The direct right of action against an insurer. How AR v Others (C-618/21) gives the Court of Justice an opportunity to clarify the law

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The reference

On 30 March 2023 the Court of Justice delivered its ruling in *AR v Others* (C-618/21), a reference from Poland. The reference centred on the application of Directive 2009/103/EC, the consolidated Motor Vehicle Insurance Directive (hereafter MVID), and the obligations therein relating to insurance against civil liability in respect of the use of motor vehicles. The MVID regulates the compulsory motor vehicle insurance regime throughout the EU to ensure minimum standards of protection are available to persons suffering injury (third-parties) for accidents involving vehicles. The significance of this judgment is that, for the first time, the Court has clarified the scope of the direct right of action of an injured party against the insurer of the driver at fault, for the damage caused by a motor vehicle (a right introduced in the Fourth MVID (2000/26)).

The MVID

At Article 3 MVID, each Member State must take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance. The extent of the liability covered and the terms and conditions of the cover shall be determined on the basis of these measures. Article 18 continues by requiring Member States to ensure that any party injured as a result of an accident caused by a vehicle covered by insurance (in compliance with Article 3) enjoys a direct right of action against the insurer of the assured. This is supplemented by Recital 30 where the MVID reiterates the direct right to invoke the insurance contract against the insurer, noting this is of *great importance* for the protection of victims of motor vehicle accidents (authors’ emphasis). Such a right facilitates an efficient and speedy settlement of claims, and the avoidance of legal proceedings.

The questions on interpretation of Article 18 MVID

The referring court raised points affecting six cases where the injured parties had brought direct action claims against the insurer of the party at fault. Pertinent to these cases were distinctions in the quantum of compensation available – one favourable to the injured party (a ‘hypothetical repair costs’ model which allowed for compensation based on what the costs of repair would be, regardless of the use of compensation for that purpose) and the other more favourable to the insurer (a ‘differential costs’ model which valued the vehicle in its current damaged state, compared with its previous, non-damaged state, and established compensation on this difference). There were also conditions that could be applied to the access to the compensation, based on the contractual agreement between the insurer and assured, and the referring court requested guidance on the compatibility of this with Article 18.

The questions raised were thus:

Must Article 18, in conjunction with Article 3, be interpreted as precluding national legislation which allows an injured party exercising a direct right of action for repair of the damage to their vehicle against an insurer, to obtain from the insurer only compensation for the real and actual loss to their property (the differential repair costs)? If the answer to this first question is yes, must Articles 3 and 18 be interpreted as precluding national legislation which, in such a direct right of action against the insurer, grants to the injured party only an amount corresponding to the costs of restoring the vehicle to its state before the damage, instead of compensation for the real and actual loss to their property? The third question was based on the premise that the first question was answered in the affirmative and the second in the negative. In such a situation, do Articles 3 and 18 preclude national legislation allowing an insurer paying hypothetical costs to make the payments conditional on compliance with contractual terms? Finally, the referring court asked if the Articles precluded national legislation from restricting compensation to the differential model in the event that the owner of the damaged vehicle had sold it and so therefore could not have it repaired.

Judgment of the Court and its effects

Firstly, the Court held, in respect of the scope of Article 18 MVID, that when read with Article 3, Member States are not precluded in their national legislation, in claims involving a direct action by the injured party against the insurer of the person at fault, from providing that the sole means of obtaining redress from that insurer is by way of monetary compensation.

Secondly, the Court held that Member States *are* precluded in their national legislation from establishing rules for the calculation of that compensation, and imposing on it conditions relating to its payment, where they would have the effect, in the context of a direct action brought under Article 18 MVID, of excluding or limiting the insurer's obligation, under Article 3, to cover all the compensation which the person responsible for the damage must provide to the injured party in respect of the damage suffered by that party.

