Changing lanes and removing rights: quashing the judicial activism of the Court of Justice through Directive 2021/2118

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Abstract

Since the first Motor Vehicle Insurance Directive (MVID) in 1972, not only did the scope of the legal protection of victims of motor vehicle accidents increase in each of the five subsequent MVID iterations but so did the activism of the Court of Justice to continue the protective momentum. A pivotal judgment came in 2014, when in *Vnuk v Zavarovalnica Triglav* the Court interpreted the MVID as applying to vehicles on public and private land. Consequently, and following a consultation exercise by the EU Commission, Directive 2021/2118 was enacted which amended the MVID, reversing the effects of *Vnuk* but also limiting rights for third-party victims of motor vehicle accidents in unexpected ways. In this article, we assess the broad and negative effects of the Directive's implementation and compare how the Commission's 'Roadmap' proposals would have been a far more proportionate response to curb the Court of Justice's activism.

Keywords: Compulsory insurance; Directive 2021/2118; judicial activism; Motor Vehicle Insurance Directive; third-party victim; *Vnuk.*

Introduction

The history of the Motor Vehicle Insurance Directive (MVID), and particularly its relationship with national laws, is a conflicted one. Whilst the UK Road Traffic Act 1930 was the inspiration for the first MVID in 1972,[1] the implementation of the measures within the MVID has been varied, often with the transposing laws in States such as the UK being in contradiction of the protective rights being developed.[2] The MVID itself,

[1] (The) First Council Directive 72/166/EEC [1972] OJ L103/1.

[2] N. Bevan, 'Asleep at the wheel?', 163 *New Law Journal*, (2013), no. 7556, 10; N. Bevan, 'On the right road?', 163 *New Law Journal*, (2013), no. 7546, 94; N. Bevan, 'On the right road? (Pt. II)', 163 *New Law Journal*, (2013), no. 7547, 130; N. Bevan, 'On the right road? (Pt. III)', 163 *New Law Journal*, (2013), no. 7548, 160; N. Bevan, 'On the right road (Pt. IV)', 163 *New Law Journal*, (2013), no. 7549, 193; N. Bevan, 'UK in breach over uninsured drivers', 164 *New Law Journal*, (2014), no. 7610, 4; N. Bevan, 'Untraced drivers' scheme is car crash', 164 *New Law Journal*, (2014), no. 7598, 4; N. Bevan, 'A call for (more) reform', (2015) 165 *New Law Journal*, (2015), no. 7661, 9; N. Bevan, 'No through road', 165 *New Law Journal*, (2015), no. 7648, 7; J. Marson, K. Ferris and A. Nicholson, 'Irreconcilable differences? The Road Traffic Act and the European Motor Vehicle Insurance Directives,' 1 *Journal of Business Law*, (2017), 51–70; J. Marson and K. Ferris, 'Motor vehicle insurance law: Ignoring the lessons from King Rex', 38 *Business Law Review*, (2017), 178–86; J. Marson and K. Ferris, 'The Uninsured Drivers' Agreement 2015 as a legitimate source of authority', 38 *Statute Law Review*, (2017), 133–46; J. Marson and K. Ferris, 'Brexit means Brexit: What does it mean for the protection of third party victims and the Road Traffic Act?', 39 *Statute Law Review*, (2018), 211–27; J. Marson and K. Ferris, 'For the want of certainty: Vnuk, Juliana and Andrade and the obligation to insure', 82 *The Modern Law Review*, (2019), 1132, 1132–45; J. Marson and K. Ferris, 'The compatibility of

having been established to ensure fulfilment of the EU's free movement principles, did not initially achieve its goals. For example, there was a recognition that disparities existed between the rights of third-party victims of accidents involving motor vehicles, depending upon the national laws in the Member States where the individual was a victim. This extended to variations in the contractual provisions permitted between the policyholders and insurers, again enabling a limitation to the protection of parties outside this agreement. As such, five further iterations of the Directive[3] were enacted culminating in a consolidating Sixth MVID (to which we refer throughout this article as the 'MVID' unless expressly referring to another of the iterations). In each of the versions of the MVID, there developed a trend where the ability of Member States to facilitate the parties to exclude cover and the rights of third-party victims (through the operation of, for example, exclusion clauses) was limited and protections were increased, such as through the Fourth and Fifth MVID. These Directives required Member States to create a national guarantee fund body to provide compensation for the victims of uninsured vehicles and untraced drivers, including damage to personal property and/or their personal injuries.

