The European Market and Motor Third Party Liability: Compensation and reparation for serious bodily injury in Western Europe

Twenty-five years after five States ratified the Schengen Agreements, twenty-five countries have now signed up to this treaty, including Switzerland on 12 December 2008. The Schengen Area now includes twenty-two members of the European Union and three associated States. As decreed by the Schengen Agreements, the principle of the free circulation of people and goods linked to economic growth has naturally contributed to the increase of insurable and reinsurable elements.

Against this backdrop of the opening up of borders, the European Union adopted the 6th directive in September 2009 with a view to implementing a minimum insurance system. Once this directive has been transposed, all road accident victims will have to be covered, regardless of who is responsible for the damage caused and regardless of where such damage occurs.

Despite this shared political ambition, we continue to note major disparities between methods and amounts of compensation in Western Europe.

By breaking down the risks covered and the legal environments involved, we will look at the various reparation and compensation systems in use. We can then establish a comparison of bodily injury costs between several States. Finally, our technical experts will outline the topical issues of their specific markets.
Comparative overview

To make our comparison as pertinent as possible, we will do our best to examine a broad outline of the legal systems of various different countries. We have taken data from nine Schengen States with a similar GDP per inhabitant, in order to facilitate a comparative analysis unaffected by any economic elements.

For the nine States selected, we will devote this first section to the examination of motor risk and the evolution of the surrounding legal framework.

It is important to point out that a comparative analysis of claims occurrence is impossible due to the disparity in the criteria for bodily injury.

The European authorities wanted to strengthen insurance cover, and the resulting 6th Directive\(^1\), effective as of 27 October 2009, currently fixes the minimum amounts of cover for mandatory insurance within the European Union (€1 M/victim and €5 M/claim). This text also includes a Fund for covering the victims of unidentified or uninsured vehicles.

These rules constitute a minimum system to be adopted before 11 June 2012, and each State remains at liberty to adopt more favourable terms and conditions.

Generally, we are seeing a common evolution of national laws towards greater protection for all victims at each stage of the compensation process. The right to compensation for certain categories of victim has been strengthened, for example children under 10 in Germany along with victims aged under 16 or over 70 in France.

With regard to damage assessment, the scope of some heads of damage is constantly expanding, for example consequential damage in Germany and biological damage in Italy.

With regard to settlement, certain laws protect victims from appeals by social security bodies, for example France’s law of 21 December 2006.

Similarly, payment in the form of annuities is developing in the United Kingdom and Switzerland. On the French market, this is already an established practice. Finally, those countries that have a compensation scale periodically conduct reviews in order to keep up with the realities of the current social situation, for example Spain and Belgium.

Specifically, we are seeing several different types of loss of autonomy cover for the most serious victims. These may involve a reparatory reintegration programme, or a compensatory monetary award. In order to satisfy the principal of full compensation, the two methods may be combined.

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Major trends in terms of reparation

Reparation signifies repairing, or “putting back into working order”. The objective is to return some autonomy to the injured party so that he can regain a place in his environment, his work and society in general. This place will most certainly be different to the one he occupied before the accident, but the procedure will help him to regain some kind of status.

Professional rehabilitation and Case Management are the most effective levers in terms of reparation. They may be put into action by the private or public sectors or by cooperation between the two.

In terms of Case Management, there may be several players involved: a physiotherapist to help the victim recover some functional capacity, an occupational therapist to adapt the victim’s environment to the after effects of his accident, a personal development counsellor or social worker to facilitate his return to work.

In certain States, all of these actions are coordinated by the public or private sectors, which delegate management to a reintegration specialist: the Case Manager. The Case Manager must draw up a programme of social, family and professional reintegration and assist the victim throughout this coverage linked to the trauma suffered.

In terms of professional rehabilitation, the most developed policy belongs to the Northern European States. So far, the German system has enabled 2/3 of victims to find new employment and thus to subscribe to social security schemes 2 years after their accidents. If necessary, strong incentives may be implemented to oblige victims to follow a rehabilitation project.

