicles.

55. If interest and costs are awarded in cases involving compulsory insurance before national courts in cases in which traffic accidents have been caused by insured vehicles, that must, in accordance with the principles just mentioned, also apply in compensation proceedings brought by victims of untraced vehicles. This requirement follows from the Second Directive in conjunction with the principles governing the application of Community law.

54. This involves the principles of equivalence and effectiveness. These principles, recognised as such only in the more recent case-law of the Court,³⁷ are based on established case-law stretching back far

56. This result cannot be altered by the fact that the MIB was in existence well before the Second Directive was adopted and that the Agreement between the MIB and the Secretary of State for Transport relating to untraced drivers already existed some considerable time before the Second Directive entered into force. Article 1(4) of the Second Directive makes express reference to authorisation of a body, thus raising a presumption that such bodies and associ-

37 — See, for example, Case C-231/96 *Edis* [1998] ECR I-4951, paragraph 34; Case C-228/96 *Aprile* [1998] ECR I-7141, paragraph 18; Case C-120/97 *Upjohn* [1999] ECR I-223, paragraph 32.

38 — See, for example, Case 33/76 *Rewe* [1976] ECR 1989, paragraph 5, and Case 45/76 *Comet* [1976] ECR 2043, paragraphs 12 to 16.

39 — See Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12 and the case-law there cited.

ated regulatory provisions may already exist in some Member States. This, however, does not release the legislative authorities of the Member States from their duty to provide the minimum standard for compensation rules required by the Directive. In so far as victims of untraced vehicles are in a worse position than victims of properly insured vehicles, the problem might be one of incorrect transposition of the Directive, an issue to which I shall be returning.

57. As an interim conclusion with regard to the first and second questions, it may be stated that interest and costs are a necessary component of compensation claims brought by victims of untraced vehicles if and to the extent to which such interest and costs form part of claims for compensation brought by victims of properly insured and identified vehicles. This finding holds good in regard to both the substance and the payment details.

58. The United Kingdom Government and the MIB argue that under the system of domestic law interest and costs do not really form part of a claim for compensation but that the *courts* have been statutorily empowered to award interest.

59. In this connection, an economic approach is called for in the comparison of the scope of compensation in respect of damage or injury caused by untraced

vehicles, on the one hand, and damage or injury caused by properly insured vehicles, on the other. If, in respect of the same damage or injury, a lower amount is in principle payable depending on the person who has caused that damage or injury, that cannot, when considered against the background of the requirements of Community law, be justified by arguments based on the domestic legal system.

60. The objection put forward by the United Kingdom Government and the MIB to the effect that interest can be awarded by courts alone implies further that no interest is in principle awarded in respect of periods prior to the delivery of a judgment.

61. The crucial point in the calculation of interest on a compensation claim is essentially the point in time taken as the reference point. This may be the event occasioning the damage or injury, but it may also be the delivery of a judgment, if, for example, the extent of damage, account being taken of the effluxion of time,⁴⁰ is defined in the judgment. It is also in this sense that one may presumably construe the above⁴¹ judgments in *Ireks-Arkady*⁴² and *Grifoni*.⁴³ The procedures normally obtaining in the Member State concerned may in principle be applied provided that the outcome is not less favourable for legal positions that are based on Community law.

40 — See *Marshall* (cited in footnote 7), paragraph 31.

41 — See paragraphs 41 and 42.

42 — Cited in footnote 10.

43 — Cited in footnote 10.

62. If this is applied to the present case, however, a problem will arise if interest is awarded only by courts but access to courts is rendered unduly difficult. The procedure might then in itself pose a problem in Community-law terms. I shall return to this problematic area in what follows.

(2) *The arbitration procedure — third question*

Submissions of the parties

63. In clause 3 of the Agreement applying in the present proceedings (see paragraph 6 above), it is stated, however, that compensation to be paid by the MIB is to be assessed in the same way as a court would assess damages. The objection that interest can, if at all, be awarded only by a court may not therefore preclude a calculation of compensation which is in line with Community law.

65. The *claimant* submits that the arbitration procedure provided for by the Agreement on Untraced Drivers satisfies neither the requirements of effective judicial control, as developed by the Court in its judgment in *Johnston*,⁴⁴ nor those under Article 6 of the ECHR⁴⁵ relating to the right to a 'fair trial'.⁴⁶ There is no hearing and an appeal against the arbitrator's decision is possible only on grounds of serious irregularity affecting the arbitration or on a question of law, subject, in the latter case, to the condition that leave to appeal is granted.

64. For the sake of completeness, it should also be pointed out that, in the case of the payment of compensation under the Agreement concerning uninsured drivers interest and costs may also be brought into the calculation. The fact that it is not the competent insurance company but rather a collective body which is liable for payment can therefore not serve as objective justification for a different calculation of compensation under the Agreement in regard to untraced drivers.

66. The difference in treatment in procedural terms, the claimant argues, also constitutes an infringement of the principle of equal treatment, which requires that victims of untraced drivers be afforded the same judicial protection in the United Kingdom as is afforded to victims of insured or uninsured drivers. The fact that the victim of an untraced driver has no driver to sue cannot constitute objective justification for discriminatory treatment. Moreover, the sole purpose of such dis-

44 — Case 222/84 *Johnston* [1986] ECR 1651, paragraphs 18 and 19.

45 — European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR').

46 — See the judgment of the European Court of Human Rights ('the Court of Human Rights') of 22 July 1999 in *Scarth v. United Kingdom*, no. 33745/96, ECHR 1999.

criminatory treatment in respect of victims of untraced drivers is to save costs.

and less costly resolution than court proceedings.

67. The *United Kingdom Government* and the *MIB* submit first of all that Article 1(4) of the Second Directive prescribes only minimal procedural requirements. The victim must refer directly to the body responsible. The Directive otherwise refers to the laws, regulations and administrative provisions of the Member States.

68. With regard to the principle of effective judicial protection, the United Kingdom Government argues that the legal procedures available to victims of untraced drivers, far from rendering the legal protection of such victims impossible or excessively difficult to enforce, provide them with multiple levels of protection. The fact that there is no hearing before the arbitrator did not prevent the claimant from setting out his case in full or from responding to the allegations of contributory negligence.

