

COMMISSION OF THE EUROPEAN COMMUNITIES

**PROPOSAL FOR A DIRECTIVE AMENDING COUNCIL DIRECTIVES 72/166/EEC,
84/5/EEC, 88/357/EEC, 90/232/EEC AND DIRECTIVE 2000/26/EC
ON INSURANCE AGAINST CIVIL LIABILITY IN RESPECT OF THE USE OF MOTOR
VEHICLES**

**SUBMISSIONS OF THE PAN-EUROPEAN ORGANISATION OF PERSONAL INJURY
LAWYERS**

SEPTEMBER 2002

The Pan European Organisation of Personal Injury Lawyers (PEOPIL) was founded in 1996 and formally established as a not-for-profit organisation in 1998 by European lawyers to improve and promote judicial co-operation and mutual knowledge of legal and judicial systems of European jurisdictions in the field of personal injury law.

The objectives of the organisation are:

- ?? To develop co-operation and networking of personal injury lawyers within Europe;
- ?? To promote access to the legal system for consumers suffering personal injury;
- ?? To promote higher standards of care and safety for consumers;
- ?? To promote proper and fair compensation for all personal injury cases;
- ?? To support and encourage the exchange of information and knowledge.

Currently the Pan-European Organisation of Personal Injury lawyers has 458 members from 18 jurisdictions within the European Union, 11 Non-European Union jurisdictions within Europe and 4 jurisdictions outside Europe. Membership is drawn from lawyers normally representing Claimants or Defendants. Many members have significant experience of acting on behalf of victims or insurers in cross border disputes and particularly in relation to road traffic accidents. It is a stated aim of PEOPIL that it wishes to encourage a complete dialogue and it seeks to enfranchise both “sides” and as many European countries as possible.

The following is a breakdown of PEOPIL’s core activities and objectives:

PEOPIL participates in the development of EU legislation:

PEOPIL formulated written submissions in response to the European Commission Green Papers on Liability for defective products, Legal Aid and on compensation to the victims of crime and was invited by the European Commission to participate in the hearings regarding the above papers. Currently, PEOPIL is working on a response to the Commission’s Green Paper on alternative dispute resolution in civil and commercial law and is finalising a European Commission sponsored study of European legal systems regarding personal injury law and litigation.

PEOPIL is committed to building links with other European organisations:

PEOPIL maintains official contacts with many organisations across Europe and indeed the world. For example PEOPIL has official contacts with the Arbeitsgemeinschaft Verkehrsrecht (working group Traffic Law), ADAC (Allgemeiner Deutscher Automobil Club e.V.), APIL the Association of Personal Injury Lawyers and FOIL, the Forum of Insurance Lawyers, in the United Kingdom. Most recently PEOPIL signed an agreement with the Council of the Bars and Law Societies of the European Union (CCBE) in order to develop closer co-operation.

PEOPIL seeks to encourage contacts amongst European lawyers:

PEOPIL identified the need for European Exchange Groups (EEG). It has launched groups in the fields of Road Traffic Accidents, Medical Negligence, Whiplash, Tourism, and Tobacco Litigation. Those groups serve as a discussion forum considering - amongst other things - attempts to harmonise legal rules within the European Union. The Commission of the European Union substantially supported the establishment of these groups at the Paris Conference by awarding funds from the Grotius Programme.

PEOPIL uses innovative ideas to maximise its services to European lawyers and consumers:

PEOPIL took a lead role in establishing a database of lawyers, able and willing to deal with cross-border disputes, or any other case involving an international element. This database is designed to allow users to access lawyers specialising in a particular field or working in a particular jurisdiction.

PEOPIL promotes opportunities to exchange knowledge of the legal systems in all EU Members States:

In 2000, PEOPIL held a seminar in Italy to discuss liability for ski accidents in Italy and other EU jurisdictions.

In 2001 PEOPIL organised a Seminar in Innsbruck, Austria, on “Compensation in the light of disasters at the Kitzsteinhorn in Kaprun near Salzburg on 11 November 2000”.

This year PEOPIL, organised a conference in Rome to discuss whiplash injuries. The conference involved the European Parliament, the Italian Council of Ministers, the Italian Ministry of Health and the Italian Ministry of Industry.