The combination of these two levers consequently provides advantages for both the community and the individual.

<table>
<thead>
<tr>
<th>Country</th>
<th>Case management</th>
<th>Professional rehabilitation</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Social security cover</td>
<td>Private initiative</td>
</tr>
<tr>
<td>Germany</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Austria</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Belgium</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Spain</td>
<td>✓</td>
<td>✓</td>
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<tr>
<td>France</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Italy</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Netherlands</td>
<td>✓</td>
<td>✓</td>
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<tr>
<td>United Kingdom</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Switzerland</td>
<td>✓</td>
<td>✓</td>
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</tbody>
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Source: SCOR Global P&C

Major compensation trends

Compensation means the act of process of making amends for loss or damage. The subjectivity of compensation criteria naturally contributes to the inaccessibility of this objective. How do you match a sum of money to the loss of autonomy or to suffering? The concept of compensation may suffice for economic damage alone, but it remains insufficient for other damage.

For each of the States, the compensation of bodily injury may be examined in the light of three legal indicators.

- What degree of protection do the States want: is the coverage of risks limited?
- What is the scope of compensation: does the claims burden cover the rights of social security bodies as well as the rights of the victim?
- What is the lifetime of a claim: is there any right to act in the event of deterioration after compensation?

<table>
<thead>
<tr>
<th>Country</th>
<th>Minimum cover per claim</th>
<th>Appeals by social security bodies</th>
<th>Reopening due to deterioration</th>
</tr>
</thead>
<tbody>
<tr>
<td>Germany</td>
<td>€7.5 M</td>
<td>Yes</td>
<td>No†</td>
</tr>
<tr>
<td>Austria</td>
<td>€5 M</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Belgium</td>
<td>Unlimited</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Spain</td>
<td>€70 M</td>
<td>Partly</td>
<td>Yes</td>
</tr>
<tr>
<td>France</td>
<td>Unlimited</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Italy</td>
<td>€2.5 M</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Netherlands</td>
<td>€5 M</td>
<td>Partly</td>
<td>Yes</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>Unlimited</td>
<td>Partly</td>
<td>No†</td>
</tr>
<tr>
<td>Switzerland</td>
<td>€31.848 M</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>

Source: SCOR Global P&C

(2) For bodily injuries.
(3) Except reserves at settlement.
Some legislation takes into account not just the damage caused to the victim but also the costs incurred by the social security bodies.

This option must be considered in order to appreciate the degree of protection afforded by the cover. Naturally, the rights of the victim and the social security bodies are thrown into competition if there is a limit to cover. This competition will become sharper if there are several victims. In such situations, the legislator may define an order of priority with regard to creditors.

Unlimited cover means that all claims can be accommodated. Providing more protection on a social level, it generates a lesser degree of foreseeability, particularly in the event of strong compensation volatility.

After the settlement of damages and in the event of deterioration at a later date, the right to act of the victim and the social security bodies is generally maintained. Whilst they provide protection on a social level, these actions lead to legal and financial unpredictability. In fact there is a constant risk that the file will be reopened within the limitation period. In this respect, the disparity in time limits should be highlighted.

This brief analysis illustrates the disparity in systems along with the relativity of the concept of full compensation established by the Council of Europe in 1975 and claimed by each of the States.

The disparity in average costs covered by insurers State by State

Our analysis will be devoted to the most serious kind of bodily injury. We will not look at the scenario of cranial trauma, the after effects of which vary too greatly from one situation to the next. Rather, we will look at a medullar injury that most often leads to total inability to work. For this reason we will also avoid looking at the situation for paraplegics.

The scenario of a quadriplegic victim enables us to make a much more deepened comparative analysis of the costs covered by the insurer.

We will concentrate on the single example of a 30-year-old injured man suffering the after effects of cervical fractures at level C6 to C2.

The graph illustrates the existing disparities between these 9 States. The differences do not emanate from economic factors, since our study has deliberately eliminated these. Certain specific features may explain the differences between costs.