69. As regards the principle of equal treatment, victims of untraced drivers are in several respects better placed than victims of uninsured drivers. The procedure adopted is liable to result in a speedier

70. Both the United Kingdom Government and the *MIB* express doubts, in regard to Article 6 of the ECHR, as to whether the main proceedings involve 'civil rights and obligations'. In any event, according to the case-law of the Court of Human Rights,⁴⁷ the proceedings must be considered a whole, including the role of any appellate courts. Even if the procedure before the *MIB* did not comply in full with the requirements of Article 6 of the ECHR, that before the arbitrator does in any event comply with those requirements. The arbitrator's independence and impartiality are guaranteed and he exercises unlimited jurisdiction subject to supervision by the High Court. In view of the fact that no hearing takes place before the arbitrator, counsel for the United Kingdom Government did, none the less, express some doubt during the oral procedure as to whether the arbitration procedure is compatible with Article 6 of the ECHR.

71. The *Commission* takes the view that Article 1(4) of the Second Directive confers a right to compensation on victims of injuries caused by untraced drivers and that Member States must therefore guarantee effective judicial protection of that right. The Commission goes on to consider whether the arbitration procedure satisfies the requirements of Article 6 of the ECHR. On the basis of the information provided in the order for reference, and subject to the

47 — Eur. Court H.R., *Bryan v. United Kingdom* judgment of 22 November 1995, Series A no. 335.

need for further clarification, it takes the view that the criteria developed by the Court of Human Rights point to some shortcomings in the arbitration procedure. These shortcomings relate in particular to the status of the arbitrator, in regard to his independence, the lack of any hearing and the very limited scope of the right of appeal against the arbitrator's award.

which calls for legal protection. The starting point here is Article 1(4) of the Second Directive, which should be read in conjunction with the sixth recital in the preamble to that Directive. The material passages are worded as follows:

Appraisal

'Each Member State shall set up or authorise a body with the task of providing compensation... for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation... has not been satisfied...

72. By its third question, the High Court is seeking to ascertain whether the procedure to be followed under the Agreement for obtaining compensation satisfies the requirements of Community law with regard to effective legal protection. Examination in this connection, however, is not confined to the procedure before the MIB, as set out in the Agreement, for setting in motion the arbitration procedure, but also relates to the associated possibility of challenging the arbitration award, within certain limits, before ordinary courts, as demonstrated by part V of the third question in the reference.

The victim may in any case apply directly to the body, which... shall be obliged to give him a reasoned reply regarding the payment of any compensation.'

The sixth recital provides:

73. In order to address these issues, it is first necessary to examine the position under Community law, the vindication of

'... it is necessary to make provision for a body to guarantee that the victim will not remain without compensation where the vehicle which caused the accident is uninsured or unidentified;... it is important... that the victim of such an accident should be able to apply directly to that body as a first point of contact'.

74. Apart from the possibility given to Member States to impose a subsidiary status on the activity of this body,⁴⁸ a victim has a right to compensation at least up to the limits of the insurance obligation. This is a clearly designated legal position which Community law confers on those persons coming within the Directive's definition.

this point in *Johnston*, the 'requirement of judicial control stipulated by that article reflects a general principle of law which underlies the constitutional traditions common to the Member States. That principle is also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950. As... the Court has recognised in its decisions, the principles on which that Convention is based must be taken into consideration in Community law.'⁵²

75. In order to give effect to this entitlement, effective legal protection must be guaranteed. While the Directive does not expressly refer to a requirement of legal protection for this entitlement, this none the less follows from the general principles governing the application of Community law.

77. The Court further stated in *Johnston*: 'It is for the Member States to ensure effective judicial control as regards compliance with the applicable provisions of Community law and of national legislation intended to give effect to the rights for which the Directive provides.'⁵³

76. The Court has already on numerous occasions had the opportunity to set out its views on the principle of effective legal protection as a general legal principle in Community law. It was thus called on in *Johnston*⁴⁹ and *Coote*⁵⁰ to address these issues against the background of the application of Article 6 of the Directive on equal treatment for men and women with regard to employment.⁵¹ As the Court ruled on

78. These fundamental considerations are in no way limited to the specific context of the Equal Treatment Directive but extend also to other areas of law, as the general formulation of the findings shows. In the context of the fundamental Community law on access to employment, the Court, in *Heylens*,⁵⁴ referred, for example, to the statements of principle made in *Johnston*.

48 — See the second sentence of Article 1(4).

49 — Case 222/84 (cited in footnote 44).

50 — Case C-185/97 *Coote* [1998] ECR I-5199.

51 — Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40) ('the Equal Treatment Directive').

52 — See *Johnston* (cited in footnote 44), paragraph 18, and *Coote* (cited in footnote 50), paragraph 21.

53 — See *Johnston* (cited in footnote 44), paragraph 19, and *Coote* (cited in footnote 50), paragraph 22.

54 — Case 222/86 *Heylens* [1987] ECR 4097, paragraph 14.

79. Reference may be made to Article 6 of the ECHR with regard to the substantive requirements of the principle of effective legal protection. The first sentence of Article 6(1) provides: 'In the determination of his civil rights and obligations..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law....'

80. Reference should also be made to Article 47 of the Charter of Fundamental Rights,⁵⁵ which, admittedly, does not yet have any binding legal effect. It can, however, be used as a standard of comparison, at least in so far as it addresses generally recognised principles of law. According to its Article 51, the Charter is also to apply to Member States when implementing Union law. The first and second paragraphs of Article 47 of the Charter provide as follows:

81. Thus, the principle of effective legal protection laid down in Community law, on the one hand, contains the requirements set out in the provisions just cited and, on the other, imposes on courts and tribunals of the Member States a duty to cooperate in guaranteeing that legal protection.⁵⁶

82. In order now to consider in detail whether the procedure enabling victims of untraced vehicles to obtain compensation satisfies the requirements of Community law, it is first necessary to examine the procedural requirements laid down by the Directive and also any further requirements resulting from the principle of effective legal protection.

'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

83. The second subparagraph of Article 1(4) of the Second Directive must be treated as a minimum procedural requirement, stating as it does that the victim may in any case apply directly to the body, which must give him a reasoned reply regarding the payment of any com-

⁵⁵ — OJ 2000 C 364, p. 1.