The progressive nature of the MVID was evident, as was the incremental and developing protection afforded third-party victims. The MVID, as an EU Directive establishing harmonisation of the laws of Member States, required national legislative action to give effect to the relevant rules. Naturally this led to differences and inconsistencies between the States, and the Court of Justice was present to assist in its interpretation and correct application. The Court of Justice had been adopting a largely predictable interpretation of the MVID through its jurisprudence, and most Member States accepted and agreed with its direction as to the meaning and extent of its understanding of the Directives. At least this was the case, until a judgment in 2014 changed the direction of EU compulsory motor vehicle insurance law.

Vnuk[4] involved a Slovenian farmworker who was loading bales of hay in a barn loft. He was struck from ladders on which he was standing whilst performing this task by the driver of a tractor who was, at the time, reversing a trailer. Vnuk brought a claim for damages against the driver's motor vehicle insurer. However, given the accident occurred on private farmland, involving a vehicle used exclusively on private land, national law did not require the application of an insurance policy. This, argued Vnuk, was an unfair and unnecessarily restrictive reading of Article 3(1) of the MVID which superseded Slovenian law and thus did not support the limited application of the geographic scope of compulsory motor vehicle insurance. Article 3(1) of the MVID reads:

> 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.

English law with the Motor Vehicle Insurance Directives: The courts giveth . . . But will Brexit taketh away', 136 *The Law Quarterly Review*, (2020), 35-40; and J. Marson and K. Ferris, 'Too little, too late? Brexit day, transitional periods and the implications of MIB v. Lewis', 45 *European Law Review*, (2020), 415-426.

[3] (The) Second Council Directive 84/5/EEC on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles [1984] OJ LL8/17; (The) Third Council Directive 90/232/EEC [1990] OJ L129/33; (The) Fourth Council Directive 2000/26/EC [2000] OJ L181/65; (The) Fifth Council Directive 2005/14/EC [2005] OJ L149/14; and the 'MVID' refer to the Sixth Directive 2009/103/EC.

[4] Case C-162/13 *Damijan Vnuk v Zavarovalnica Triglav* [2014] ECLI:EU:C:2014:2146.

The Court at First Instance accepted the possible disparities between national and EU law and allowed the appeal. This led to the Slovenian Supreme Court referring to the Court of Justice a question on the validity of its national law's interpretation of Article 3(1). The Court of Justice began its discussion of the MVID by outlining what was meant by the term 'use of vehicles' and whether the MVID should be interpreted as restricting the requirement to insure such vehicles, as the intervening Member States argued, to roads and public places. Vnuk argued that the national law, and that of the domestic court when interpreting the word 'use,' was too narrow and should have extended to the imposition of compulsory insurance applying to the use of vehicles on private land. Advocate General Mengozzi provided his Opinion, acknowledging that Article 3(1) was initially established to remedy the problem with free movement created with insurance checks conducted at the borders of each Member State, but with the appreciation that the legislation had since evolved to provide victims of accidents involving motor vehicles specific protection. Consequently, Advocate General Mengozzi considered that, given the previous trajectory of the Court of Justice jurisprudence, it was within the powers of the Court to adopt a protective and expansive interpretation of the MVID, especially as it applied to third-party victims,[5] and this was consistent also with its restrictive application of those national provisions which attempted to limit the rights of such individuals.[6] On these bases, the Court of Justice concluded that compulsory insurance was applicable to the use of vehicles which

> … covers any use of a vehicle that is consistent with the normal function of that vehicle. That concept may therefore cover the manoeuvre of a tractor in the courtyard of a farm in order to bring the trailer attached to that tractor into a barn, as in the case in the main proceedings...[7]

Thus, the MVID should be considered as applying to vehicles on private land, the only stipulation being that the vehicle was to be used in a manner consistent with its normal function (per *Vnuk*). Further, despite in the present case the vehicle was being used with a trailer attached, and may, in certain circumstances, be an agricultural machine, has no effect on the finding that such a vehicle corresponds to the concept of 'vehicle' in Article 1(1) of the First Directive.

The conclusion of the case was that the compulsory insurance of motor vehicles extended beyond roads and other public places, to include private land, including land where no access was explicitly provided to members of the public. *Vnuk* was closely

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[5] Examples could be found in Case C-129/94 *Criminal proceedings against Rafael Ruiz Bernáldez* ECLI:EU:C:1996:143 at [18], and Case C-442/10 *Churchill Insurance Company Limited v Benjamin Wilkinson and Tracy Evans v Equity Claims Limited* ECLI:EU:C:2011:799 at [30]. The emphasis on the rights of third-party victims has also been reiterated in Case C-22/12 *Katarína Haasová v Rastislav Petrík and Blanka Holingová* [2013] ECLI:EU:C:2013:692 at [47 and 49], and Case C-277/12 *Vitālijs Drozdovs v Baltikums AAS* [2013] ECLI:EU:C:2013:685 at [38 and 40].