Compensation systems in Spain and the Netherlands deflect appeals by the social security bodies either partially or totally onto the responsible party. Consequently, the cost of awards made is borne by the contributors to social security systems and by the taxpayer. The mutualisation of social expenditure has a wider scope and therefore is easier for the insurance industry to bear.

The situation in the United Kingdom is very singular in the sense that the victim’s legal and defence expenses, which can represent a quarter of the claims burden, weigh down costs.

We should also point out the singularity of the situation in France, where there is a high level of volatility in terms of settlements between different jurisdictions. Although similar to the French system, the amount of compensation in Belgium is lower than 33% due to the presence of a scale. When the damage suffered by the victim is identical, how do you explain such differences, for example to a British citizen subject to the legal system of another State?

In order to better understand this disparity, we set out below an examination by nine of our technical correspondents of the problems currently encountered in Germany, Austria, Belgium, Spain, France, Italy, the Netherlands, the United Kingdom and Switzerland.

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**30-year-old quadriplegic man**

Settlements made by insurers (Base 2007-2008)

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(4) Resolution 75-7 on compensation for bodily injury or death, adopted by the Committee of Ministers of the Council of Europe on 14 March 1975.
Differing perspectives on the current problems involved in compensation

**Hans-Ulrich Finck (Cologne):**
In Germany, the minimum amount of cover for third party bodily injury is fixed at €7.5 million. Despite the infrequency of legal intervention, we are seeing a regular increase in compensation costs due to a combination of several factors. The general spread and increase of compensation for “Schmerzegeld” (moral damages), regardless of who was at fault, constitute an initial factor. Progress in terms of medical techniques has led to an increase in medical and equipment costs, as is the case in other markets. Moreover, the recent introduction of the “Fallpauschalen” (class of payment) system does not provide for any control of health expenses on a case-by-case basis. The amounts awarded for placement in a care institution or for personal care are becoming increasingly large. Finally, the development of compensation in the form of life annuities is contributing to the overall claims burden. These five phenomena are a matter of concern for us and we are already taking them into account.

**Beate Quast (Zurich):**
In Austria, the minimum coverage for third party bodily injury damage is fixed at €5 million. Our compensation system is similar to Germany’s. We are also seeing a rise in the cost of moral damage and future expenses. For future expenses, case law assesses the cost of personal care equally, regardless of whether the care is provided by the family or by a paid employee. Finally, the thirty-year limit constitutes a risk that files will be reopened.

These different phenomena reduce foreseeability and are a source of concern.

**Anne Druesne (Paris):**
In Belgium, coverage for third party bodily injury damage is unlimited. Since 1994, an “indicative compensation table” has been in place to limit the number of heads of damage and to provide a framework for their settlement. The two judges’ associations5 updated this scale in 2004 and 2008. The last revision generated an increase in claims reserves, due notably to the drop in the capitalisation rate from 3% to 2%. The accumulation of interest can constitute a major part of compensation, despite the lowering of rates in 2009 (5.5% instead of 7%). These three factors give us cause to remain vigilant with regard to the evolution of current claims and the assessment of their reserves.

**José Marquez Ruiz (Madrid):**
In Spain, the minimum coverage for third party bodily injury damage is fixed at €70 million. Compensation is governed by a scale. Since it was implemented in 1995, recourse to amicable settlement has increased considerably and is now involved in 90% of claims. Victims have benefitted not only in terms of rapidity but also in terms of security with regard to fixed compensation. At the same time, insurers have improved the visibility of their commitment. Fifteen years after the amicable settlement was adopted, compensation players are thinking about how to adapt it in order to bring it more into line with the current social situation. These changes principally consist of improving the adjustment factor for economic losses, a new capitalisation table for care costs, a new definition of victims, and so on. These proposals should be adopted by 2012 and will most probably generate an increase in compensation and consequently a greater level of reinsurance intervention.