⁵⁶ — See *Peterbroeck* (cited in footnote 39), paragraph 12.

pensation. These minimum conditions are satisfied inasmuch as an injured person may, under the Agreement, directly have recourse to the MIB,⁵⁷ which must examine the application⁵⁸ and make a determination.⁵⁹ The United Kingdom Government takes the view that no more extensive procedural requirements can be derived from the Directive.

84. As already indicated above, the Directive also gives an injured person a substantive right, vindication of which by the courts also follows from Community law. It is thus necessary to examine whether the factors pointing to effective legal protection are present. Article 6 of the ECHR, already incorporated into Community law, and Article 47 of the Fundamental Rights Charter, which cover in large measure the same substantive ground, may serve as a guideline for this purpose.

85. For the purpose of casting doubt on this method of proceeding, however, the United Kingdom Government has pointed out that it is already questionable whether the rights of a victim are 'civil rights' within the meaning of Article 6 of the ECHR. In

the examination of the nature of the claim, for the purpose of drawing any conclusions as to the right to interest,⁶⁰ the civil-law context of the claim for compensation was considered. On this basis, one ought here to be able to proceed on the basis of a claim in civil law. However, even if the claim is, for whatever reason, a claim for compensation under public law, this could not provide justification if the person injured remains deprived of legal protection in its enforcement. Moreover, no comparable restriction on civil-law claims can be inferred from Article 47 of the Fundamental Rights Charter either. It is thus sufficient if what is in issue is a right 'guaranteed by the law of the Union'. A claim for compensation under Article 1(4) of the Second Directive must unquestionably be treated as being such a right.

86. A feature common to Article 6 of the ECHR and Article 47 of the Fundamental Rights Charter is that legal protection must be guaranteed by an independent and impartial court or tribunal established by law and also operating publicly in accordance with fair procedure.

87. The right of objection before the MIB, which initially concerns only a review of the proposed decision in the light of any further evidence adduced by the victim, does not meet the requirements of judicial control as thus defined. The first step in the objection procedure is comparable to

57 — Clause 1 states: '... this Agreement applies in any case in which an application is made to the MIB for a payment in respect of the death of or bodily injury to any person caused by or arising out of the use of a motor vehicle on a road in Great Britain...'. See also paragraph 6 above.

58 — Clause 7 provides: 'MIB shall cause any application made to them for a payment under this Agreement to be investigated...'. See also paragraph 6 above.

59 — Clause 9 provides: 'MIB shall notify their decision to the applicant...'. See also paragraph 6 above.

60 — See paragraph 36 et seq. above.

administrative appeal proceedings. Neither the complete independence nor the impartiality of the body providing compensation can be assumed. The MIB takes a decision which — in so far as the victim accepts it — it must allow to be enforced against itself and which places it under obligations. However, the introduction of the right of objection under the Agreement, which, as already pointed out,⁶¹ is of a private-law nature, cannot be classified as 'established by law'.

88. This would, however, have no negative implications if an avenue of legal redress against such a decision were available. In this it is necessary to agree with the United Kingdom Government that the possibilities of legal protection must be considered from an overall perspective. As a first step, the focus must therefore be turned to the arbitration procedure, but consideration must not merely stop there.

89. First of all, the question arises as to whether the arbitration procedure provided for in the Agreement is a judicial procedure. On the basis of the Court's case-law regarding the definition of the constituent factors that identify a court or tribunal for the purposes of Article 177 of the EC Treaty (now Article 234 EC), five identifying criteria may be mentioned. These are establishment *on a statutory basis* as a *permanent body*, *mandatory*

jurisdiction, *adversarial procedure* and the *application of legal rules*.⁶²

90. If we proceed on the basis that the arbitration procedure is laid down in the Agreement between the MIB and the Secretary of State for Transport, the establishment of a tribunal on a statutory basis is already questionable. On the other hand, a tribunal need not necessarily be linked to the judicial organisation of the Member State concerned.⁶³ However, if the arbitrator operates within the framework of the Arbitration Acts,⁶⁴ that might argue in favour of the tribunal having a legal basis.

91. Under the Agreement between the MIB and the Secretary of State for Transport, an arbitrator is appointed for arbitration proceedings on an *ad hoc* basis. It is therefore extremely problematic to consider this as a 'permanent body' unless one is to treat the existence of lists of potential arbitrators among the Queen's Counsel as a permanent body, recourse to the lists or invocation of the tribunal alone being dependent on practical requirements.

92. In contrast, the further characteristic of *mandatory* jurisdiction is satisfied — assuming that jurisdiction is accepted as

62 — See Case 246/80 *Broekmeulen* [1981] ECR 2311.

63 — See, for example, with regard to the judicial nature of the Conseil des Avocats, Case 138/80 *Borker* [1980] ECR 1975.

64 — See in this context paragraphs 111 and 114 of the reference for a preliminary ruling.

61 — See paragraph 39 above.

such — given that — so far as one can conclude from all of the submissions in the present case — it is not possible to choose any other manner of challenging a decision of the MIB by way of judicial proceedings.⁶⁵

93. On the other hand, it seems extremely doubtful whether arbitration proceedings can be described as adversarial. Both parties — the MIB and the person injured — can, it is true, set out their respective views in the knowledge of the other's submissions. In the course of the present proceedings before the Court, it became clear that the claimant was accused of dishonest conduct when he brought his appeal and that he had no opportunity to refute that allegation. This amounts to a procedural defect which is problematic in several respects.

94. Under the rules of procedural law governing civil proceedings, to which applies the principle that the parties determine the facts and evidence forming the basis for a decision ('Beibringungsgrundsatz'), a tribunal may not base its decision on any circumstances not raised by the parties in the proceedings and on which the opposing party has been unable to state its views. Even if one wished to attribute — conditionally — a public-law character to the arbitration procedure as a continuation of the quasi-administrative procedure before the MIB, the claimant's rights

of defence⁶⁶ will have been infringed. Even in proceedings to which the principle of judicial inquiry⁶⁷ applies, the rights of defence must be guaranteed in such a way that a party can set out its views on circumstances and matters of which it stands accused.