This is a timely decision and has provided to the Court an opportunity to explicitly confirm the right of injured parties to have a direct right of action against the insurer of the vehicle at fault, and the terms which may or may not be attached to this right. Poland had an established system whereby the injured party had a right to claim against the insurer for repair work to be completed to establish the (vehicle and its financial worth) of the claimant back to the position it was before the accident had taken place. Such a system is common in torts and can be seen in a system of reliance losses in contract law, and was based on the doctrine of unjust enrichment. That doctrine sought to restore the injured party to their previous position and do no more. Compensation in these circumstances was not to be punitive, not to dissuade against transgression and not to advantage the claimant given there is no control over what a claimant actually does with the compensation awarded (here it would be to pay for the repairs to the vehicle or choose not to repair).

Poland was not alone in practices which needed clarification. Whilst a Member State, the UK adopted a principle that as insurance law was based on a contractual relationship (see *Cameron v Liverpool Victoria Insurance Co Ltd* [2017]), in English insurance law an insurer is

liable to no one but its assured, even when the risks insured include liabilities owed by the assured to third parties (albeit limited statutory exceptions exist). The principles in the laws of the UK and Poland are based on an understanding, replicated in Poland's reference to the Court, that a victim of an accident involving a vehicle has no general direct right of action against an insurer in respect of an underlying liability of the driver. The direct right of action lies exclusively in requiring the insurer to satisfy a judgment once the driver's liability has been established in legal proceedings.

Article 18 MVID as an unqualified right

Article 18 MVID, as held by the Court, confirms this position that a direct right of action is a principle of EU law and must be followed in the Member States. However, this is not an unqualified right and *AR v Others* (C-618/21) further confirms that as the form and nature of compensation is a matter for the States (insofar as they respect the minimum levels of compensation in the MVID), and this is a matter of contract law between the insurer and their assured, the third party can claim no more rights than those available in the contract. This achieves the EU principle of effectiveness and equivalence given that it has the effect of awarding the injured party compensation that the insured party would have been entitled to claim from the insurer had the assured compensated the victim personally, within the limits of the contract between them.

Article 18 MVID and the principles of effectiveness and equivalence

The Court then applied this interpretation of Article 18 MVID to the questions of the referring court. When considering the potential for the unjust enrichment of the injured parties in their claims against insurers, the Court explained the role of national courts in ensuring rights guaranteed under EU law do not result in the unjust enrichment of the persons concerned (*Balgarska Narodna Banka*, C-501/18, para 125; and *Mercedes-Benz Group*, C-100/21, para 94). This does not, however, lead to conflation of the obligation to provide insurance cover (a matter of EU law) with the extent of the compensation available on the basis of the civil liability of the insured person (governed by national law). This is because EU law does not intend to harmonise the rules of the Member States in respect of civil liability, the States 'are, in principle, free to determine the rules of civil liability applicable to road accidents' (*K.S. v A.B.*, C-707/19, para 24). The consequence is that Member States are free to determine which damage caused by motor vehicles must be compensated, the extent of the compensation and the persons entitled to it (para 44). Yet this, seemingly extensive right, is subject to the exercise of such powers in compliance with EU law. National provisions governing compensation are not to deprive EU law of its effectiveness, in particular by automatically excluding or disproportionately limiting the victim's right to compensation by compulsory insurance (*K.S. v A.B.*, C-707/19, para 26; and *Van Ameyde España*, C-923/19, para 44). Hence, national rules which require the use of compensation for the repair of the vehicle, whose effect would be to preclude the compensation from corresponding to the costs of restoring the damaged vehicle in the event that the damaged vehicle had already been sold, would undermine the effectiveness of Article 18 MVID.

That the Court of Justice has had the opportunity to not only confirm the direct right of action through Article 18 MVID, and place limits on the attachment of conditions when accessing compensation, is of assistance to third-party victims of motor vehicle accidents throughout the EU. It will also encourage Member States to review their laws regulating the terms under which policies of insurance are issued to ensure compliance with the ruling. However, given the substantive effects of Directive 2021/2118 and the changes it will introduce to the MVID from December 2023, interested parties should remain vigilant for developments in this area.

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Drs Marson and Ferris are specialists in EU motor vehicle insurance law, having published extensively on the subject, most recently on Directive 2021/2118 in the European Law Review, and critiques of the application of the Motor Vehicle Insurance Directives in the Modern Law Review and Law Quarterly Review.