

OPINION OF ADVOCATE GENERAL
EMILIOU
delivered on 23 April 2026 (1)

Case C-17/25

**LS,
KV,
RY,
UJ,
TM**
v
**Società Cattolica di Assicurazione SpA,
joined parties:
Fata Assicurazione Danni SpA,
BZ,
FN,
NA,
ZI,
DR,
Darag Italia SpA,
EO**

(Request for a preliminary ruling from the Corte suprema di cassazione (Supreme Court of Cassation, Italy))

(Reference for preliminary ruling – Motor vehicle civil liability insurance – Directive 84/5/EEC – Non-material damage suffered by the victim’s heirs – Action for recovery brought by the insurer – Plea of nullity in respect of a contractual clause included in the insurance policy – No power for the court to review the validity (enforceability) of that clause – Effects of a judgment having acquired the force of res judicata on the validity (enforceability) of that clause)

I. Introduction

1. Under Article 2(1) of Second Council Directive 84/5/EEC, (2) the Member States were under an obligation to provide that any statutory provisions or clauses contained in insurance policies that excluded from the insurance cover, in particular, the use or driving of vehicles in breach of the technical requirements concerning their condition and safety were to be void (or rather, unenforceable) vis-à-vis victims of road traffic accidents. (3) The same rule is now set out in Directive 2009/103/EC, (4) the legal successor to the Second Directive (and to the other directives in that area). (5)

2. The dispute in the main proceedings concerns a road traffic accident that involved a collision between a motorcycle and another vehicle; the motorcyclist and his passenger were both killed. The passenger was the owner of the motorcycle and the holder of the insurance policy covering that motorcycle. The insurance company concerned brought recovery proceedings against the passenger's heirs, claiming reimbursement of the sums paid to them in respect of the non-material damage caused by the passenger's death. In support of its claim, the insurance company argued that the motorcycle was technically suitable for the transport of only one person (the rider) and that the insurance policy excluded cover in the event of unlawful transportation of persons ('the exclusion clause').

3. There have been several stages in these proceedings. At the current stage, pending (for the second time) before the Corte suprema di cassazione (Supreme Court of Cassation, Italy), which is the referring court, the passenger's heirs argue that the exclusion clause is void. The referring court observes that the plea concerning the (relative) nullity of the exclusion clause is inadmissible under national law because of the effects of *res judicata*, produced by a judgment handed down at an earlier stage of the proceedings and confirming the insurer's right to bring the action for recovery against the passenger's heirs based on that clause, given that that right had not been challenged. The referring court also observes that such (implied) confirmation of the insurer's right to bring an action for recovery appears to be in breach of the rule laid down in Article 2(1) of the Second Directive (which applies *ratione temporis* to the case at hand). (6) That court therefore wonders whether EU law requires the national effects of *res judicata* to be set aside to allow for that matter to be examined, so as to ensure the effectiveness of the abovementioned provision.

4. This matter draws inspiration from, in particular, the Court's case-law establishing an obligation for the national courts to disregard the effects of *res judicata* in consumer matters where, in simple terms, those courts have failed to examine, at an earlier stage of the judicial proceedings, the possible unfairness of terms in consumer contracts. (7) That obligation emerged as a result of progressive case-law developments (which, as I will explain later, culminated in the recent judgment in *Soledil*) and constitutes an exception to the rule that final judicial findings are to remain intact. The questions referred for a preliminary ruling in the present case afford the Court an opportunity to clarify, for the first time, whether that obligation applies in the field of EU legislation on motor vehicle liability insurance, based on considerations specific to the protection of victims of road traffic accidents, which is one of the objectives pursued by that legislation.

II. Legal framework

A. European Union law

5. The second recital of Directive 72/166/EEC (8) stated that 'whereas the only purpose of frontier controls of compulsory insurance cover against civil liability in respect of the use of motor vehicles is to safeguard the interests of persons who may be the victims of accidents caused by such vehicles; whereas the existence of such frontier controls results from disparities between national requirements in this field'.

6. The third recital of that directive stated that 'whereas these disparities are such as may impede the free movement of motor vehicles and persons within the Community; whereas, consequently, they have a direct effect on the establishment and functioning of the common market'.

7. The fifth recital of the same directive provided that 'whereas it is desirable that the inhabitants of the Member States should become more fully aware of the reality of the common market and that to this end measures should be taken further to liberalise the rules regarding the movement of persons and motor vehicles travelling between Member States; ...'.

8. The sixth recital of that directive further stated that 'whereas such relaxation of the rules relating to the movement of travellers constitutes another step towards the mutual opening of their markets by Member States and the creation of conditions similar to those of a domestic market'.

9. Article 3(1) of the First Directive provided that 'each Member State shall ... take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is

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

10. The third and seventh recitals of the Second Directive were worded as follows:

‘Whereas, however, major disparities continue to exist between the laws of the different Member States concerning the extent of this obligation of insurance cover; whereas these disparities have a direct effect upon the establishment and the operation of the common market;

...

Whereas it is in the interest of victims that the effects of certain exclusion clauses be limited to the relationship between the insurer and the person responsible for the accident; ...’

11. Article 2(1) of the Second Directive stated:

‘Each Member State shall take the necessary measures to ensure that any statutory provision or any contractual clause contained in an insurance policy issued in accordance with Article 3(1) of [the First Directive] which excludes from insurance the use or driving of vehicles by:

- persons who do not have express or implied authorisation thereto, or
- persons who do not hold a licence permitting them to drive the vehicle concerned, or
- persons who are in breach of the statutory technical requirements concerning the condition and safety of the vehicle concerned,

shall, for the purposes of Article 3(1) of [the First Directive], be deemed to be void in respect of claims by third parties who have been victims of an accident.

However the provision or clause referred to in the first indent may be invoked against persons who voluntarily entered the vehicle which caused the damage or injury, when the insurer can prove that they knew the vehicle was stolen.

Member States shall have the option – in the case of accidents occurring on their territory – of not applying the provision in the first subparagraph if and in so far as the victim may obtain compensation for the damage suffered from a social security body.’

12. The fifth recital of Third Council Directive 90/232/EEC (9) stated that ‘whereas there are, in particular, gaps in the compulsory insurance cover of motor vehicle passengers in certain Member States; whereas, to protect this particularly vulnerable category of potential victims, such gaps should be filled’.

13. The thirteenth recital of the Third Directive stated that ‘whereas such an addition, which leads to greater protection for the parties insured and for the victims of accidents, will facilitate still further the crossing of internal Community frontiers and hence the establishment and functioning of the internal market; whereas, therefore, a high level of consumer protection should be taken as a basis’.

14. Article 1(1) of the Third Directive stated that ‘without prejudice to the second subparagraph of Article 2(1) of [the Second Directive], the insurance referred to in Article 3(1) of [the First Directive] shall cover liability for personal injuries to all passengers, other than the driver, arising out of the use of a vehicle’.

B. Italian law

15. The referring court cites in particular Article 2059 of the Codice Civile (Civil Code), as interpreted by national case-law, concerning compensation for non-material damage suffered by the close family members of a person who has died in an accident. The referring court explains that those family members are to be regarded as victims and, therefore, as injured third parties whose right to compensation cannot be undermined by an action for recovery brought by the insurer.

16. The referring court also explains that the Codice di procedura civile (Code of Civil Procedure; ‘the CPC’) does not allow claims brought in civil proceedings to be amended at will. At first instance, the claim may only be amended within narrow limits (see Article 171^{ter} of the CPC or, for the rules in force at the time of the first instance proceedings, Article 183 of the CPC). In appeal proceedings, the addition of new grounds is not permitted (Article 345 of the CPC); the same applies to reviews of legality (Article 360 of the CPC).

17. Furthermore, in the event of an appeal in cassation against an appeal judgment, ‘in referral proceedings ... the parties may not make submissions other than those made in the proceedings in which the judgment under appeal was handed down, unless the need for new submissions arises from the judgment in cassation’ (Article 394, third paragraph, of the CPC). The issues examined by an appeal court which are not contested in cassation therefore have the status of *res judicata* (Article 2909 of the Civil Code and Article 324 of the CPC). Derogations from that principle are possible only where the cassation with referral concerns a part of the judgment that is the logical or legal prerequisite for another part of the same decision (Article 336, first paragraph, of the CPC).

18. Furthermore, in response to the question put to it by the Court, the referring court explains that Article 2(1) of the Second Directive was not transposed by national legislation into an ad hoc legislative act, but that all the provisions laid down by that directive (with the exception of Article 3, which is not at issue here) were already provided for by legge 24 dicembre 1969, n. 990, relativa all’assicurazione obbligatoria della responsabilità civile derivante dalla circolazione dei veicoli a motore e dei natanti (Law No 990 relating to compulsory insurance against civil liability in respect of the use of motor vehicles and craft) of 24 December 1969 (GURI No 2 of 3 January 1970) (‘Law No 990’).

19. In particular, the second paragraph of Article 18 of that law enshrined the principle that contractual clauses limiting insurance cover could not be enforced against injured third parties (a rule which, according to the referring court, corresponds to Article 2(1) of the Second Directive). More specifically, that provision provided that ‘for the entire maximum amount of the policy, the insurer may not rely, against the injured party acting directly against it, on any exceptions arising from the contract or on any clauses providing for the possible contribution of the insured party to the compensation for the damage. However, the insurer shall have a right of recourse against the insured party to the extent that it would have been entitled under the contract to refuse or reduce his or her benefit.’