95. With regard, finally, to the fifth criterion, 'the application of legal rules', this will be satisfied if the tribunal decides in accordance with law and statute but not if it reaches its decisions on the basis of fairness. For a final decision on whether this fifth criterion is satisfied, it will be necessary to address this question again at a later stage. The decision on costs in the arbitration decision against the claimant, on the grounds of his alleged dishonesty — see in this regard clause 22 of the Agreement, cited in paragraph 6 above — without the claimant having had any opportunity to address that issue, suggests that considerations of fairness may be made to form the basis of the decision.

96. As an interim conclusion, it may thus be held that the arbitration tribunal does not satisfy in full the relatively strict criteria which Article 177 of the EC Treaty (now Article 234 EC) imposes on a court or tribunal.

97. With regard, now, to the characteristics of impartiality and independence following from Article 6 of the ECHR in conjunction

⁶⁵ — See Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraphs 28 and 29.

⁶⁶ — On protection of the rights of defence as a criterion to be taken into account, see Joined Cases C-430/93 and C-431/93 *van Schijndel and van Veen* [1995] ECR I-4705, paragraph 19.

⁶⁷ — Generally in public-law disputes and criminal proceedings.

with Article 47 of the Fundamental Rights Charter, one must, it seems, proceed, according to the submissions of the parties to the present proceedings, on the basis that the Queen's Counsel featuring on the lists described provide every guarantee as to their independence. That notwithstanding, the question still arises as to whether, in view of their procedural situation and their proximity to the MIB, they also provide the same guarantee as to their impartiality. The arbitrator can require from the MIB any more extensive investigation which is considered appropriate. There is accordingly what may be described as a form of negotiating level between the arbitrator and the MIB. Once the arbitrator has taken his arbitration decision, this is in the first instance forwarded to the MIB alone, which is then responsible for its further transmission to the victim.

98. Before the arbitrator, moreover, there is no public hearing within the meaning of Article 6 of the ECHR in conjunction with Article 47 of the Fundamental Rights Charter inasmuch as the arbitrator acts on the basis of the documents before him (see clause 17, cited in paragraph 6). The procedural cooperation between the arbitrator and the MIB cannot be regarded as constituting a public hearing. The victim is not involved in these negotiations in the way that adversarial procedure requires. The principle of orality in judicial proceedings is to this extent related to the principle that proceedings should be conducted in public. Finally, the manner in which the decision is notified cannot be regarded as being a public pronouncement for the purposes of Article 6 of the ECHR. The public nature of the proceedings does not therefore appear to be adequately guaranteed.

99. The arbitration procedure under the Agreement must for those reasons be brought into question in several respects.

100. In its judgment in *Nordsee*,⁶⁸ the Court has already once been called on to set out its views on the judicial nature of a private arbitration tribunal in regard to Article 177 of the EC Treaty (now Article 234 EC). The Court ruled in that case that attention must be paid to the particularities of the individual arbitration proceedings. The Court there concluded that the arbitration tribunal lacked judicial capacity on the grounds, first, that, when the contract was entered into, the parties were free to leave potential disputes to be resolved by the ordinary courts,⁶⁹ and, second, that the public authorities were not involved in the decision to opt for arbitration and were not called on to intervene automatically in the proceedings before the arbitrator.⁷⁰

101. If one considers the arbitration proceedings in the present case against this background, it will be noticed that the public authorities, in the form of the Secretary of State for Transport, were fully involved in the decision to choose the avenue of arbitration proceedings. On the other hand, anyone who may have been injured is obliged to seek legal protection within the framework of an agreement in the establishment of which he played no role and which was negotiated between parties entirely separate from him and over which he had no influence.

68 — Case 102/81 *Nordsee* [1982] ECR 1095.

69 — *Nordsee* (cited in footnote 68), paragraph 11.

70 — *Nordsee* (cited in footnote 68), paragraph 12.

102. In the light of all of the doubts just outlined as to the establishment and procedure of the arbitration tribunal, the crucial question is therefore what form the further legal protection of the injured party might take.

103. As point v of the third question referred suggests, and as is confirmed by the parties' concordant submissions in this regard, a victim can appeal to the ordinary courts against the arbitration decision. However, there is no unrestricted appeal procedure, access to the courts and the scope of review being subject to several limiting conditions.

104. As outlined by the High Court, the situation is as follows. The arbitration decision may be challenged on grounds of serious irregularities adversely affecting it or on issues of law, which include that as to whether a specific finding of the arbitrator was supported by evidence or whether, on the basis of the available evidence, an arbitrator could not reasonably have reached a particular conclusion. An appeal on questions of law requires judicial leave, which will be granted only if the arbitration decision is obviously wrong *and* it appears just and proper in the circumstances to have the matter judicially determined.

105. These restrictive conditions governing access to the courts have features of a pure review as to legal issues or plausibility. Judicial review and the granting of leave to appeal are matters frequently reserved to the higher courts in appeal proceedings.

Examination of an appeal submitted as to whether the arbitration decision is obviously wrong and whether it would, in all the circumstances, be just and proper to obtain a judicial decision would have a further restrictive effect. Access to the ordinary courts is rendered considerably more difficult for a person injured by an untraced vehicle. This is extremely problematic in the light of the requirements of effective legal protection.

106. If one takes account of the fact that this stage of the proceedings actually concerns first-instance proceedings before an ordinary court, this will not meet the requirements of effective legal protection. It must be possible for the injured person to secure, at least before one court, full judicial protection with regard to issues of fact and law.

107. A comparison of this avenue of legal redress with the legal protection guaranteed to victims of insured or uninsured drivers of traced vehicles — for whom the ordinary avenues of legal redress remain open — shows that the legal protection available for victims of untraced drivers remains far behind the latter. While the possibilities of legal protection for both groups of persons need not, from the perspective of Community law, be absolutely identical, the legal protection must none the less be qualitatively equivalent. In the context of the present case, this means that a guarantee of recourse to the ordinary courts must be provided.