PEOPIL has also held conferences covering a wide variety of other relevant issues in cities including Paris, Amsterdam, Brussels, Barcelona and Munich.

Any enquiries in respect of these submissions should be addressed, in the first instance, to:

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**PEOPIL'S RESPONSE TO THE PROPOSAL BY THE EUROPEAN COMMISSION
COM(2002) 244 FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE
COUNCIL AMENDING COUNCIL DIRECTIVES 72/166/EEC, 84/5/EEC, 88/357/EEC,
90/232/EEC AND DIRECTIVE 2000/26/EC ON INSURANCE AGAINST CIVIL LIABILITY
IN RESPECT OF THE USE OF MOTOR VEHICLES**

PEOPIL is in favour of the European Parliament's and Commission's initiative to modernise Road Traffic Insurance Directives in order to update and to improve victims' protection by the provision of compulsory insurance.

Indeed, most of the proposed provisions are greatly welcomed by PEOPIL including the extension of key provisions of the Fourth Motor Insurance Directive (2000/26/EC) so that they will apply in all motor accidents in Member States . In Particular, PEOPIL supports the extension of a direct right of action for an accident victim against a motor insurer (Article 4 (d)) , the extended rights of access to Information centres (Article 4 (f)) , and ,with one proposed ammendment (see later) , the extension of the reasoned response and reasoned offer procedures (Article 4 (e)) . The extension of these provisions are likely to assist victims and insurers in simplifying and accelerating the conduct of motor insurance claims . It is also hoped that such provisions will decrease the need for National Courts to intervene in disputes and reduce the costs associated with such claims.

Nevertheless, PEOPIL has considerable concerns about some provisions of the current proposal and make the following comments :

Article 2 of the Proposal – Amendments to Directive 84/5/EEC: review of the minimum amounts of cover.

PEOPIL fully agrees that a review of the minimum amounts of insurance cover (*Paragraph 2, Article 2*) should take place as a necessary step towards improvement of the protection of victims' rights, but a different approach on the *quantum* of compulsory minimum is suggested here.

The Commission's proposal takes into account the impact of inflation on the current amounts and it rejects the European Parliament draft Resolution (2001) which provides single minimum cover of EUR 2.000.000,00.

In this respect PEOPIL considers that inflation should not be the primary factor in setting any minimum threshold . Indeed , PEOPIL consider that the continued use of a minimum insurance

threshold is unjustified and penalises those victims who have sustained the most severe injuries in motor accidents . Current levels of awards in each Member State should be carefully considered in order to substantially improve the protection of personal injury victims. In particular, it should be noted that in most Member States a victim who is severely injured by a motor vehicle accident (for example, a victim who suffers quadriplegia) is entitled to claim compensation for pecuniary and non-pecuniary losses in excess of the EUR 2,000,000 minimum insurance threshold suggested by the European Parliament in 2001. It is alarming to note that The Commissions current proposal is for a minimum threshold at an even lower level of EUR 1,000,000.

The total number of claims where compensation will exceed EUR 2,000,000 is a tiny fraction of the overall number of motor insurance claims in any year .The total of damages paid in such high value claims is likely to be a very small percentage of the overall compensation paid by insurers in all road traffic accidents . However , the severity of the injuries sustained by such victims mean that the associated costs of maintaining their albeit impaired quality of life are often extremely high .

As an example , in the case of *Martin Willem Otto Biesheuvel V Andrew Birrell (2) [1999] PIQR Q40* , a Dutch National sustained severe spinal injuries leading to quadriplegia in a road traffic accident in England . The accident was caused by fault on the part of the Defendant . As well as the devastating injuries , Mr Biescheuvel sustained very significant loss of earnings and had very substantial past and future medical and care needs . At trial in the High Court in London , Mr Biesheuvel was awarded compensation in the sum of £9,281,692 , which at present rates is the equivalent of EUR 14,674,356 and is more than EUR 13,000,000 in excess of the current minimum insurance threshold proposed by the European Parliament .

Imposing a minimum insurance threshold also acts as an effective ceiling upon awards and settlements in motor accident claims . There is little or no point in claiming compensation above the threshold . The recognition of novel or increased heads of compensation based on the legitimate and reasonable needs of the victim (perhaps in the light of improved medical or scientific knowledge) is thwarted .