III. Facts, national proceedings and questions referred

20. PA died in a road traffic accident on 30 August 1998. It occurred while PA was travelling on a motorcycle owned by him that was ridden by SE, who was also killed in the accident. The motorcycle was insured against civil liability by FATA SpA, which subsequently became Società Cattolica di Assicurazioni SpA (‘Cattolica’). PA was the policyholder.

21. In 1999, TM, EO, RY, LS, KV and UJ (‘PA’s relatives’) brought proceedings before the Tribunale di Crotone (District Court, Crotone, Italy) against all persons who might, in principle, be held liable for the accident, including Cattolica. The proceedings were concluded at first instance by the judgment of 24 January 2005 of the Tribunale di Crotone (District Court, Crotone), by which SE was held 80% liable for the accident (the remaining 20% having been attributed to the driver of the other vehicle).

22. While those proceedings were pending, Cattolica brought proceedings before the same court against PA’s relatives, claiming that (i) the motorcycle at issue had been recognised as technically suitable for the transport of only one person; (ii) the insurance policy covering that vehicle excluded cover in the event of unlawful transportation of persons; (iii) although that exclusion was not enforceable against the injured third party, it allowed the insurance company to claim reimbursement from the policyholder of sums paid to the victim of the accident; (iv) since the policyholder had died, his debts had been transferred to his heirs under the law of succession; and (v) in consequence, although PA’s relatives were entitled to be compensated for PA’s death, they also inherited his debts and therefore had to repay the insurer the sums paid to them in their capacity as injured third parties. On

that basis, Cattolica claimed that they should be ordered to reimburse all the sums paid or to be paid to them ('the action for recovery').

23. The Corte di appello di Catanzaro (Court of Appeal, Catanzaro, Italy), in a judgment of 27 September 2012, ordered PA's relatives to repay the amounts received from Cattolica. Cattolica brought an appeal on a point of law against that judgment, claiming that the Corte di appello di Catanzaro (Court of Appeal, Catanzaro) had ruled on the claim for reimbursement of the sums already paid to PA's relatives by way of payment on account, but had not ruled on the obligation to reimburse the sums to be paid to them in the future.

24. By judgment of 10 May 2016, the Corte suprema di cassazione (Supreme Court of Cassation) upheld that appeal, ruling that Cattolica was entitled to recover in full the sums already paid and those still to be paid, provided that the court hearing the substance of the case were to find that PA's relatives were PA's heirs. The hearing on the substance of the case was resumed before the Corte di appello di Catanzaro (Court of Appeal, Catanzaro). By judgment of 21 December 2020, that court found that PA's relatives were PA's heirs, ordered them to repay Cattolica the sums already received, and ordered that the sums still due be offset against those to be repaid pursuant to the action for recovery. (10)

25. LS and KV (two of PA's relatives) brought an appeal on a point of law against that judgment before the Corte suprema di cassazione (Supreme Court of Cassation). UJ, RY and TM joined that appeal (LS, KV, UJ, RY and TM are referred to here as 'the appellants in the main proceedings'). Before that court, those appellants submit, for the first time since the beginning of the main proceedings, that the exclusion clause is void on the ground that it is contrary to Article 2(1) of the Second Directive.

26. The referring court observes that this argument, although potentially well founded, is manifestly inadmissible under national law, since it was not raised at an earlier stage of the proceedings. It follows that Cattolica's right under the exclusion clause is now covered by the effects of *res judicata* deriving from earlier judicial decisions handed down in the proceedings, due to the absence of a plea being raised in that regard. However, the referring court notes that the Court's case-law has recognised that there are several exceptions to the principle of the finality of judgments and harbours doubts as to whether one such exception should apply to the circumstances of the present case. That court also notes that the appellants in the main proceedings had shown what it considers to be complete inactivity by failing to claim the nullity of the disputed clause at an earlier stage of the proceedings.

27. In those circumstances, the Corte suprema di cassazione (Supreme Court of Cassation) decided, by decision of 23 December 2024, received at the Court on 15 January 2025, to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- '(1) Does Article 2 of [the Second Directive], in a situation such as the one at issue in these proceedings, preclude national legislation which, by reason of the fact that a judgment has acquired the force of *res judicata* in Italian civil proceedings, prevents raising for the first time before the [Corte suprema di cassazione (Supreme Court of Cassation)] the nullity of a clause, included in a [motor vehicle civil liability] insurance contract, which, in breach of [the Second Directive], allows the insurer to bring an action for recovery against the person transported who is both the injured and insured party?
- (2) Does the principle that the effectiveness of [EU] law takes precedence over the force of *res judicata* apply even where: (a) the force of *res judicata* adversely affects the right to compensation for damage, conferred by Article 2 of [the Second Directive] on members of the family of the person who has died as a result of a road traffic accident, from the [motor vehicle civil liability] insurer; (b) the holder of that right has acted in a wholly passive manner in the proceedings which were concluded as a result of the force of *res judicata* adversely affecting EU law[?]

28. Furthermore, the referring court requested that the present reference for a preliminary ruling be dealt with pursuant to the expedited procedure provided for in Article 105 of the Rules of Procedure of the Court of Justice. In support of that request it referred, first, to the relevance of the Court's future judgment to many other cases, given the wide use of contractual clauses such as the one at issue here.

Second, it pointed to the length of time that has elapsed since the events giving rise to the present proceedings.

29. The President of the Court refused that request by order dated 8 April 2025, recalling that, pursuant to the Court's established case-law, the mere interest (while legitimate) of litigants in determining as quickly as possible the scope of their rights under EU law does not, in itself, constitute an exceptional circumstance which could justify the use of the expedited procedure. In that order, the President of the Court also recalled that the same applies as regards the large number of persons or legal situations which may be affected by the decision that the referring court must give after making a request to the Court for a preliminary ruling. (11)

30. Written observations in the present proceedings were submitted by Cattolica, the Italian and Finnish Governments and the European Commission. Those governments and the Commission presented oral argument at the hearing that took place on 12 March 2026.

IV. Assessment

31. By its questions, the referring court asks, in essence, *first*, whether EU law precludes the effects of *res judicata* under national law which cover the right of an insurer to seek reimbursement of compensation paid (or to be paid) to the heirs of a passenger who was the victim of a road traffic accident. In the present case, that passenger was also the policyholder and used the vehicle concerned in breach of its technical specifications. This question arises in a situation where the action seeking such reimbursement is based on a term of the insurance policy that is claimed to be in breach of the rule deriving from Article 2(1) of the Second Directive. I recall that, under that rule (now set out in Article 13(1)(c) of Directive 2009/103), the Member States had to ensure that statutory provisions or contractual terms excluding from the insurance cover, in particular, the use of the vehicle contrary to the vehicle's technical and safety specifications were to be void (unenforceable) vis-à-vis third parties who had been victims of an accident. That question draws inspiration from, in particular, the *res judicata* exception that the Court has developed in the field of consumer protection governed inter alia by Directive 93/13/EEC (12) and that applies in situations where the national courts have failed to examine the possibly unfair nature of the relevant contractual terms.

32. *Second*, the referring court asks whether the assessment of the above question is affected by the fact that the appellants in the main proceedings 'have acted in a wholly passive manner'. As I will explain later, those terms are inspired by the concept of 'complete inaction' that is, again, borrowed from the case-law developed in the context of Directive 93/13, and the referring court employs it to describe the fact that the appellants in the main proceedings failed to claim the nullity of the exclusion clause at an earlier stage of the proceedings (in which they otherwise actively participated).

33. Before turning to the merits of those questions (B), I will briefly address their admissibility (A).

A. Admissibility of the questions referred

34. Without formally raising an objection of inadmissibility in respect of the request for a preliminary ruling, Cattolica states in its written observations that the Corte suprema di cassazione (Supreme Court of Cassation) exceeded its jurisdiction by making the present request. That is because, in that party's view, the wording of the applicable national law precludes an interpretation of national law that is in conformity with EU law. Specifically, that party submits that Article 2909 of the Civil Code provides that the effects of *res judicata* extend both to questions expressly raised and to those implicitly adjudicated upon. Even if the Court were to conclude that EU law requires the national effects of *res judicata* to be set aside in the present circumstances, that result cannot be obtained under the relevant national law because it would amount to a *contra legem* interpretation of Article 2909 of the Civil Code.

35. In that respect, I note that, *first*, in the context of a preliminary ruling procedure governed by Article 267 TFEU, it is not for the Court, in view of the division of functions between it and the national courts, to verify whether the decision to refer the case was taken in accordance with the national rules of judicial organisation and procedure. (13)

36. *Second*, I recall that, in the present procedural context, ‘it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court’. (14) Consequently, the presumption of relevance which questions referred for a preliminary ruling generally enjoy implies that where the questions submitted concern the interpretation of EU law, the Court is, in principle, required to give a ruling unless, in particular, it is quite obvious that the interpretation of EU law sought bears no relation to the actual facts of the main proceedings or their purpose. (15)

37. In the present case, the questions referred seek to establish whether the effectiveness, which Member States are required to ensure, of the rule set out in Article 2(1) of the Second Directive makes it necessary for the national rule of *res judicata* to be disregarded in a situation where a final judicial determination has confirmed a right that is alleged to be in contradiction with that rule. The explanation provided in the order for reference makes it clear that that question of EU law is directly relevant for the decision that the referring court will have to adopt on the admissibility of the plea raised before it concerning the exclusion clause. In those circumstances, the relevance of the questions referred is clearly established.