108. In view of the fact that the case involves a civil-law dispute concerning compensation, in which the injured party and the insurance body stand opposed, I consider a stage for the determination of facts to be indispensable. Nor does the judgment in *Upjohn*⁷¹ run counter to this finding. In that case the Court held that judicial competence for a full review of facts was not indispensable. The facts of that case, however, were entirely different. The authority responsible in *Upjohn* for granting or revoking authorisation for medicinal products was required to carry out complex assessments in the medico-pharmacological field.⁷² This called for a certain discretionary scope, particularly in view of the fact that an applicant could, by means of a fresh application, secure a reappraisal of the decision taken by the administrative authority.⁷³

109. In justification of the existing rules, the United Kingdom Government and the MIB have pointed out that these injury cases are disposed of under those rules in what is generally a more rapid and cost-effective manner.

110. The event giving rise to injury, which resulted in the present proceedings, occurred on 25 December 1991. Almost five years later, on 27 August 1996, the arbitrator issued her decision. Up to that point there had not yet been any mention of bringing the matter before an ordinary court.

71 — Case C-120/97 (cited in footnote 37).

72 — *Upjohn* (cited in footnote 37), paragraph 33.

73 — *Upjohn* (cited in footnote 37), paragraph 40.

111. Even if the procedure under the Agreement might have been quicker and more cost-effective than compulsory-insurance proceedings before ordinary courts, this still does not amount to sufficient justification for depriving injured parties of effective legal protection in the form of a determination of the facts by an ordinary court.

112. Finally, it will be a matter for the High Court to assess the shortcomings in the legal protection and to draw the legal consequences therefrom. In this it will have to take account of the fact that the absence of judicial review, covering issues of fact and law, of an arbitrator's findings in a claim resulting from the Second Directive fails to satisfy the Community-law requirements as to effective legal protection.

(3) Correct implementation of the Directive — fourth question

Submissions of the parties

113. The *claimant* argues that the Second Directive has not been correctly implemented where the Member State fails to impose on the authorised body an obligation to provide compensation to victims of untraced drivers to the same degree as

applies with regard to compulsory insurance under the First Directive. The Second Directive has not been implemented in the United Kingdom with the binding force necessary to satisfy the principle of legal certainty. Apart from the fact that the compensation provided for by the Agreement is not in all respects the same as that provided for by the Second Directive, victims have to rely on an agreement to which they are not a party and to rely on the simple practice of the MIB of failing to take before the courts the point that the Agreement confers no rights on victims which can be enforced against it.

114. The *United Kingdom Government* and the MIB take the view that there is no need to reply to the fourth question. They point out, however, that it is for the Member State concerned to choose the forms and methods for implementing a directive. Where the national provisions already in force comply with the directive they do not require further amendment. That is what happened in the United Kingdom with regard to implementation of the Second Directive: the Agreement meets the requirements of precision, clarity and transparency and thus satisfies the principle of legal certainty.

115. In its written observations, the *Commission* expresses its opinion that the MIB is an authorised body within the meaning of Article 1(4) of the Second Directive, as it has been entrusted by the authorities of the Member State with the role provided for in the Second Directive and not only has the capacity, but is also obliged, to compensate victims. Victims can also apply directly to that body, which must provide them with a

reasoned reply. Further, a legal procedure is provided for in the event that a victim is not satisfied with the compensation offered.

116. During the oral procedure, however, the Commission's Agent expressed some misgivings based on the case of *White v White*,⁷⁴ cited by the parties, and the judgment of the Court of Appeal dismissing the claimant's appeal.⁷⁵ To the extent to which the Member State's legal system classifies the MIB as an exclusively private body and treats the agreement between it and the Secretary of State as being purely private in nature, with the result that there is no obligation whatever to apply the criteria laid down in the Second Directive, the MIB is not in fact properly authorised within the meaning of Article 1(4) of the Second Directive.

Appraisal

117. By its fourth question, the High Court is seeking to ascertain whether the United Kingdom has complied with its obligation under Article 1(4) of the Second Directive to authorise a body with responsibility for providing compensation in respect of damage or injuries caused by an untraced or uninsured motor vehicle. In issue is whether

⁷⁴ — Judgment of the House of Lords of 1 March 2001 [2001] UKHL 9.

⁷⁵ — See paragraph 12 above.

there is such compliance in the case where, pursuant to an agreement with the competent authority, a pre-existing body is required to assume responsibility for such damage or injuries but victims have no directly enforceable claim in law against that body. The High Court also asks whether the determinant factor in answering that question is the fact that the Member State considered in good faith that that agreement provided protection for victims that was at least as effective as that provided by the Second Directive.

118. The MIB's establishment dates back to 1946 and the first generation of agreements on compensation for victims of uninsured or untraced drivers originates from that period. There was thus provision in the United Kingdom, long before the Second Directive was adopted, for compensation for the victims of traffic accidents where those responsible were uninsured or could not be traced.

119. According to the documents on the case-file, a consultation process was initiated by the United Kingdom Government, following adoption of the Second Directive on 30 December 1983, into the issue of whether separate implementing measures were required to transpose the Directive. This examination concluded that the existing protection for victims was fully adequate and that more extensive transposition measures were therefore not required in that regard. This appraisal was apparently shared by the Commission, as it raised no objections in regard to

transposition of the Second Directive. In view of the fact that — as the parties to the present proceedings have confirmed unanimously — the MIB has always in practice consistently satisfied its obligations under the two Agreements dealing with uninsured and untraced drivers, there were also no grounds for doubts as to whether the Second Directive had been correctly transposed.

120. The view that no additional entities had to be set up in order to implement the Second Directive also found support in the wording of Article 1(4) of the Second Directive, which expressly refers to the possibility of authorising an already existing body. This explains why no formal legal measure was adopted in the United Kingdom to transpose the Second Directive, even though the period for transposition expired on 31 December 1987, pursuant to Article 5(1) of the Second Directive, and the Commission has also not expressed any criticism of this fact in almost 15 years.

