

# New Court Decisions on Auxiliary Fund Liability in Greece

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Greece had enacted Laws 4092/2012 and 2837/2000, establishing restrictions and limitations respective to the liability of the Hellenic Auxiliary Fund (EPIKOURIKO KEFALEO) in Road Traffic Accidents. By its recent decisions (nr. 3/2017, 4/2017 and 5/2017) the Civil Section of the Supreme Court of Greece, in its Plenary Session, held that these law provisions, directly contradict and violate the Greek Constitution and the First Protocol of the ECHR, and as such they have been pronounced invalid and unenforceable.

Following are the provisions that have been disapplied by the Greek Supreme Court as being unconstitutional:

1. The monetary limitation of non-pecuniary damages payable by the Auxiliary Fund to the secondary victims of fatal RTAs to the maximum compensation of 6.000€ per beneficiary.
2. The general monetary limitation of the Auxiliary Fund liability not exceeding in any case 100.000€, with retrospective application to accidents that happened prior to the law enactment.
3. The restriction of interest due by the Auxiliary Fund on payable compensations to 6%, substantially lower (almost half) than the interest imposed on all other private debtors and parties in litigation.

More specifically on the Supreme Court of Greece - Plenary Session, Decision 5/2017 (Civil Section):

Claims for non-pecuniary damages were brought before Greek Courts by the parents and grandparents of a minor who died in a fatal Road Traffic Accident. The claim was brought against the owner and driver of the liable vehicle and against the civil liability insurance company "ASPIS PRONOIA A.E.". During litigation the insurance company went bankrupt and its license was recalled. The Greek Auxiliary Fund "EPIKOURIKO KEFALEO" entered ex lege into the place of the bankrupt insurer and continued the pending litigation defending against the claimants' arguments and claims, by force of article 25 par. 4 of Greek law 489/1976 codified by Presidential Decree 237/1986, implementing the respective EU law.

However, by Greek Law 4092/2012, limitations have been introduced to the compensations payable by the Greek Auxiliary Fund (EPIKOURIKO KEFALEO) in case of bankruptcy or recall of the license of the civil liability insurer. Specifically, art. 19 par 2 of Presidential Decree 237/1986 was amended to provide, inter alia, that:

(a) the compensation paid by the EPIKOURIKO KEFALEO for non pecuniary damages to the secondary victims in case of a fatal RTA cannot exceed the amount of six thousand (6.000)€ per beneficiary;

(b) that the liability of the EPIKOURIKO KEFALEO to pay compensation to the victims of RTA in case of the civil liability insurer's bankruptcy or insolvency or license recall, shall be restricted to an amount ranging between 70% and 90% of the judicially awarded damages, and in any case, shall never exceed the maximum amount of one hundred thousand euros (100.000€) in total;

(c) the restriction/limitation extended to already pending claims, for which no final judgment had been issued at the time Law 4092/2012 came into force (8.11.2012); and

(c) that the interest due by the EPIKOURIKO KEFALEO on the payable compensation to the victims shall be calculated on the basis of a 6% annual rate, i.e. considerably lower (almost ½) than the legal interest rate applying to the other debtors.

Both the First Instance Court of Arta by its decision nr. 98/2013, and the Court of Appeal of Ioannina by its decision nr. 106/2014, held that the above provisions of Law 4092/2012, setting limits and restrictions to the liability and obligation of the EPIKOURIKO KEFALEO, were **contradicting**:

- **The Greek Constitution**
- **The European Law and**
- **The European Convention on Human Rights.**

An appeal on legal issues was filed and the matter was referred to the **Plenary Session of the Supreme Court of Greece**, due to the important controversial legal issues involved. The Supreme Court upheld the judgment of the First Instance Court and of the Court of Appeal. Inter alia the Supreme Court held as follows:

*<< [...] It must be noted that by the above mentioned provision of article 1 par. 4 of the Second Directive 84/5/EEC, according to which " Each Member State shall set up or authorize a body with the task of providing compensation, at least up to the limits of the insurance obligation, for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in paragraph 1 has not been satisfied", it is also established that there is an obligation for payment of compensation for non pecuniary damages in case of death (Supreme Court, Plenary Session 9/1993, ECJ C-277/12 of 24-10-2013 in the case Vitalijs Drozdovs vs. Baltikums AAS). Furthermore, it is prescribed by art. 9 par. 1 of the codifying Directive 2009/103/EC exactly which are the minimum limits of the insurance cover which must in any case be complied with (ECJ-C-348/98 Fereira dd 14-11-2000).*

*Furthermore, according to art. 25 par of the [Greek] Constitution, the rights of the person as individual and as member of the society are guaranteed by the State, whilst any kind of limitations/restrictions imposed to these rights must be either directly provided for by the Constitution or by the law but based on respective authorization and under the condition that the principle of proportionality is safeguarded.*

*Finally, by art. 1 of the First Protocol of the European Convention, that has been ratified by (Greek) Law 53/1974 and is of higher formal validity than the common (usual) laws, it is provided that "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest*

and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties”.

**In consideration of the above, the provisions of Law 4092/2012 that have been cited are to be disapplied/are not enforceable for the following reasons:**

The setting of six thousand euros (6.000€) as the maximum limit for the non pecuniary damage of each beneficiary in case of a fatal accident is directly contradicting **art. 1 par. 4 of the Second Directive 84/5/EEC**, according to which “ Each Member State shall set up or authorize a body with the task of providing compensation, at least up to the limits of the insurance obligation for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in paragraph 1 has not been satisfied”; this is a provision that covers also non pecuniary damages (moral damages) in case of a fatal accident, as above stated.