38. As regards, *third*, the observation made by Cattolica about the alleged impossibility of interpreting Article 2909 of the Civil Code in conformity with the requirement to disregard the national effects of *res judicata* in the circumstances of the main proceedings (if, again, such a requirement were to be established), the determination of that matter falls to the referring court in the light of the interpretative possibilities offered under the applicable national law. The fact that the present reference has been made without any questions being raised concerning the purported impossibility of interpreting the above provision of national law in conformity with EU law indicates that the referring court has not identified any interpretative obstacle such as the one described by Cattolica.

39. Moreover, and notwithstanding the above, an incompatibility between a rule of national law and a requirement of EU law can generally be addressed by other means. Where it is impossible to interpret national law in conformity with EU law, an obligation may arise to set the incompatible rule of national law aside (where the rule of EU law which governs the situation has direct effect). (16) It is true that that possibility does not arise in horizontal relationships such as the one at issue in the main proceedings (given that the provision at issue forms part of a directive and a directive cannot be relied on as such against another private individual). (17) However, where it is not possible to ensure compliance with EU law in the above ways, the party concerned can seek to engage the liability of the relevant Member State before the national courts. (18) It follows that the (potential) impossibility of ensuring compliance with a reply that the Court provides in a given case by interpreting national law in conformity with EU law does not render that reply (and therefore the questions having prompted it) irrelevant.

40. For all those reasons, the present request for a preliminary ruling must, in my view, be considered to be admissible.

B. Merits of the questions referred

41. In this Section, I will first make some preliminary comments on the scope of the present reference (1). I will then turn to the relevant regulatory context, including the position of EU law vis-à-vis the national effects of *res judicata* in, in particular, consumer matters (2). On that basis, I will explain that, notwithstanding some similarities, the specific features of the protection provided for in Directive 93/13 that have justified a (rather broadly defined) exception to the national effects of *res judicata* are not present in the area of motor vehicle liability insurance (3).

1. Scope of the analysis

42. I wish to make two clarifications concerning the scope of the present analysis.

43. *First*, as the Commission recalls, the situation in the main proceedings involves private parties (the appellants in the main proceedings) claiming the nullity (unenforceability) of a contractual term

vis-à-vis another private party (Cattolica) on the ground of infringement of Article 2(1) of the Second Directive. However, according to the Court's established case-law, and as already briefly noted above, a directive cannot have direct horizontal effect between private individuals. (19) Thus, Article 2(1) of the Second Directive cannot be relied on as such against the insurer to argue that the exclusion clause at issue is null (unenforceable). That said, the referring court explains that the rule set out in that article is reflected in the second paragraph of Article 18 of Law No 990 (as follows from points 18 and 19 above). It also explains that that provision, as interpreted by the national courts, enshrines the principle that contractual clauses limiting insurance cover cannot be enforced against injured third parties, as the Italian Government also observed at the hearing.

44. In those circumstances, the present reference cannot be regarded as raising the issue of the direct applicability of Article 2(1) of the Second Directive in a horizontal relationship, but rather as seeking an interpretation of its provisions for the purpose of the correct (EU-law-compliant) application of the equivalent provision of national law as well as of the relevant provisions of national law relating to *res judicata*.

45. *Second*, the present reference primarily concerns the implications of the consumer-related *res judicata* exception in the area of motor vehicle liability insurance. That said, in its written submissions, the Commission observed that should the relationship between Cattolica and PA be classified as one between a seller or a supplier and a consumer within the meaning of Directive 93/13, the principles flowing from the protection provided for in that directive would automatically apply (including those relating to the *res judicata* exception). The interaction between both regimes was also debated in depth at the hearing.

46. Against that background and to make it easier for the reader to navigate the following analysis, I will conduct my assessment of the applicability of the *res judicata* exception developed in the area of consumer protection in the light of the specific objectives of EU legislation in the field of motor vehicle liability insurance, in line with the referring court's request. I will then turn to the relationship (and possible overlap) between that area of law and Directive 93/13. (20)

2. *Relevant regulatory context*

47. As indicated above, I will start this subsection by commenting on the concept of a third party who has been the victim of an accident within the meaning of the EU law regime on compulsory insurance against civil liability in relation to the use of motor vehicles (a). I will then turn to the position that EU law takes on the effects of *res judicata* under national law (b).

(a) *Concept of a third party who has been the victim of an accident*

48. The referring court notes that the judgment of the Corte di appello di Catanzaro (Court of Appeal, Catanzaro), challenged before it, appears to have infringed EU law by denying the right to compensation to the heirs of a person who, while being transported as a passenger in a motor vehicle (for which he was the relevant policyholder) died in a road traffic accident involving that vehicle, and must therefore be considered to be a third party who has been the victim of an accident within the meaning of the relevant EU rules in the field of motor vehicle civil liability insurance.

49. In that regard, I recall, *first*, that those rules of EU law pursue a twofold objective: 'first, to ensure the free movement of vehicles normally based in the territory of the European Union and of persons travelling in those vehicles and, second[,], to guarantee that the victims of accidents caused by those vehicles receive comparable treatment irrespective of where in the European Union the accident occurred'. (21)

50. *Second*, as regards the persons to whom that guarantee of comparable protection applies, the Court has repeatedly stated that the only distinction permitted is that between the driver and the passenger. (22) It follows that all the passengers must be protected under the EU law rules on motor vehicle civil liability insurance and their legal position must be the same, irrespective of whether they are also, in particular, the policyholder. (23) In other words, the fact that a passenger has the status of policyholder does not affect his or her status of third party who has been the victim of an accident (24)

(although such a passenger cannot obviously be considered to be a third party vis-à-vis the insurance policy covering the vehicle involved in the accident).

51. *Third*, the Court has held that insurers are generally prevented from relying on statutory provisions or contractual clauses in order to refuse to compensate victims of accidents. (25) It has also explained that Article 2(1) of the Second Directive simply repeats that obligation by requiring the Member States to ensure that certain statutory provisions or clauses in an insurance policy are void (unenforceable) vis-à-vis third parties who have been the victims of an accident. (26)

52. I recall that the categories of provisions or clauses that the EU legislature has singled out concern those excluding the use of vehicles (i) by persons who do not have express or implied authorisation thereto; (ii) by persons who do not hold a licence permitting them to drive the vehicle concerned; and (iii) by persons who are in breach of the statutory technical requirements concerning the condition and safety of the vehicle (at issue here). In that context, the Court has stressed that the only derogation from the obligation to compensate third-party victims concerns the first category referred to above, as regards persons who voluntarily entered the vehicle which caused the damage or injury, when the insurer can prove that they knew that the vehicle was stolen, (27) as was apparent from the second subparagraph of Article 2(1) of the Second Directive (now the second subparagraph of Article 13(1) of Directive 2009/103). (28) That derogation does not appear to be applicable here.

53. *Fourth and finally*, while the rules of EU law relating to motor vehicle civil liability insurance do not seek to harmonise the rules of the Member States governing civil liability applicable to road accidents, the latter rules may not deprive the former of their effectiveness. (29) The Court has repeatedly held that that would occur if, solely on the basis of the victim's contribution to the occurrence of his or her injuries, national rules, established on the basis of general and abstract criteria, either denied the victim the right to be compensated by the compulsory insurance against civil liability in respect of the use of motor vehicles or limited such a right in a disproportionate manner. (30)

54. On that basis, the Court has held the following to be incompatible with EU law: national legislation whereby compulsory motor vehicle liability insurance does not cover liability in respect of personal injuries to persons (who were genuine third-party victims) travelling in a part of a motor vehicle which has not been designed and constructed with seating accommodation for passengers; (31) legislation permitting the refusal or disproportionate limitation of compensation to be paid by an insurer to the victim of an accident, where the latter was the owner of the vehicle and contributed to the damage or injury by deciding to travel in that vehicle despite it being driven by someone who was under the influence; (32) legislation excluding automatically from the benefit of insurance a passenger who was a victim in a road traffic accident, was insured to drive the vehicle and had also given permission to an uninsured driver to drive that vehicle; (33) and, finally, legislation allowing the insurer to rely on the nullity of the insurance policy on account of the intentionally false declarations made by the insured party who was a victim in a road traffic accident, upon the conclusion of that policy, as regards the identity of the usual driver of the vehicle concerned. (34)

55. It is in the light of those principles that the referring court seems to consider that the fact that Cattolica was able at an earlier stage of those proceedings to recover the sums due to the appellants in the main proceedings in relation to the accident that caused PA's death is incompatible with the rule under Article 2(1) of the Second Directive.

56. That said, the precise implications of the case-law referred to in points 53 and 54 above for the dispute in the main proceedings do not form the subject matter of the present reference and are therefore not examined here in further detail. Indeed, that reference seeks to ascertain whether such an examination must be allowed as a matter of EU law as it is precluded by national law due to the effects of *res judicata*. In consequence, I must now turn to the exceptions to the above expression of the principle of legal certainty that follow from EU law.