121. However, the fact that there must still be a problem regarding transposition of the Second Directive is evidenced not only by the present case but also by the House of Lords judgment of 1 March 2001 in *White v White*,⁷⁶ which has been mentioned on several occasions in these proceedings and which concerned the parallel agreement concerning uninsured drivers. The House of Lords ruled that it was not in a position,

⁷⁶ — Cited in footnote 74.

as required under the Court's *Marleasing* case-law,⁷⁷ to construe the agreement in such a way as to give effect to the substance of the Directive (see paragraph 127 below). The House of Lords justified this view on the ground that the agreement in issue was a contract under private law, even though one of the contracting parties was a State body. The contracting parties were therefore bound only by that to which they had agreed. The House of Lords held that the *Marleasing* principles had for that reason to be left out of account, although it had expressly stated at another point in its judgment that the 1988 MIB Agreement had been concluded with a view to implementing the Directive.⁷⁸

122. The Court of Appeal judgment, by which an appeal brought by the claimant was dismissed at a procedural stage preceding the present proceedings, is also instructive in the present context. The Court of Appeal held that what the United Kingdom had done by way of implementation of the Directive did not bring into existence 'any entity or relationship' which enabled the Directive to be enforced against anybody (save possibly in the *Francovich* sense against the United Kingdom itself).⁷⁹

123. The claimant accordingly takes the view in the present proceedings that the

United Kingdom has not implemented the Second Directive.

124. The duties devolving on Member States in the implementation of a directive have been laid down in settled case-law. The main features may be recapitulated at this point. With regard to the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC), the Court laid down the following basic principles:

'It follows from that provision that the implementation of a directive does not necessarily require legislative action in each Member State. In particular, the existence of general principles of constitutional or administrative law may render implementation by specific legislation superfluous, provided however that those principles guarantee that the national authorities will in fact apply the directive fully and that, where the directive is intended to create rights for individuals, the legal position arising from those principles is sufficiently precise and clear and the persons concerned are made fully aware of their rights and, where appropriate, afforded the possibility of relying on them before the national courts. That last condition is of particular importance where the directive in question is intended to accord rights to nationals of other Member States because those nationals are not normally aware of such principles.'⁸⁰

⁷⁷ — Case C-106/89 *Marleasing* [1990] ECR I-4135.

⁷⁸ — 'The MIB-Agreement was entered into with the specific intention of giving effect to the Directive.'

⁷⁹ — See in this connection Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357.

⁸⁰ — Case 29/84 *Commission v Germany* [1985] ECR 1661, paragraph 23. See also, along the same lines, Case C-96/95 *Commission v Germany* [1997] ECR I-1653, paragraph 35.

125. This case-law has been confirmed in numerous judgments.⁸¹ However, the Court was also obliged, in a separate context, to point out that: ‘... in order to secure the full implementation of directives in law and not only in fact, Member States must establish a *specific legal framework* in the area in question.’⁸²

126. In regard to the requirement of legal certainty, the Court has held: ‘Accordingly, the provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the requirement of legal certainty, under which, in the case of a directive intended to confer rights on individuals, persons concerned must be enabled to ascertain the full extent of their rights’.⁸³ The Court has used similar terms to reiterate this view in subsequent judgments.⁸⁴

127. In its judgment in *Marleasing*,⁸⁵ the Court confirmed that the obligation on Member States to secure the objective laid down in a directive is binding on ‘all the authorities of Member States including, for matters within their jurisdiction, the courts.

It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the [EEC] Treaty.’⁸⁶

128. As has already been indicated in the discussion of the third question, the purpose of the Second Directive is to enable persons injured by uninsured or untraced motor vehicles to bring a claim against a body in the Member State concerned. In so far as Article 249 EC leaves it to national bodies to choose the form and the means for achieving the Directive’s binding objective, an agreement between a public authority and a private-law entity forming the basis of the rights of victims is not *per se* objectionable. Those rights must, however, be identifiable and pursuable with the requisite clarity and certainty.

129. During the oral procedure counsel for the claimant pointed out the substantive discrepancies between the Second Directive and the Agreement, not all of which, however, are the subject of the present proceedings. Fundamental importance does, none the less, attach to the questions relating to the injured person’s claim and its enforceability.

81 — See Case 247/85 *Commission v Belgium* [1987] ECR 3029, paragraph 9; see also, along the same lines, Case C-190/90 *Commission v Netherlands* [1992] ECR I-3265, paragraph 17, and Case C-217/97 *Commission v Germany* [1999] ECR I-5087, paragraphs 31 and 32.

82 — Case C-339/87 *Commission v Netherlands* [1990] ECR I-851, paragraph 25; emphasis added.

83 — Case C-197/96 *Commission v France* [1997] ECR I-1489, paragraph 15.

84 — Case C-354/98 *Commission v France* [1999] ECR I-4927, paragraph 11.

85 — Case C-106/89 (cited in footnote 77).

86 — *Marleasing* (cited in footnote 77), paragraph 8.

130. Thus, as the relationship between an injured person and the MIB has been described by all parties, injured persons have in fact no claim against the MIB. True, the MIB does not appear to refuse compensation despite the absence of any contractual relationship in law with the injured person in view of the fact that it is obligated to provide compensation on foot of the Agreement with the Secretary of State for Transport. However, should the injured person consider that he is adversely affected, he must, if necessary, institute judicial proceedings against the Secretary of State to force the latter to insist on compliance with the Agreement.

131. This approach is fraught with so many imponderables that it fails to satisfy the requirements of legal certainty outlined above. This finding is reinforced by the problems associated with legal protection discussed in connection with the third question.

132. The situation, however, becomes totally unacceptable against the background of the attitude of the national courts of the Member States. It would have been at least necessary for the national courts to carry out, at any rate with regard to the substantive rights of injured persons within the meaning of the *Marleasing* case-law, an interpretation of the legal positions resulting from the Agreements between the MIB and the Secretary of State for Transport in the light of the Second Directive, particularly in view of the fact that the House of Lords proceeded on the basis that the 1988 Agreement concerning uninsured drivers had been concluded with the intention of giving effect to the Second Directive.

133. As the British courts find that they are unable, in view of the structure of the legal relations, to proceed in such a manner, it becomes clear that the Second Directive was not implemented in national law in the United Kingdom with the requisite precision and clarity. The requirements of legal certainty have therefore not been satisfied.