**François Blanchet (Paris):**
In France, coverage for third party bodily injury damage is unlimited. We are seeing an increase in the amount of compensation allocated to victims, with no connection to the usual economic indicators of inflation and production. Although the right to compensation for the victims of road accidents has been governed by a law since 5 July 1985, we are still waiting for an official structure with regard to the right of compensation, through the adoption of a list of heads of damage, a single capitalisation scale and a scale for the assessment of disability. For several years, costs relating to care have been rising due to an increase in both the hours of care provided and the cost of these hours. Today, according to our studies, this head of damage alone represents more than 50% of settlement amounts. There is no tool available to assess the needs and curb the inflation of this head of damage.

In order to reduce the differences in compensation between the various jurisdictions, a draft law is currently under discussion in Parliament. This text proposes a framework for assessment methods, which would reduce the volatility of settlements. We are monitoring the outlook for this reform with great interest.

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5 The National Association of Trial Judges and the Royal Association of Justices of the Peace and the Police.
Stefano Lassa (Milan):
In Italy, the minimum coverage for third party bodily injury damage is fixed at €2.5 million. It is important to point out two specific factors: compensation in the form of annuities does not exist in this market and files are not reopened in the event of deterioration. Victims with after effects of less than 10% are compensated according to a scale. In 2005, the Italian legislature wanted to introduce a similar system for victims with a disability level greater than 10%. Insurers and reinsurers have been waiting for the publication of this system ever since…

Pascal Cornet (Paris):
In the Netherlands, the minimum coverage for third party bodily injury damage is fixed at €5 million. The absence of appeals by the social security bodies makes this compensation system one of the most moderate in Western Europe. Dutch legislature has intervened in order to preserve this balance. Since 1 March 2008, the contractual liability of private or public transporters with regard to road accidents is capped at €1 million per victim, up to a limit of €15 million per claim. Nevertheless, this stability is threatened by the intervention of certain reforms. The law now permits the compensation of indirect victims. A draft law plans to extend the right to compensation for the victim’s economic losses to his professional and personal environment. For its part, the association of victims’ lawyers is campaigning for better compensation with regard to moral damage, to mirror the situation in neighbouring countries. We could therefore see an increase in the cost of claims covered by insurers.

Stuart Lomax (London):
In the United Kingdom, coverage for third party bodily injury damage is unlimited. The relative stability of compensation costs over the past few years could be threatened if judges multiply settlements for future economic losses in the form of annuities. In such a scenario, a drop in the rates used combined with the economic situation would automatically generate an increase in the cost of claims. Currently, however, only a few victims renounce their fixed sum. Uncertainty surrounding the number of files involved considerably reduces the degree of foreseeability attached to this risk in our market.

Viviane Le Dantec-Fuhrmann (Zurich):
In Switzerland, the minimum coverage for third party bodily injury damage is fixed at €31.848 million. There are institutional stability factors at play in Switzerland. Disability insurance involves obligatory professional reinsertion for the victim, focussing on compensation in kind. Moreover, an interest rate of 3.5% is used for the capitalisation of future damage, which has remained unchanged since 1946. However, as in neighbouring countries, our market has seen an increase in the level of compensation awarded. For example, the base rates used for calculating damage to the household have been increased. Generally, there is still no medical scale for assessing disability, which constitutes a source of uncertainty. Nevertheless, the Swiss Insurance Association advocates a medico-legal frame of reference to be published in March 2010.

Despite this context, the Supreme Court has confirmed its attachment to the “principle of legal security” on several occasions, thereby contributing to stability in this area.

Conclusion
This study enables us to observe the extreme variety of compensation and reparation techniques with regard to bodily injury in Europe. The multitude of coverage systems explains the disparity in compensation costs payable by the insurer and contributes to differences in pricing policy. Under such conditions, the standardisation of systems appears difficult, even though the principle of full compensation was established by a Council of Europe resolution in 1975. The proliferation of legal rules and the increase in social needs mean that we really need to have a global vision. To this end, we put our analysis at your disposal so that we can anticipate future developments together.

(6) “Reintegrationsleitfaden Unfall” by Magdalena Guggenheim and Peter Birchler