(b) EU law and the national effects of *res judicata*

57. As a preliminary point, I note that there is no general obligation under EU law that would require 'a national court to disapply domestic rules of procedure conferring finality on a judgment, even if to do so would make it possible to remedy a domestic situation which is incompatible with EU law'. (35)

The Court has repeatedly drawn attention to the importance of the principle of *res judicata*, which is, in simple terms, justified by the interest in the stability of the law and legal relations, and by the sound administration of justice, (36) as recalled, in essence, by all the interested parties to the present proceedings.

58. At the same time, that rule is not an absolute one. The question whether EU law may, in some situations, require the national effects of *res judicata* to be disregarded (by derogation from the general rule described above) must be viewed through the prism of the principles of equivalence and effectiveness which frame the exercise of the procedural autonomy of the Member States in accordance with the duty of sincere cooperation, enshrined in Article 4(3) TEU. (37)

59. The consideration of those two principles has resulted in the identification of several exceptions to the national effects of *res judicata*. The exceptions that have been established based on the principle of effectiveness (which is the only relevant principle here) (38) can be divided into three broad categories.

60. A first category concerns an exception specific to the area of State aid, in which that exception was justified, in particular, by reference to the division of competences between the European Union and the Member States in that field of law. (39) The second category concerns situations in which the national effects of *res judicata* are so broadly construed as to prevent the achievement of EU-law-compliant results in related cases. (40) I agree with the Finnish Government and the Commission that neither of those two categories of exceptions is in play here.

61. For the reasons that will be set out below, the same cannot be said about the third category, that is, of exceptions concerning consumer protection under, in particular, Directive 93/13 on unfair terms in consumer contracts. That protection involves the following two key aspects which are relevant here.

62. *First*, the Court has consistently recalled that ‘the system of protection introduced by Directive 93/13 is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his or her bargaining power and his or her level of knowledge’. (41)

63. To compensate for that weaker position, Article 6(1) of Directive 93/13 provides, essentially, that unfair terms are not binding on consumers, the latter being ‘a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them’. (42) In the same vein, the Court has explained that that provision must be regarded as one of equal standing to national rules that have the character of rules of public policy within the domestic legal order, (43) and it also referred to ‘the public interest underlying the protection which Directive 93/13 confers on consumers’. (44) It is the requirement to re-establish genuine equality between the parties that entails an obligation for the national courts to assess of their own motion (where necessary) whether a contractual term falling within the scope of Directive 93/13 is unfair. (45)

64. *Second*, where that obligation has been infringed and where the legality of the contractual term at issue is considered to have been impliedly and finally adjudicated upon (in the absence of the question of legality having been raised and properly examined), the national effect of *res judicata* cannot prevent a subsequent judicial review. (46) That consequence flows from the obligation for the Member States to provide for ‘adequate and effective means to prevent the continued use of unfair terms in [consumer] contracts’, which is set out in Article 7(1) of Directive 93/13 and which, according to the Court, reaffirms the principle of effective judicial protection, also reflected in Article 47 of the Charter of Fundamental Rights of the European Union. (47)

65. The Court developed the above principles, in particular, in the context of ‘simplified’ summary procedures such as those relating to the foreclosure of mortgages and the issue or enforcement of payments orders. (48) However, it has also made clear that they apply in the context of ordinary proceedings, which may have involved several stages in which consumers participated and which were unaffected by any restrictive rule of national procedural law which would make it excessively difficult or impossible for those consumers to assert their rights. Indeed, it follows from the Court’s recent judgment in *Soledil* (which concerned a case involving several stages of ordinary proceedings with consumers’ participation) that it was the (mere) failure on the part of the national court to examine the

possible unfairness of the relevant contractual terms which resulted in such an excessive difficulty or impossibility. (49)

66. Having recalled those elements, I will now turn to the crux of the matter to examine whether the principles described above, developed in the field of consumer protection, must apply by analogy to the circumstances in the main proceedings, with the result that the national effects of *res judicata* must be disregarded.

3. *Res judicata in the circumstances of the present case*

67. In order to take a position on the first question referred, as summarised in the previous point, I will consider in more depth the rationale of the consumer-related *res judicata* exception which, as I will explain, is closely related to the *ex officio* examination obligation also developed in the same field of law (a). On that basis, I will explain that because the latter obligation does not apply, in my view, in the area of law under consideration here, neither can the above *res judicata* exception apply (b). For the sake of completeness, should the Court disagree with my analysis, I will address the concept of the consumer's 'complete inaction' as alluded to in the second question referred (c), before making some closing remarks about the relationship between Directive 93/13 and the field of motor vehicle civil liability insurance (d).

(a) *The two-pronged rationale of the res judicata exception in consumer matters*

68. I have already observed that the protection of consumers required under Directive 93/13 has led the Court progressively to develop what has become a broadly defined exception to the rule of *res judicata*. The Court has explained, in essence, that without that exception, that protection would be 'incomplete and insufficient' where the courts have failed to examine the possible unfairness of the relevant contractual terms. (50)

69. Given that, in particular, passengers who are victims of road traffic accidents are considered to be vulnerable parties, (51) the question arises as to whether the protection they are to receive under EU legislation in the area of motor vehicle liability insurance must lead to the same *res judicata* exception being applicable.

70. Cattolica and the Italian and Finnish Governments argue in favour of a negative reply. The Commission acknowledges the arguments for and against such an extended application while expressing a preference, at the hearing, for the consumer-related *res judicata* exception to be extended to cover the area considered here.

71. I note that, as a first step, the above matter can be addressed by reference to the traditional analysis of the limits that the European Union can impose on the Member States' procedural autonomy (as observed in point 58 above). Viewed from that perspective, I note that there is no indication, in the order for reference, of any restrictive rule of national law that would make it excessively difficult or impossible for the victims of road traffic accidents (or their heirs) to enforce their rights. (52)

72. However, I have already explained that the key element flowing from the Court's case-law relating to *res judicata* in the context of Directive 93/13 is the clarification that, where a national court has failed adequately to review the contractual terms, (53) the effectiveness of the protection to be granted to the consumer is considered to have been undermined. In other words, the conclusion that the principle of effectiveness has been infringed (which requires the effects of *res judicata* to be disregarded) does not depend on the identification of a particularly restrictive rule of procedure that would be 'responsible' for the consumer's difficulties in protecting his or her rights. The mere failure on the part of a national court to review, of its own motion where necessary, the possible unfairness of the relevant contractual term suffices to make that conclusion, irrespective of whether the consumer has faced specific procedural hurdles (such as an extremely short limitation period to lodge an action or to file a defence) making it 'excessively difficult' for him or her to state his or her case or defend himself or herself appropriately and to raise the question of the unfairness of the term at issue. I recall that that conclusion also stands, irrespective of whether the relevant proceedings were, by their nature, particularly expedient (the issue or enforcement of payment orders, mortgage proceedings) or whether they were ordinary. (54)

73. I also recall that both obligations (to conduct an *ex officio* examination and, if no such review has taken place, to disregard the effects of *res judicata*) emerged progressively within a legal framework that reflects concerns of public policy or public interest, (55) in which both obligations are closely linked. Indeed, the Court has observed that the ‘obligation to carry out ... an *ex officio* examination is justified by the nature and importance of the public interest underlying the protection which Directive 93/13 confers on consumers, with the result that an effective review of the possible unfairness of contractual terms, as required by that directive, could not be guaranteed if the force of *res judicata* were to be extended to judicial decisions which do not indicate that such a review has been conducted’. (56)

74. It is true that the existence of an obligation to conduct an *ex officio* examination of the enforceability of the exclusion clause at issue is not called into question in the main proceedings, because the appellants raised the matter themselves before the referring court. (57) That said, it follows from the above that, in order to conclude that a *res judicata* exception applies in the context of the Second Directive, it is necessary to establish, first of all, that the public interest underlying that directive is such as to require national courts to examine of their own motion the enforceability of a particular contractual clause included in an insurance policy (a matter which, as the Commission noted, has not yet been considered in the Court’s case-law). In other words, the conclusion as to the obligation to disregard the effects of *res judicata* cannot be reached without simultaneously identifying an obligation for the national courts to raise the relevant point of law of their own motion.

75. I will therefore turn to the question whether the rationale of the protection to be afforded to victims of road traffic accidents triggers an obligation for the national courts to examine, of their own motion, whether an insurer can rely, vis-à-vis such victims, on a clause excluding from the insurance cover loss or injury caused in certain situations (such as in the case of illegal transport). That clarification will allow me to address the question whether, moreover, under that legislative framework, an exceptional obligation to disregard the effects of *res judicata* arises as well.

(b) *The two-pronged rationale in the field of motor vehicle liability insurance*

76. As a preliminary point, I recall that there is no general obligation under EU law requiring national courts to raise, of their own motion, an infringement of EU law, irrespective of the importance of the provision concerned to the EU legal order, where the parties are given a genuine opportunity to raise such a plea before a national court. (58) That position can be explained by the fact that, in civil litigation in particular, it is typically for the parties to take the initiative, while the courts are not required to raise a particular plea of their own motion where that would mean going beyond the scope of the action. Consequently, the Court has required the national courts to act of their own motion as a matter of EU law only in exceptional cases when justified by the public interest. (59)

77. I have already explained that that is the case, in particular, in the field of consumer protection, more specifically in the situations falling within the scope of Directive 93/13. The Court has extended that obligation, moreover, to situations under other acts of EU consumer law. (60) The field of consumer protection is, for that matter and to my knowledge, the only field within the broader area of civil matters governed by EU law in which the Court has found that obligation to exist (in cases when no such obligation is explicitly provided for by the relevant EU legislation).