134. The High Court, finally, also wished to know whether, for the purpose of answering the question, any significance attaches to the fact that the Member State believed in good faith that the Directive had been correctly transposed. Determining whether a directive has been transposed in a Member State's national law is in principle a matter of objective examination. The good faith, or bad faith, of a Member State is an irrelevant factor in a determination as to whether the requirements posited by Community law have or have not been adequately met by transposition. In view, however, of any potential claim for compensation, this question may well assume significance.

135. The answer to the fourth question must therefore be that there is no proper implementation of the Second Directive in a Member State's national law so long as an injured person does not have an enforceable claim against the body on which the authorities of the Member State have conferred responsibility for compensating victims of untraced (or uninsured) motor vehicles.

(4) *Liability of the Member State to pay damages — fifth question*

Submissions of the parties

136. According to the *claimant*, the conditions necessary to establish a claim for damages against the United Kingdom for failure to implement the Second Directive are satisfied. The result prescribed by the Directive entails the grant of rights to individuals, namely victims of untraced or uninsured drivers, a class to which the claimant clearly belongs. The content of that right is identifiable from the provisions of the Directive and concerns compensation from an authorised body. It is not necessary for the Court of Justice to examine whether a causal nexus has been established; that is a matter for the national court of the Member State. Finally, the breach is sufficiently serious because the United Kingdom has failed to adopt any measures to implement the Directive.

137. The *United Kingdom Government* argues that the alleged breaches in regard to interest and costs raise a number of questions. Even if the Court should not wish to go along with its argument, the breach of Community law is not sufficiently serious for the United Kingdom to incur liability for damages. Similarly, it was reasonable for the United Kingdom to assume that the procedures in place satis-

fied the requirements of effective judicial control. Finally, even if one were to assume that the body was not approved in such a manner as to satisfy the requirements of the Directive, that did not in any event cause the claimant any loss.

138. The *MIB* takes the view that the reply to the fifth question is a matter for the defendant in the main proceedings.

139. In the opinion of the *Commission*, it is for the national court to decide whether there has been a sufficiently serious breach of Community law in this case. It points out, however, that the Second Directive makes no mention of interest and costs and that there is no case-law on those points. The Commission states, furthermore, that it has not previously raised this issue in regard to the implementation of the Second Directive and that the question whether the arbitration procedure is compatible with the dictates of effective legal protection requires additional clarification.

Appraisal

140. By its fifth question, the High Court is seeking to determine whether the defects in implementing the Second Directive consti-

tute a sufficiently serious breach of Community law as to lead to a claim for damages against the Member State concerned.

141. As will be evident from the foregoing submissions, numerous misgivings arise with regard to the transposition of the Second Directive and the practical application of the measures defined as constituting implementation. First, the scope of the compensation must be measured against the amounts of compensation regularly payable in the context of compulsory insurance, with the result that it is extremely probable that interest and costs have been improperly excluded from the calculation of compensation on the basis of the Agreement. Further, the avenue of legal redress available to an injured person does not satisfy in every respect the requirements of effective legal protection. Finally, defects may be identified in the authorisation of the MIB as the body under Article 1(4) of the Second Directive in so far as injured persons have no direct right of claim against that body such as would also entitle them to institute judicial proceedings.

142. It may therefore be assumed that these shortcomings constitute a breach of Community law with regard to the implementation of a directive. It is, however, questionable whether this breach can lead to a claim for damages against the Member State.

143. The Court's case-law on Community-law-based compensation claims against a Member State dates back to the *Francovich* judgment.⁸⁷ (The proceedings in that case resulted from the failure by the Italian authorities to implement timeously in national law the directive on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer.)⁸⁸ The Court there set out as follows the basic principles underlying State liability:

'The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.

The possibility of obtaining redress from the Member State is particularly indispensable where, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law.'⁸⁹

87 — Joined Cases C-6/90 and C-9/90 *Francovich and Others* (cited in footnote 79), paragraph 41.

88 — Council Directive 80/987/EEC of 20 October 1980 (OJ 1980 L 283, p. 23).

89 — Paragraphs 33 and 34 of the judgment in *Francovich* (cited in footnote 79).

144. The conditions governing a right to reparation depend in this regard 'on the nature of the breach of Community law giving rise to the loss and damage'.⁹⁰

145. Where there has been a breach of the third paragraph of Article 189 of the EEC Treaty (now the third paragraph of Article 249 EC), which was the basis on which the Court proceeded in *Francovich*, three prior conditions must be satisfied before there can be a right to reparation:

'The first of those conditions is that the result prescribed by the directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties.'⁹¹

146. The Court has since defined these principles in greater detail in a number of cases.⁹² In the judgment in *Brasserie*

du Pêcheur,⁹³ the first issue facing the Court was to determine whether a claim seeking to establish State liability could also arise through a breach of *primary law* by the national legislature.⁹⁴ The Court in principle answered that question affirmatively.⁹⁵ That case also provided the Court with its first opportunity to rule that the breach must be sufficiently serious.

147. With regard to the criterion of 'a sufficiently serious breach', the Court stated that 'the Member State... concerned [must have] manifestly and gravely disregarded the limits on its discretion'.⁹⁶

'The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national

90 — Paragraph 38 of *Francovich* (cited in footnote 79).

91 — Paragraph 40 of *Francovich* (cited in footnote 79).

92 — See Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029; Case C-392/93 *British Telecommunications* [1996] ECR I-1631; Case C-5/94 *Hedley Lomas* [1996] ECR I-2553; Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer and Others* [1996] ECR I-4845; Case C-319/96 *Brinkman* [1998] ECR I-5255; Case C-302/97 *Konle* [1999] ECR I-3099; Case C-140/97 *Recherberger and Others* [1999] ECR I-3499; Case C-424/97 *Haim* [2000] ECR I-5123; and Case C-150/99 *Stockholm Lindöpark* [2001] ECR I-493.

93 — Cited in footnote 92.

94 — In issue was the breach of Articles 30 and 52 of the EEC Treaty. See paragraphs 23 and 36 of the judgment in *Brasserie du Pêcheur* (cited in footnote 92).

95 — See *Brasserie du Pêcheur* (cited in footnote 92), paragraphs 40 and 41.