[6] As evidenced through the commentary and restrictive application of provisions in Case C-348/98 *Vitor Manuel Mendes Ferreira and Maria Clara Delgado Correia Ferreira v Companhia de Seguros Mundial Confiança SA* [2000] ECLI:EU:C:2000:442; Case C-356/05 *Elaine Farrell v Alan Whitty, Minister for the Environment, Ireland, Attorney General and Motor Insurers Bureau of Ireland (MIBI)* [2007] ECLI:EU:C:2007:229; *Haasová* n. 5 and *Drozdovs* n. 5.

[7] *Vnuk* n. 4 at [59].

followed by a triumvirate of authorities which caused confusion in some respects as to the direction and interpretation of the MVID, but also solidified the direction that the Court of Justice was taking with regards the geographic scope of compulsory motor vehicle insurance. In *Juliana*[8] the Court of Justice held compulsory motor vehicle insurance cover was required for vehicles parked on private land, even those which had been intentionally incapacitated to prevent their use (here, by the owner whose health was deteriorating and who had no intention of using the vehicle again). Continuing in the case of *Andrade*,[9] involving, again, a tractor, the Court of Justice recognised how vehicles can have multiple uses, depending on what their intended purpose was at the time of the accident. Thus, a tractor can be used as a means of transport, but may also be used in an agricultural capacity (here as the mechanism to dispense herbicide on a sloped vineyard).[10] Finally, in *Núñez Torreiro*[11] the Court of Justice held use of a military vehicle in a restricted area would also constitute a 'vehicle,' despite the area not being open to the public, given the vehicle was being used according to its normal function.

Yet despite the general movement of the case authority towards expanding the geographic scope of the MVID, there were inconsistencies in this developing jurisprudence. For example, the car in *Juliana* was parked and stationary (indeed, it was immobilised by the owner, and only became useable after the owner's adult son made it operational), yet was considered a vehicle and subject to the national insurance regime following application of the MVID. However, the tractor in *Andrade* had been parked on a sloped terrace and whilst being used to deliver herbicide to crops it slipped (and therefore was not being driven), crushing the victim at the bottom of the terrace. This vehicle was not required to be covered by insurance at the time of this accident. The all-terrain vehicle in *Núñez Torreiro* was held to be a vehicle, as it was, according to the Court of Justice, being used according to its normal function, despite the finding that it was using wheels on the terrain when it was argued that tracks would have been more appropriate, and therefore perhaps less likely to have led the vehicle to have caused the injury to the victim. These cases, along with the tenor of the Court of Justice's activism towards increasing the geographic scope of compulsory motor vehicle insurance led to calls for a review of the MVID to determine whether the direction taken by the Court of Justice was in accordance with the intention of the legislation. This led to an initial public consultation exercise.[12]

The Commission Roadmap review post *Vnuk*: Options and the resulting Directive

On 8 June 2016, the Commission published its Roadmap for the MVID, assessing the impact of the decisions on motor insurance and to determine the necessity for a Seventh

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[8] Case C-80/17 *Fundo de Garantia Automóvel v Alina Antónia Destapado Pão Mole Juliana and Cristiana Micaela Caetano Juliana* ECLI:EU:C:2018:661.

[9] Case C-514/16 *Isabel Maria Pinheiro Vieira Rodrigues de Andrade, Fausto da Silva Rodrigues de Andrade v José Manuel Proença Salvador, Crédito Agrícola Seguros — Companhia de Seguros de Ramos Reais SA, Jorge Oliveira Pinto* ECLI:EU:C:2017:908.

[10] See J. Marson and K. Ferris, 'For the want of certainty: Vnuk, Juliana and Andrade and the obligation to insure', 82 *Modern Law Review*, (2019), 1132, 1132–45 for commentary.

[11] Case C-334/16 *José Luís Núñez Torreiro v AIG Europe Limited, Sucursal en España and Unión Española de Entidades Aseguradoras y Reaseguradoras (Unespa)* ECLI:EU:C:2017:1007.

[12] European Commission (2017) 'Public consultation on REFIT review of Directive 2009/103/EC on motor insurance.' Available at: https://ec.europa.eu/info/consultations/finance-2017-motor-insurance_en.