78. Further exceptions have been defined in the field of immigration and asylum law, where the Court has justified that approach by the absolute nature of the right to be protected (prohibition of torture or inhuman and degrading treatment or punishment in the context of the adoption of a return decision), (61) by its importance in combination with the specific legislative regime (the right to liberty in the context of detention in immigration and asylum matters), (62) and by the legislative definition of the harmonised scope of judicial review (applications for international protection rejected based on the concept of ‘safe country of origin’). (63)

79. By contrast, the Court declined to reach the same conclusion in the judgment in *K.B. and F.S.* in the context of criminal proceedings in which the suspects were not properly informed of their procedural rights (in particular of the right not to incriminate oneself). (64) The Court explicitly refused to transpose to that area of law the principles developed under Directive 93/13, while explaining ‘that the legal relationships involved in a consumer protection context differ from those in criminal

proceedings ... to such an extent that the principles established in the field of unfair terms cannot simply be applied to procedural safeguards in criminal proceedings'. (65)

80. In the light of the above, where should one situate the area of law concerned here?

81. To answer that question, it is useful to recall that the specificity of 'the principles established in the field of unfair terms', alluded to in the judgment in *K.B. and F.S.*, hinges on the need identified by the Court to replace the balance between the parties as established by the contract with genuine equality, that need stemming from the weaker position of consumers as regards knowledge and bargaining power vis-à-vis the seller or supplier.

82. Against that background, in order for the *res judicata* exception under consideration to be 'transposed' to the field of motor vehicle liability insurance, the same or similar protective rationale would thus have to be identified.

83. As the Commission argued, in principle there is no doubt that the rule set out in Article 2(1) of the Second Directive constitutes an expression of a robust legislative policy promoting the protection of victims of road traffic accidents. That is, as already observed, one of the two main objectives of that legislation (66) which 'has continuously been pursued and reinforced'. (67) While specific elements of that protection have been added during the period post-dating the facts of the case in the main proceedings, that emphasis clearly existed during the material time, as evidenced for instance by the fifth recital of the Third Directive, which identifies passengers as a 'particularly vulnerable category of potential victims'. (68)

84. That objective may admittedly lend itself to be viewed as reflecting a particularly important public policy by analogy with the Court's considerations concerning the nature of the policy of protecting consumers (see point 63 above).

85. If that is accepted, one could further state that when it comes to the criteria of lesser 'knowledge and bargaining power', relied on in the context of Directive 93/13, victims of road traffic accidents are, in fact, in an even more difficult situation than consumers. Indeed, when the victims are genuine third parties vis-à-vis the vehicle involved in the accident (which is, in my view, the typical scenario), they will not know the identity of the insurer (let alone the content of the insurance policy). (69) That could further lead to the suggestion that, without an *ex officio* judicial examination of the enforceability of the terms of that policy, the protection to which those persons are entitled would be 'incomplete and insufficient' (70) (by analogy with the findings made in relation to matters falling under, in particular, Directive 93/13).

86. That said, for the following reasons, I would advise against embracing that position.

87. In that respect, *first*, there is no doubt that the victims of road traffic accidents may face difficult and tragic situations over which they have, in principle, no control. (71) That vulnerable position is the very reason why the EU legislature has progressively reinforced various aspects of their protection. However, the identified need to protect a person in a situation of vulnerability is insufficient per se to trigger an obligation requiring the national courts to raise a point of law of their own motion. That, in my view, clearly follows from the judgment in *K.B. and F.S.*, discussed above, which, to summarise, concerned a person suspected of criminal activity whose procedural rights had been infringed by law enforcement authorities. There is no doubt that a person facing such authorities will find himself or herself in a situation of relative weakness, while the consequences for that person of the illegal conduct of the State authorities may be particularly serious. Nonetheless, the obligation to conduct an *ex officio* examination of the procedural flaw at issue could not be imposed based on the principles deriving from Directive 93/13 on account of, in essence, the specificity of the context in which those principles were developed, as observed above.

88. In that respect, in contrast to Directive 93/13 and as the Italian Government argued, in essence, at the hearing, the rules in the field of motor vehicle liability insurance do not aim to maintain a balance between the parties' contractual rights and obligations and to prevent the use of the contractual terms, due to those terms causing, 'contrary to the requirement of good faith, ... a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'. (72)

89. Indeed, although Article 2(1) of the Second Directive requires the relative nullity (unenforceability vis-à-vis the victims) of certain terms included in an insurance policy, it does so not to correct a contractual imbalance between the insurer and a third-party victim (because, in a typical scenario, there is simply no contract between those two parties (73)), but to protect the victim against the legal effects of those terms (which would prevent the victim from being compensated for the losses and injuries caused) irrespective of any contractual relationship between those two parties. That specific protective logic is particularly obvious when one considers the part of Article 2(1) of the Second Directive that requires the relative nullity (unenforceability) of the statutory provisions with the exclusionary effects described in that provision (and in point 52 above) – statutory provisions which exist, by their very nature, independently of the parties' will.

90. In connection with the above, the protection of third-party victims does not mean that the terms (or statutory provisions) excluding, in particular, illegal transport from the insurance cover must be regarded as unlawful per se. On the contrary, the fact that an accident resulted from illegal transport remains, in my view, a relevant factor in the relationship between the insurer and the policyholder (because the legal effects are to be excluded only in relation to the victim). (74)

91. Viewed from that perspective, the logic governing Article 6(1) of Directive 93/13, on the one hand, and Article 2(1) of the Second Directive, on the other, are rather different in terms of the 'penalty' that they require in respect of 'problematic' contractual terms. While the former provision requires the nullity of the unfair contractual term, and possibly (where necessary) of the entire contract (because of its inherent unlawfulness), that is not the result sought by Article 2(1) of the Second Directive, which only requires certain terms to be prevented from producing legal effects vis-à-vis the victims of road traffic accidents.

92. Again, that difference in the logic underlying Article 6(1) of Directive 93/13 and Article 2(1) of the Second Directive is not, in absolute terms, incompatible with the proposition that an *ex officio* judicial examination should be required to ensure that a victim is adequately protected. There is, as already observed, the same (if not worse) asymmetry of information in the relationship between the victim and the insurer compared to those falling under Directive 93/13. However, that difference is, in my view, reason enough to support the argument that the protective logic specific to Directive 93/13, with its particular legal implications, simply does not exist under the EU rules on motor vehicle liability insurance.

93. *Second*, irrespective of the above, I recall that the requirement to disregard the effects of *res judicata* has been linked by the Court to the obligation addressed to the Member States in Article 7(1) of Directive 93/13. That provision requires the Member States to ensure that 'adequate and effective means exist to *prevent the continued use* of unfair terms in contracts concluded with consumers by sellers or suppliers' (emphasis added). No such obligation is imposed in respect of exclusion clauses such as the one at issue here, as observed by the Italian and Finnish Governments and as acknowledged by the Commission.

94. Indeed, Article 2(1) of the Second Directive requires the taking of '*necessary measures* to ensure that any statutory provision or any contractual clause contained in an insurance policy' which excludes, in particular, illegal transportation from the insurance cover 'shall ... be deemed *to be void* in respect of claims by third parties who have been victims of an accident' (emphasis added). That wording is clearly closer to that embraced by Article 6(1) of Directive 93/13, (75) in that they both aim to ensure that the term at issue does not produce binding effects (at least) vis-à-vis the vulnerable party concerned (in a given case).

95. By contrast, Article 2(1) of the Second Directive lacks the more systemic and dissuasive dimension of Article 7(1) of Directive 93/13, which exhorts the Member States to ensure that the use of unfair terms is prevented (in general). Viewed from that perspective, the *res judicata* exception may be construed as fulfilling the function of deterring sellers or suppliers from including unfair terms in contracts by denying them the benefit of legal certainty that would otherwise follow from the final nature of a judicial determination in their favour (a determination made without an examination of whether the relevant term is unfair within the meaning of Directive 93/13). That dimension is not present in Article 2(1) of the Second Directive because, as already observed, the objective pursued by it

is to ensure that a third-party victim, who (typically) has no contractual relationship with the insurer, is compensated by the latter, irrespective of any exclusion clause. By contrast, that provision does not seek to impose a ban on exclusion clauses altogether.