Also, the imposed maximum limit of 6.000€ compensation is contrary to the **principle of the strict sensu proportionality (art. 25 par. 1 d of the [Greek] Constitution)**, because this intervention by the legislator is not effective for the achievement of the intended purpose, i.e. to ensure the viability of the Auxiliary Fund; furthermore, it is also not necessary for the achievement of its purpose, since this could have been achieved by use of milder means, either by providing for an extra financing of the fund by the state budget or by obliging it [the Fund] to improve its financial situation by increasing its income and reducing its operational expenses.

On the other hand, the application of the above provision, which extends the application of this upper monetary limit of the EPIKOURIKO KEFALEO liability to already existing/pending claims, is invalid, because it is contrary to the above mentioned **article 1 of the First Additional Protocol of the ECHR**, [...]. This provision establishes the right of a person to have his **property respected**, which [property] the person can be deprived from only for reasons of public interest. The meaning of property includes not only rights in rem but also all rights of “property nature” and established “economic rights”. Accordingly, the rights arising out of obligations are included, and more specifically claims, [...] The afore mentioned provision of [Greek] Law 4092/2012 to drastically reduce/limit the height of the non-pecuniary damages payable by the EPIKOURIKO KEFALEO is in essence abolishment of the civil right of the beneficiaries arising out of the death of their relative in a road traffic accident. This legal provision is therefore incompatible with article 1 of the First Additional Protocol of the ECHR, because it tends towards an unjustified deprivation of a property item of the beneficiaries, without the presence of public benefit reasons. The mere budgetary/cash interest of the EPIKOURIKO KEFALEO does not consist public benefit.

Furthermore, as per **art. 4 par. 1 and 2 of the [Greek] Constitution**, Greek citizen are equal in front of the law. Greek citizen have equal rights. By this provision, it is not only the equality of Greek citizen in front of the law that is established, but also the equality of the law towards them, in the sense that the legislator, when regulating essentially similar things, relationships or situations, categories or persons, cannot differentiate his regulation by introducing exceptions, unless when the different regulation is not arbitrary and is imposed

by reasons of general public interest/benefit; this existence of special circumstances or social or public interest/benefit is subject to the control of the courts (Supreme Court, Plenary Session 3/2006, 38/2005, 30/2005, 23/2004, 11/2008).

Finally, by **article 14 of the International Covenant on Civil and Political Rights**, «all are equal in front of the courts». Each person is entitled to have his case tried just and in public, by a competent, impartial and independent court of justice ... in disputes of civil rights and obligations». The International Covenant on Civil and Political Rights has been implemented into Greek legislation by Law 2462/1997. In the sense of these provisions, the principle of equality of the litigation parties, which is a special manifestation of the principle of equality, imposes their equal treatment by the legislation which determines the terms of judicial protection. Therefore, law provisions by which favorable treatment of one of the litigation parties is being established, which party gets in a favorable situation in comparison to his counterparty, are not enforceable/not valid (Supreme Court, Plenary Session 12/2013, 4/2012). Accordingly, the provisions by which it is determined that the interest rate that is payable by the EPIKOURIKO KEFALEO is 6% per year, i.e. a rate that is lower than what its own debtors are obliged to pay to it and which applies to all debtors, is contradicting to 1) art. 4.1 of the Constitution and art. 14 of the International Covenant on Civil and Political Rights, since by these law provisions a favorable treatment of the EPIKOURIKO KEFALEO is established whilst his counterparty is placed in disadvantage and 2) to art. 1 of the First Additional Protocol of the ECHR, since by these favorable provisions, damage is being caused to the counterparty of the EPIKOURIKO KEFALEO (in this present case to the respondents), without this being justified by reasons of public interest, since the mere cash interest of the EPIKOURIKO KEFALEO cannot justify the violation of road traffic accident victims' right to claim and to be paid interest for their claims at a rate equal to that what private parties are obliged to pay in general, while the fact that the EPIKOURIKO KEFALEO, which is not a public law legal entity, but is simply under the control of the State (Supreme Court 1025/2015) does not constitute a public interest reason.

Finally, the above provision is contradicting to the constitutionally (**art. 25 Constitution**) established principle of proportionality, as said above. This principle, which imposes the proportionality between the intended target/scope and the means that are used to reach it, is obviously violated in this present case. If the intended target/scope is the protection of the EPIKOURIKO KEFALEO, the 6% interest rate payable by it, i.e. half of what the private debtor is obliged to pay, is not proportional (Supreme Court Plenary Session 3/2017, 4/2012). [...]

Furthermore, regarding the application filed by the applicant with its pleadings for the submission of a preliminary question to the European Court of Justice acc. to art. 267 of the Treaty on the Functioning of the European Union, based on its [the applicant's] argument that there exists an interpretation issue of the primary and secondary EU law and in particular an issue for the interpretation of art. 1 par. 4 of the Directive 84/5/EEC in relation to art. 4 par. 1 of [Greek] Law 4092/2012, it is held [by the Court] that the requirements are not present for the reference of a preliminary question and specifically there exists no doubt about the interpretation of the above EU law provision and therefore there exists no necessity for a ECJ preliminary ruling; the respective application is therefore rejected.[...] >>.