96 — *Brasserie du Pêcheur* (cited in footnote 92), paragraph 55.

measures or practices contrary to Community law.’⁹⁷

148. Responding to the question whether fault is a constituent factor in a claim seeking to establish liability, the Court stated that this is not required as such but that ‘certain objective and subjective factors connected with the concept of fault under a national legal system may well be relevant for the purpose of determining whether or not a given breach of Community law is serious’.⁹⁸

149. In its judgment in *British Telecommunications*,⁹⁹ the Court also applied the comparatively narrower conditions laid down in *Brasserie du Pêcheur* to a case involving the inadequate transposition of a *directive* as the event giving rise to damage.

150. In its judgment in *Hedley Lomas*,¹⁰⁰ however, the Court made it clear that even the mere infringement of Community law

may be sufficient to establish the existence of a sufficiently serious breach where ‘at the time when it committed the infringement, the Member State in question was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion’.¹⁰¹

151. In *Dillenkofer and Others*,¹⁰² a case in which, as in *Francovich*, there had been a failure to adopt measures for the transposition of a directive within the prescribed period, for which reason the claimant considers that these judgments have a bearing on the present case, the Court explained that ‘the condition that there should be a sufficiently serious breach, although not expressly mentioned in *Francovich*, was nevertheless evident from the circumstances of that case’.¹⁰³

152. To that extent it must be regarded as settled that a sufficiently serious breach is a prerequisite in every case of a potential claim for damages against a Member State.

153. Basing itself on the statements concerning a considerably reduced, or even an

97 — Paragraph 56 of *Brasserie du Pêcheur* (cited in footnote 92).

98 — *Brasserie du Pêcheur* (cited in footnote 92), paragraph 78.

99 — Case C-392/93 (cited in footnote 92), paragraph 40.

100 — Judgment in Case C-5/94 (cited in footnote 92).

101 — *Hedley Lomas* (cited in footnote 92), paragraph 28. See also the subsequent judgment in Case C-150/99 *Stockholm Lindöpark* (cited in footnote 92), paragraph 40.

102 — Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 (cited in footnote 92).

103 — *Dillenkofer and Others* (cited in footnote 92), paragraph 23.

absence of any, discretion in its judgment in *Hedley Lomas*, the Court stated as follows in *Dillenkofer and Others*: 'So where, as in *Francovich*, a Member State fails, in breach of the third paragraph of Article 189 of the Treaty, to take any of the measures *necessary to achieve the result prescribed by a directive* within the period it lays down, that Member State manifestly and gravely disregards the limits on its discretion.'¹⁰⁴

154. In order to reply to the fifth question, it is thus necessary to determine whether the breaches of Community law indicated constitute, whether individually or in their totality, a sufficiently serious breach. On the basis of the *Francovich* and *Dillenkofer* judgments, one might, along with the claimant, take the view that the inactivity on the United Kingdom's part amounts to a manifest and grave disregard by that Member State of the limits placed on the exercise of its discretion.¹⁰⁵ Regard being had, however, to the fact that the Member State was able to have recourse to an existing infrastructure which at least in part was expressly in accordance with the Directive, this view of the matter does appear to be unsatisfactory. The question thus arises as to the extent to which the legislature of the Member State was obliged to take steps to achieve the purpose prescribed by the Directive.¹⁰⁶

155. There was clearly no further need for the establishment of a body within the meaning of Article 1(4) of the Second Directive. That Directive does, however, confer on an individual victim a right to compensation against that body, as has already been set out above.¹⁰⁷ In order to found and enforce a claim it is not sufficient that a potential victim can somehow or other bring the matter before the body. The Directive is precise and clear in regard to this position in law. As the Agreements concluded between the MIB and the Secretary of State for Transport do not confer a legal position with those attributes on a victim, the national legislature ought to have taken appropriate measures. Action on its part was necessary to establish a judicially enforceable claim in favour of the victim at least up to the limits of the insurance obligation. Whether this ought to have been achieved by legislation or by a substantive adjustment of the Agreement is a decision ultimately falling within the discretion of the Member State. To that extent the Directive confers a degree of organisational discretion on the Member State. That notwithstanding, the Member State ought to have laid down in mandatory terms, with regard to both substantive and procedural law, the obligation as to results deriving from the Directive in regard to the victim's legal position.

156. As there was already a functioning infrastructure in place, the problem initially remained concealed, and this was also the reason why the Commission took no steps to challenge the lack of action on the part of the United Kingdom in regard to the Directive. Those facts do not, however, mean that that inactivity did not amount to

104 — *Dillenkofer and Others* (cited in footnote 92), paragraph 26; emphasis added.

105 — *Dillenkofer and Others* (cited in footnote 92), paragraph 26.

106 — *Dillenkofer and Others* (cited in footnote 92), paragraphs 26 and 47.

107 — See paragraph 74 et seq.

a breach of the duty devolving on the Member State to adopt the necessary measures under the third paragraph of Article 249 EC.

157. Appraisal of the questions whether damage has been suffered by the claimant — and, if so, to what degree — and whether any such damage was causally

linked to the breach of duty is a matter for the national court. By virtue of the fact that the United Kingdom has failed to ensure that persons injured by untraced vehicles have an enforceable claim, at least up to the limits of the insurance obligation, against the body defined in Article 1(4) of the Second Directive, that Member State has committed a sufficiently serious breach of Community law within the meaning of the Court's case-law on claims for compensation brought against Member States.

V — Conclusion

158. In the light of the foregoing considerations, I propose that the Court reply as follows to the questions submitted for preliminary ruling:

- (1) Interest and costs are a necessary component of compensation claims brought by victims of untraced vehicles if and to the extent to which interest and costs form part of claims for compensation brought by victims of properly insured and identified vehicles. This finding holds good in regard to both the substance and the payment details.

- (2) In the circumstances outlined in the third question, a victim must, on grounds of effective legal protection, have the right to appeal to an ordinary court on questions of fact and law.
- (3) Regard being had to the rights of victims, the Second Directive has not been transposed in the national law of the Member State with the precision and clarity necessary to satisfy the requirement of legal certainty.
- (4) By virtue of the fact that it has failed to ensure that persons injured by untraced vehicles have an enforceable claim, at least up to the limits of the insurance obligation, against the body defined in Article 1(4) of the Second Directive, the United Kingdom has committed a sufficiently serious breach of Community law.