96. Given that the Court's case-law concerning the *res judicata* reversal requirement is attached to that specific preventive and systemic aspect of the regime of Directive 93/13 (to ensure that unfair terms are not used in general, in addition to the exclusion of their legal effects in a given case) and that that position constitutes an exception to the main rule under which the final nature of a judicial determination must be respected, I consider that a reversal of *res judicata* cannot be required in the circumstances of the case in the main proceedings where no similar systemic objective is pursued. (76)

97. *Third and finally*, it seems to me that when the Court has required a step as far-reaching as an *ex officio* examination (and, failing which, the reversal of *res judicata*) in a situation that, in principle, falls within the procedural autonomy of the Member States (in the absence of any legislative provision on the matter), it has necessarily relied on the specific role of consumers in the functioning of the internal market (when acquiring goods and services) (77) as well as on the premiss that their lack of awareness of the applicable rules may deter them from purchasing goods or services in another Member State. (78) At the same time, the existence of harmonised rules on unfair terms was identified as an important tool to maintain undistorted competition (79) and to enhance competition among suppliers, thereby increasing the choice available to consumers. (80)

98. Legislation in the field of motor vehicle liability insurance is, of course, also a tool contributing to the functioning of the internal market and, more particularly, to the free movement of vehicles and persons, as acknowledged in the respective directives. (81) However, it has also been acknowledged that that harmonisation, while pursuing the twofold objective recalled in point 49 above (to ensure the free movement of vehicles and of persons travelling in them and to guarantee comparable treatment for the victims of accidents), is mainly focused on the protection of victims of road traffic accidents, that also being the stated purpose of the (previously existent) frontier controls of compulsory insurance cover against civil liability in respect of the use of motor vehicles. (82) In the same vein, the Commission observed at the hearing that the obligation of compulsory coverage (ensuring that all vehicles normally based in a given Member State's territory are insured against civil liability) (83) and the direct right of action that victims must have against the insurer of the person responsible (a requirement that was added subsequently to the facts in the main proceedings) (84) constitute the central elements of the legislation at issue.

99. Without prejudice to the importance of that objective and the personal hardship that road traffic accidents bring about for victims, it seems to me that that rationale, although again related to the internal market, is not as deeply embedded in the pursuance of the internal market objective as in the case of the harmonisation sought by Directive 93/13 (which, as explained, directly and immediately enhances commercial transactions). That rationale is, at any rate and again, simply different in what it aims to achieve. That, together with the abovementioned exceptional derogation that the requirement both of an *ex officio* examination and of the reversal of *res judicata* represent from the standard operation of law, provides further justification as to why those derogations developed under, in particular, Directive 93/13 should not be extended to the area of motor vehicle liability insurance.

100. For all those reasons, and given that the legislature did not choose to include, in the latter legislative framework, a provision on the scope of judicial review, I am of the view that whether an obligation to carry out an *ex officio* examination arises is better approached through the lens of the principle of effectiveness (and equivalence), as traditionally conceived and recalled in point 58 above. In accordance with that approach, the obligation of the courts to raise the matter of their own motion would arise only where the examination of the applicable rule of procedure leads to the conclusion that the victim concerned has not been given a genuine opportunity to raise such a plea before a national court. The same considerations should then apply *mutatis mutandis* to the question whether the effects of *res judicata* must be disregarded where the relative nullity of a clause such as that at issue in the main proceedings has not been reviewed, because, as explained above, both aspects are closely related.

101. In the light of the above considerations, and in reply to the first question referred, I am of the view that Article 2(1) of the Second Directive should be interpreted as not precluding national legislation

which, by reason of the fact that a judgment has acquired the force of *res judicata*, prevents a party from raising for the first time, at a subsequent stage of the same judicial proceedings, a plea that a clause, included in a motor vehicle civil liability insurance policy, is void (unenforceable) within the meaning of that provision, provided that no rule of national procedural law has made it excessively difficult or impossible for that party to raise that plea at an earlier stage of the proceedings, at which that question could have been examined by the national courts.

(c) *The scenario of a party's 'complete inaction'*

102. For the sake of completeness, and should the Court disagree with my analysis above, I shall now turn to the second question in which the referring court enquires whether the assessment of the obligation to disregard the effects of *res judicata* under national law – were that obligation to be established – is affected by the fact that, according to the referring court, the appellants in the main proceedings ‘acted in a wholly passive manner’ when they failed to challenge the applicability of the exclusion clause at an earlier stage of the judicial proceedings.

103. The reply to that question is, in my view, rather straightforward.

104. *First*, the concept of ‘total inertia’ (or ‘complete inaction’) was developed in the judgment in *Asturcom Telecomunicaciones* and subsequent case-law in the context of the exceptional obligation to disregard the national effects of *res judicata*. (85) As the referring court observes, it denotes, more specifically, ‘an exception to that exception’. By way of explanation, where the exceptional obligation for a court to disregard the effects of *res judicata* in order to protect a consumer arises in principle, but that consumer has remained, in the proceedings concerned, completely inactive, the obligation to disregard the force of *res judicata* does not apply and the situation reverts to the standard situation in which the effects of *res judicata* are left intact.

105. However, and *second*, it is not entirely clear to me what circumstances could lead to such a standard situation being effectively ‘restored’, given that the obligation to raise *ex officio* the possible unfairness of contractual terms appears to apply at any stage of the judicial proceedings, which renders the ‘inaction’ of the consumer irrelevant in principle, at least in the judicial proceedings that are still ongoing (such as in the main proceedings here).

106. Nevertheless, that matter does not need to be discussed further in the present circumstances because, *third*, the situation of ‘complete inaction’ within the meaning of the relevant case-law has clearly not occurred.

107. Indeed, that concept refers to a consumer who is literally absent from the proceedings and does not defend his or her case. It does not refer to a consumer who actively takes part in the proceedings, albeit without raising the disputed point of law. In other words, it does not refer to the failure by the party concerned to raise a specific plea in the proceedings, but rather to the failure to appear in those proceedings at all. For that matter, if that concept were to refer to the failure to raise a specific plea, the obligation of the national courts to raise it of their own motion would be redundant. (86)

108. In that respect, it follows from the order for reference that the appellants in the main proceedings played an active part in the previous stages of those proceedings, despite not raising the alleged illegality of the exclusion clause. Under those circumstances, they cannot be considered to have remained ‘completely inactive’ within the meaning set out above.

(d) *Postscript: possible overlap between both areas concerned*

109. Before bringing my analysis to a close, there is one last systemic or contextual aspect to be addressed which concerns, as indicated above, the possible interrelation between the legislation in the field of motor vehicle liability insurance and Directive 93/13.

110. There is, in my view, no doubt that insurance policies in that field may, in general, be classified as consumer contracts within the meaning of Directive 93/13, where the applicable conditions for such a classification are satisfied, as in principle was observed by the Commission in its written pleadings and also by the Italian Government at the hearing.

111. Furthermore, the facts of the case in the main proceedings show that there may be situations in which the third-party victim is also the party to the relevant insurance contract which, if the applicable conditions are satisfied, makes that contract ‘eligible’ to fall under the scope of Directive 93/13. (87)

112. Against that background, a certain discrepancy may arise in terms of the procedural options that will be open to such a party, as opposed to other victims of road traffic accidents. Indeed, a victim who is also the policyholder will be automatically entitled to rely on the procedural developments in terms of the *ex officio* examination or the reversal of *res judicata* developed under Directive 93/13, provided again that the insurance policy at issue satisfies the conditions in order to be classified as a contract between a consumer and a seller or supplier (within the meaning of that directive). By contrast, that option will not be open to other victims if those conditions are not satisfied or if the victim is not the policyholder. (88)

113. I do not think that that affects the result of the previous analysis.

114. First of all, any plea that may potentially be raised under Directive 93/13 would have to be framed, for obvious reasons, in terms of unfairness within the meaning of that directive. That aspect of the examination of the given contractual term is also clearly different from those governed by, in particular, Article 2(1) of the Second Directive. (89)

115. That notwithstanding, the fact that a victim of a road traffic accident, who is the policyholder and a consumer within the meaning of Directive 93/13, could in theory rely on that directive to trigger the specific procedural consequences flowing therefrom (to obtain a new examination of a given term in an insurance policy) – where such a procedural option is not open to other victims – is not in itself a reason to ‘export’ the *res judicata* exception from the area covered by Directive 93/13 to the area under consideration here (to prevent possible inequality in the procedural treatment of victims of road traffic accidents). Such a procedural discrepancy is rather a contingency resulting from the overlap of two regulatory regimes in the particular circumstances of a given case. By contrast, that is not a reason to extend principles that have been developed in one field of law, by reference to the specific features thereof, to another field of law in which those features do not exist.

V. Conclusion

116. I suggest that the Court give the following reply to the Corte suprema di cassazione (Supreme Court of Cassation, Italy):

Article 2(1) of Second 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

must be interpreted as not precluding national legislation which, by reason of the fact that a judgment has acquired the force of *res judicata*, prevents a party from raising for the first time at a subsequent stage of the same judicial proceedings a plea that a clause, included in a motor vehicle civil liability insurance policy, is void (unenforceable) within the meaning of that provision, provided that no rule of national procedural law has made it excessively difficult or impossible for that party to raise that plea at an earlier stage of the proceedings at which that question could have been examined by the national courts.

¹ Original language: English.

² Second Council Directive 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 (OJ 1984 L 8, p. 17) (‘the Second Directive’).

³ The English-language version of that provision refers to the obligation to ensure that the terms at issue are ‘deemed to be void in respect of claims by third parties who have been victims of an accident’; the

French-language version refers to any provision or clause having to be ‘*réputée sans effet en ce qui concerne le recours des tiers victimes d’un sinistre*’. As I will explain later, that obligation therefore does not aim to obtain the nullity (in absolute terms) of the provision or clause in question, but rather to ensure that it produces no legal effects in respect of a certain category of persons. It seems to me that, in some legal orders, that situation can be referred to as ‘relative nullity’ or ‘unenforceability’.