If the present proposals of either the Parliament or the Commission are adopted , this will mean that victims with the most severe injuries will not recover levels of compensation which they

require and deserve . Assessment of compensation for the comparatively small number of such victims will in any event remain with National courts , which should be free to award what they consider to be reasonable , unfettered by an arbitrary minimum insurance threshold .

If , contrary to PEOPIL's submission , a minimum threshold for insurance is to be imposed , it should be at a level which is significantly higher than the current proposals . PEOPIL suggest any minimum should be at least EUR 5,000,000 per victim . If a minimum threshold is to be imposed , PEOPIL also suggests a distinction could be drawn between the position of primary victims (persons directly injured by the car accident) and secondary victims, who are those persons who suffer damages (pecuniary and non-pecuniary) resulting from the death or injury of the primary victim . Taking into account current levels of awards in the European Union, a minimum amount of compulsory insurance cover should be at least EUR 2,000,000, *per secondary victim*.

In reviewing increases in any minimum insurance thresholds (*Paragraph 3, Article 2*) levels of actual awards made in member states should also be taken into account in addition to the European Index of Consumer Prices (EICP).

Article 4 (1) of the Proposal – Amendments to Directive 90/232/EEC: Passengers knowledge of the driver's incapacity.

PEOPIL fully supports the rule proposed under sub Paragraph 1 of the Proposal as a matter of general principle. However , whilst insurance cover should be available for such victims, PEOPIL considers the proposed Directive should make clear that this rule cannot be construed as preventing national judges from taking into account, when assessing compensation, the passenger's behaviour in respect of a driver under *evident* influence of alcohol or other intoxicating agent. This is consistent with the approach that passengers should not be exempted from the duty of taking reasonable precautions for the own safety .

Article 4 (2) of the Proposal – Amendments to Directive 84/5/EEC: pedestrians and cyclists.

PEOPIL fully supports the inclusion of pedestrians and cyclists within the compulsory insurance cover referred to in Article 3 (1) of Directive 72/166/EEC. It is also noted that the inclusion of such classes of victims within the compulsory insurance for road traffic accidents is already provided by the national legislation of some Member States.

However, PEOPIL considers any new provision should not state that the cover under the compulsory insurance of the motor vehicle applies to pedestrians and cyclists *“irrespective of whether the driver is at fault”* . The Explanatory Memorandum (Description of Articles) accompanying the Proposal indicates that *“this cover under the compulsory motor insurance of the vehicle does not determine the civil liability of the pedestrian or cyclist in a specific accident or the level of any award for damages”* and *“this should be governed by the applicable national legislation and the national courts”*.

PEOPIL understands that it is not the Commission’s intention to introduce any “no fault” liability in relation to pedestrians and cyclist victims which would extinguish the need for pedestrians and cyclists to take reasonable care to avoid accidents . However , PEOPIL recognises that the level of precautions taken by the driver of a motor vehicle should normally be higher than those undertaken by a pedestrian or cyclist and that these classes of victims are inevitably more vulnerable than drivers of motor vehicles. PEOPIL considers that this could be most appropriately reflected by rules which , in the event of an a collision between a motor vehicle and a cyclist or pedestrian , require that the motorist establish that they have taken all reasonable measures in the circumstances to avoid the collision . If the motorist is unable to establish that they have taken all such reasonable measures , their insurer will be liable to compensate the pedestrian or cyclist victim , subject to any National laws relating to the significance of any contributory fault on the part of the victim and any apportionment of liability in assessing damages .

Member States, which apply a no-fault system in compensating victims (for example Sweden), should be exempted from applying such rules since a different approach would be contrary to the Directive’s scope of improving the protection of such victims.

Article 4(4) of the proposal – The reasoned response and reasoned offer procedures

Whilst PEOPIIL welcomes the extension of key provisions of Directive 2000/26 /EC , including the use of the reasoned response and reasoned offer procedures (Article 4 (e)) , PEOPIIL considers that the word “reasoned “ should be replaced with the term “reasonable “ or a clear definition of “ reasoned “ should be provided in the Directive , to ensure that objectively appropriate replies and offers are made . The current wording allows for wholly unreasonable responses and offers to be made (although they may be “reasoned “) and this undermines the potential effectiveness of the provisions in encouraging realistic and early settlement of victims claims.