[4](#) Directive of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability (OJ 2009 L 263, p. 11), in particular Article 13(1)(c) thereof.

[5](#) Directive 2009/103 codified a fragmented regime that had progressively evolved through several directives, listed in recital 1 thereof. Those previous directives governed different aspects of the system of motor vehicle liability insurance and, depending on the date of an accident, could apply in parallel to a given case. See, for instance, judgment of 14 September 2017, *Delgado Mendes* (C-503/16, EU:C:2017:681, paragraph 31).

[6](#) I would add that the Second Directive applies alongside the First and Third Directives, referred to in points 5 and 12 below, in view of the date of the accident.

[7](#) See judgments of 9 April 2024, *Profi Credit Polska* (Reopening of proceedings concluded with a final judicial decision) (C-582/21, ‘the judgment in *Profi Credit Polska* (Reopening of proceedings concluded with a final judicial decision)’), EU:C:2024:282), and of 18 December 2025, *Soledil* (C-320/24, ‘the judgment in *Soledil*’, EU:C:2025:993).

[8](#) Council Directive 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 liability (OJ English Special Edition: Series I Volume 1972(II), p. 360) (‘the First Directive’).

[9](#) Third Council Directive 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) (‘the Third Directive’).

[10](#) As I understand it, Cattolica’s claim thus concerns the repayment, by PA’s relatives, of sums actually paid to them as well as a declaratory ruling that Cattolica was not required to pay them any outstanding sums. The specific classification of those two aspects of the action appears at any rate to be irrelevant for the purposes of assessing the present request for a preliminary ruling.

[11](#) Order of the President of the Court of 8 April 2025, *Società Cattolica di Assicurazione* (C-17/25, EU:C:2025:276, paragraphs 6 and 7).

[12](#) Council Directive of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

[13](#) Judgments of 16 July 2020, *Governo della Repubblica italiana* (Status of Italian magistrates) (C-658/18, EU:C:2020:572, paragraph 61 and the case-law cited), and of 29 July 2024, *Valančius* (C-119/23, EU:C:2024:653, paragraph 39 and the case-law cited).

[14](#) See, for instance, judgment of 18 December 2025, Procura della Repubblica presso il Tribunale di Firenze (C-325/24, EU:C:2025:989, paragraph 36 and the case-law cited).

[15](#) Or where the problem is hypothetical or where the Court does not have the necessary factual and legal information to provide a useful answer; see, for instance, *ibidem*, paragraph 37 and the case-law cited.

[16](#) See, for instance, my Opinion in *Profi Credit Polska* (Reopening of proceedings concluded with a final judicial decision) (C-582/21, ‘my Opinion in *Profi Credit Polska*’, EU:C:2023:674, points 85 to 87 and the case-law cited).

[17](#) Judgment of 7 August 2018, *Smith* (C-122/17, EU:C:2018:631, paragraph 44 and the case-law cited), concerning the Third Directive.

[18](#) Judgments of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513, paragraphs 50 to 53), and of 19 April 2007, *Farrell* (C-356/05, ‘the judgment in *Farrell*’, EU:C:2007:229, paragraphs 40 to 43); see also my Opinions in *Soledil* (C-320/24, EU:C:2025:469, point 83) and in *Centro Petroli Roma – II* (C-386/24, EU:C:2025:775, points 44 to 48).

[19](#) See point 39 and footnote 17 above.

[20](#) See point (d) of Section 3 of the present subsection of this Opinion.

[21](#) See, for instance, judgment of 30 April 2025, *Nastolo* (C-370/24, ‘the judgment in *Nastolo*’, EU:C:2025:300, paragraph 37 and the case-law cited).

[22](#) Judgment of 12 February 2026, *Stichting Koskea* (C-490/24, EU:C:2026:89, paragraphs 33 and 36 and the case-law cited). See Article 1 of the Third Directive (now Article 12(1) of Directive 2009/103).

[23](#) See, for instance, judgment of 19 September 2024, *Matmut* (C-236/23, ‘the judgment in *Matmut*’, EU:C:2024:761, paragraph 37 and the case-law cited). See, also, Opinion of Advocate General Mengozzi in *Churchill Insurance Company and Evans* (C-442/10, ‘the Opinion in *Churchill Insurance Company*’, EU:C:2011:548, point 23).

[24](#) See also Opinion of Advocate General Szpunar in *Matmut* (C-236/23, EU:C:2024:560, points 47 to 53).

[25](#) Judgment of 1 December 2011, *Churchill Insurance Company and Evans* (C-442/10, ‘the judgment in *Churchill Insurance Company*’, EU:C:2011:799, paragraph 33 and the case-law cited).

[26](#) *Ibidem*, paragraph 34 and the case-law cited.

[27](#) See, for instance, the judgment in *Matmut*, paragraph 34.

[28](#) The judgments in *Churchill Insurance Company*, paragraph 35 and the case-law cited, and in *Matmut*, paragraphs 36 and 46 and the case-law cited.

[29](#) For the present purposes, there is no need to comment on the difficulties that that distinction gives rise to, as noted for instance in Opinion of Advocate General Biondi in *Stichting Koskea* (C-490/24, ‘the Opinion in *Stichting Koskea*’, EU:C:2025:735, points 14 to 16), and the Opinion in *Churchill Insurance Company*, points 15 to 17.

[30](#) See, for instance, the judgments in *Matmut*, paragraph 64 and the case-law cited, and of 23 October 2012, *Marques Almeida* (C-300/10, EU:C:2012:656, paragraphs 32 and 33 and the case-law cited).

[31](#) The judgment in *Farrell*, paragraph 36. That case involved a passenger who was a genuine third-party victim (but not the insured party).

[32](#) Judgment of 30 June 2005, *Candolin and Others* (C-537/03, EU:C:2005:417, paragraph 35, in combination with paragraphs 11 and 12). The Court was not explicit about whether the owner (victim and passenger) was also the insured party, but that circumstance did not seem to be relevant for the conclusion reached in that judgment.

[33](#) The judgment in *Churchill Insurance Company*, paragraphs 32 to 36 and 44.

[34](#) Under which, where that nullity cannot be claimed, the insurer may obtain reimbursement of all the sums paid to such a passenger who was a victim in a road traffic accident. That reply was subject to the identification of a possible abuse of rights. See the judgment in *Matmut*, in particular paragraphs 61 and 66.

[35](#) The judgment in *Profi Credit Polska* (Reopening of proceedings concluded with a final judicial decision), paragraph 38 and the case-law cited.

[36](#) See, for example, the judgments in *Soledil*, paragraph 32, and of 24 October 2018, *XC and Others* (C-234/17, EU:C:2018:853, paragraph 52 and the case-law cited).

[37](#) The judgments in *Profi Credit Polska* (Reopening of proceedings concluded with a final judicial decision), paragraph 39 and the case-law cited, and of 16 January 2025, *BALTIC CONTAINER TERMINAL* (C-376/23, EU:C:2025:20, paragraph 73 and the case-law cited).

[38](#) For the exceptions developed based on the principle of equivalence, see my Opinion in *Profi Credit Polska* (Reopening of proceedings concluded with a final judicial decision), points 42 to 50.

[39](#) Judgment of 18 July 2007, *Lucchini* (C-119/05, EU:C:2007:434, paragraph 63). The Court stressed the exceptional nature of that finding in the judgment of 10 July 2014, *Impresa Pizzarotti* (C-213/13, EU:C:2014:2067, paragraph 61).

[40](#) See, in the area of value added tax, judgment of 16 July 2020, *UR (VAT liability of lawyers)* (C-424/19, EU:C:2020:581, paragraphs 32 to 34 and the case-law cited); in the field of State aid, judgment of 11 November 2015, *Klausner Holz Niedersachsen* (C-505/14, EU:C:2015:742, paragraphs 43 to 46); and, in the field of common agricultural policy, judgment of 7 April 2022, *Avio Lucos* (C-116/20, EU:C:2022:273, paragraphs 102 to 105).

[41](#) The judgment in *Soledil*, paragraph 22 and the case-law cited.

[42](#) *Ibidem*, paragraph 23 and the case-law cited.

[43](#) See, for instance, judgment of 21 December 2016, *Gutiérrez Naranjo and Others* (C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraphs 54 and 55 and the case-law cited).

[44](#) Judgment of 17 May 2022, *Ibercaja Banco* (C-600/19, ‘the judgment in *Ibercaja Banco*’, EU:C:2022:394, paragraph 50).

[45](#) ‘Where [they] have available to [them] the legal and factual elements necessary for that task’; the judgment in *Soledil*, paragraph 24 and the case-law cited. For situations when national courts do not have at their disposal those relevant elements, see judgment of 7 November 2019, *Profi Credit Polska* (C-419/18 and C-483/18, EU:C:2019:930, paragraph 77).

[46](#) See the judgments in *Ibercaja Banco*, paragraphs 57 to 59, and in *Profi Credit Polska (Reopening of proceedings concluded with a final judicial decision)*, paragraph 83.

[47](#) The judgments in *Soledil*, paragraph 29, and of 17 May 2022, *Unicaja Banco* (C-869/19, ‘the judgment in *Unicaja Banco*’, EU:C:2022:397, paragraph 29). The Court has often referred to Article 7(1) of Directive 93/13 in combination with the twenty-fourth recital of that directive setting out the same idea.

[48](#) Judgments of 18 February 2016, *Finanmadrid EFC* (C-49/14, EU:C:2016:98); of 26 January 2017, *Banco Primus* (C-421/14, EU:C:2017:60); of 17 May 2022, *SPV Project 1503 and Others* (C-693/19 and C-831/19, EU:C:2022:395); in *Ibercaja Banco*; of 18 January 2024, *Getin Noble Bank and Others* (Review by a national court of its own motion of unfair contractual terms) (C-531/22, EU:C:2024:58); and of 29 February 2024, *Investcapital* (C-724/22, EU:C:2024:182). In contrast to those cases, the judgment in *Unicaja Banco* did not concern the enforcement of obligations of consumers but rather a consumer’s action seeking a declaration that a clause in a mortgage agreement was void and the repayment of the sums wrongly paid under it.

[49](#) Judgment in *Soledil*, in particular paragraphs 36 to 39, in combination with paragraphs 11 to 17 thereof.

[50](#) The judgment in *Soledil*, paragraph 33 and the case-law cited.

[51](#) See the fifth recital of the Third Directive.

[52](#) Likewise, as already observed, there is nothing in the file to indicate that the need to disregard the effects of *res judicata* could be justified by the principle of equivalence.

[53](#) I recall that not all forms of judicial review can prevent a subsequent judicial review, but only one that meets certain conditions, as explained, in particular, in judgment of 29 February 2024, *Investcapital* (C-724/22, EU:C:2024:182, paragraph 45), and recalled in the judgment in *Soledil*, paragraph 35.

[54](#) As was made clear in particular in the judgment in *Soledil*; see, also, the judgment in *Unicaja Banco* (on the latter aspect see footnote 48 above).

[55](#) See footnotes 43 and 44 above and Opinion of Advocate General Richard de la Tour in Ararat (C-156/23, EU:C:2024:413, point 44).

[56](#) Judgment of 3 July 2025, C. and Others (C-582/23, EU:C:2025:518, paragraph 55 and the case-law cited).

[57](#) The Italian Government observed at the hearing that, under the applicable national law, national courts are required to raise the question of the nullity (or again, as I understand it, the unenforceability) of the exclusion clause at issue *ex officio* and that that obligation was infringed in the earlier stages of the main proceedings.

[58](#) See, in particular, judgments of 14 December 1995, *van Schijndel and van Veen* (C-430/93 and C-431/93, EU:C:1995:441, paragraphs 16 to 22); of 7 June 2007, *van der Weerd and Others* (C-222/05 to C-225/05, EU:C:2007:318, paragraph 41); and of 22 June 2023, *K.B. and F.S. (Raising ex officio of an infringement in criminal proceedings)* (C-660/21, ‘the judgment in *K.B. and F.S.*’, EU:C:2023:498, paragraph 53).

[59](#) See, to that effect, Opinion of Advocate General Richard de la Tour in Ararat (C-156/23, EU:C:2024:413, point 44).

[60](#) In relation to Directive of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ 2008 L 133, p. 66), see judgments of 21 April 2016, *Radlinger and Radlingerová* (C-377/14, EU:C:2016:283, paragraphs 62 to 74), and of 5 March 2020, *OPR-Finance* (C-679/18, EU:C:2020:167, paragraphs 17 to 24).

[61](#) Judgment of 17 October 2024, Ararat (C-156/23, EU:C:2024:892, paragraph 50).

[62](#) Judgment of 8 November 2022, *Staatssecretaris van Justitie en Veiligheid (Ex officio review of detention)* (C-704/20 and C-39/21, EU:C:2022:858, paragraphs 85 to 90 and 94).

[63](#) Judgment of 4 October 2024, *Ministerstvo vnitra České republiky, Odbor azylové a migrační politiky* (C-406/22, EU:C:2024:841, paragraphs 93 to 98).

[64](#) The judgment in *K.B. and F.S.*, paragraphs 44 to 53 and, in particular, paragraph 19.

[65](#) *Ibidem*, paragraph 52.

[66](#) See point 49 of the present Opinion. See also Opinion of Advocate General Bobek in *Ubezpieczeniowy Fundusz Gwarancyjny z siedzibą* (C-383/19, EU:C:2020:1003, point 41).

[67](#) See, for instance, the judgment in *Nastolo*, paragraph 39 and the case-law cited.

[68](#) See, for instance, the judgment in *Farrell*, paragraph 24, and the Opinion in *Stichting Koskea*, point 35.

[69](#) I note that under Article 5 of the Third Directive, Member States had the obligation to ‘adopt the necessary measures to ensure that the parties involved in a road traffic accident are able to ascertain promptly the identity of the insurance undertaking covering the liability arising out of the use of any motor vehicle involved in the accident’. See also Article 23 of Directive 2009/103.

[70](#) See point 68 of the present Opinion.

[71](#) See also the Opinion in *Stichting Koskea*, points 35 and 42.

[72](#) I recall that under Article 3(1) of Directive 93/13, ‘a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.’

[73](#) When there happens to be one, such as in the case in the main proceedings, that situation constitutes a contingency, as observed by the Italian Government at the hearing.

[74](#) I recall that the seventh recital of the Second Directive states that ‘whereas it is in the interest of victims that the effects of certain exclusion clauses be limited to the relationship between the insurer and the person responsible’.

[75](#) I recall that Article 6(1) of Directive 93/13 provides that ‘Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.’

[76](#) The fact that the final judicial determination in the main proceedings was made despite the fact that those proceedings are still ongoing is irrelevant. As I have observed elsewhere, it is well known that the concept of a final decision (to which the force of *res judicata* attaches) is not limited to the resulting single formal decision by which any given proceedings are factually concluded (because the parties have decided not to pursue them or because they have exhausted all available remedies). The effects of *res judicata* can emerge in the ongoing proceedings, at different stages thereof and on different aspects of the dispute, due to the fact that the parties did not raise the issue concerned or did not contest its assessment. See my Opinion in *Soledil* (C-320/24, EU:C:2025:469, point 77).

[77](#) Under the sixth recital of Directive 93/13: ‘... in order to facilitate the establishment of the internal market and to safeguard the citizen in his role as consumer when acquiring goods and services under contracts which are governed by the laws of Member States other than his own, it is essential to remove unfair terms from those contracts’.

[78](#) According to the fifth recital of Directive 93/13, ‘this lack of awareness may deter them from direct transactions for the purchase of goods or services in another Member State’.

[79](#) See the second recital of Directive 93/13, which states that ‘the laws of Member States relating to the terms of contract between the seller of goods or supplier of services, on the one hand, and the consumer of them, on the other hand, show many disparities, with the result that the national markets for the sale of goods and services to consumers differ from each other and that distortions of competition may arise amongst the sellers and suppliers, notably when they sell and supply in other Member States’.

[80](#) According to the seventh recital of Directive 93/13, ‘whereas sellers of goods and suppliers of services will thereby be helped in their task of selling goods and supplying services, both at home and throughout the internal market; whereas competition will thus be stimulated, so contributing to increased choice for Community citizens as consumers’.

[81](#) See, in particular, the third, fifth and sixth recitals of the First Directive, the third recital of the Second Directive and the thirteenth recital of the Third Directive.

[82](#) See the second recital of the First Directive.

[83](#) As required by Article 3(1) of the First Directive and subsequently by Article 3 of Directive 2009/103.

[84](#) Article 3 of Directive 2000/26/EC of the European Parliament and of the Council of 16 May 2000 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and amending Council Directives 73/239/EEC and 88/357/EEC (Fourth motor insurance Directive) (OJ 2000 L 181, p. 65). See Article 18 of Directive 2009/103.

[85](#) See the judgments of 6 October 2009, *Asturcom Telecomunicaciones* (C-40/08, EU:C:2009:615, paragraph 47); in *Unicaja Banco*, paragraph 28 and the case-law cited; of 18 January 2024, *Getin Noble Bank and Others (Review by a national court of its own motion of unfair contractual terms)* (C-531/22, EU:C:2024:58, paragraph 45 and the case-law cited); and in *Soledil*, paragraph 41.

[86](#) See, also, the judgment in *Soledil*, paragraph 41, in which the Court replied to a similar question referred in similar circumstances in which, as already observed, the relevant consumers appeared in the proceedings but failed to raise, in a timely fashion, a plea of unfairness in respect of the contractual term at issue.

[87](#) Provided that Directive 93/13 applies *ratione temporis* to the case at hand.

[88](#) That scenario would require a determination to be made as to whether a (genuine) third-party victim could claim consumer protection under Directive 93/13 should it be established that the policyholder acted as a consumer when concluding the insurance policy.

[89](#) I recall again that for a term to be considered to be ‘unfair’ under Directive 93/13 it must, under Article 3(1) of that directive, cause, ‘contrary to the requirement of good faith, ... a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer’. It is unclear how a term excluding illegal transport from the insurance cover could cause such an ‘imbalance’. Further doubts may arise as to how both kinds of nullity sought, respectively, by Article 6(1) of Directive 93/13 and by Article 2(1) of the Second Directive could be mutually reconciled given that the former appears to be ‘absolute’ while the latter is only ‘relative’, as discussed at the hearing.