MVID. The Roadmap was a result of pressure exerted from countries such as France and the UK as to the implications of the extension of compulsory insurance to vehicles on private land which, they argued, was due to the Court of Justice's misunderstanding of the MVID. The Commission concluded its assessment, asserting that the MVID was generally fit for its intended purpose, but areas could be improved upon to give greater certainty to Member States and the citizens coming under the Directive's remit. This would ensure continued protection for third-party victims of road traffic accidents, whilst clarifying the law which had been subject to interpretation through the Court of Justice's recent (and on-going) case authorities. There were four options identified by the Commission, yet we argue the resultant changes present in Directive 2021/2118 far exceed these, and for third-party victims, in negative ways. We now identify each of the options as presented by the Commission,[13] along with commentary on the actual changes made in Directive 2021/2118 and their implications for the future of compulsory motor vehicle insurance law through the EU.

Option 1: Do nothing, leaving the Vnuk *interpretation untouched*

The first proposition in the findings from the Commission's Roadmap was simply that the EU could have allowed the interpretation of the MVID to continue, unchanged by legislative action. The long-standing position of compulsory motor vehicle insurance applying to roads (and in the UK and Spain to 'other public places' too) had been changed in *Vnuk*, and latterly confirmed in *Juliana*, *Andrade* and *Núñez Torreiro*. There was no geographic restriction to the compulsory insurance of vehicles in the MVID and it was consequently open to the Court of Justice to interpret the Directive as extending to all land, and to vehicles used according to their normal function.

Instead of taking no action, the Parliament and Council amended the MVID markedly with a new definition of 'use of a vehicle.' This was a fundamental shift away from the Court of Justice's *Vnuk* ruling, with the insertion of Article 1(a) Directive 2021/2118 to amend Article 1 of the MVID to remove any misconceptions. A vehicle was, according to Article 1, one '… intended for travel on land and propelled by mechanical power, but not running on rails, and any trailer, whether or not coupled.' The provision was lacking in clarity resulting in inconsistencies between the transposed laws in Member States. In the UK, for example, s. 185 of the Road Traffic Act 1988 (RTA88) defines a vehicle as 'mechanically propelled [and] intended or adapted for use on roads (and other public places)' which disqualified from its scope vehicles that were not 'intended' or 'adapted' for use on roads and other public places.[14] The result is that whilst in Spain, the all-terrain vehicle in *Núñez Torreiro* was subject to compulsory insurance, in the UK, national legislation would have held that no insurance cover was needed and the victim would have been at least undercompensated, if not actually uncompensated. The result was a revised Article 1 of the MVID through Directive 2021/2118, which now reads

> (a) any motor vehicle propelled exclusively by mechanical power on land but not running on rails with:
> (i) a maximum design speed of more than 25 km/h; or

[13] EU Commission Roadmap. Inception Impact Assessment. Adaptation of the scope of Directive 2009/103/EC on motor insurance. 8 June 2016. Available at: www.ec.europa.eu/smart-regulation/roadmaps/docs/2016_fisma_030_motor_insurance_en.pdf.
[14] See *Lewington v Motor Insurers' Bureau* [2017] EWHC 2848 (Comm).

(ii) a maximum net weight of more than 25 kg and a maximum design speed of more than 14 km/h;
(b) any trailer to be used with a vehicle referred to in point (a), whether coupled or uncoupled.

Without prejudice to points (a) and (b), wheelchair vehicles exclusively intended for use by persons with physical disabilities are not considered to be vehicles referred to in this Directive.

The following insertion is of particular significance:

1a. "use of a vehicle" means any use of a vehicle that is consistent with the vehicle's function as a means of transport at the time of the accident, irrespective of the vehicle's characteristics and irrespective of the terrain on which the motor vehicle is used and of whether it is stationary or in motion.

Article 1(a) refers to a vehicle being 'propelled exclusively by mechanical power.' The insertion of the word 'exclusively,' along with the weight and speed requirements, sought to avoid overregulation of vehicles and the fear of some battery-powered vehicles being subject to compulsory insurance (electric scooters, Segways and so on). This was because precedent exists where such vehicles had come under the remit of the law in the jurisdiction of Member States and the EU used this amending Directive as an opportunity to curtail the Directive's reach.[15] In post-*Vnuk* jurisprudence, in *Wastell v Woodward*[16] the insurer of a burger van was required to compensate the victim of an accident when the vehicle was involved in causing the injury, despite the burger van not, at the time, being used as a means of transport. In each case, the vehicle manufacturers had expressed their view that the vehicles were not intended nor suited to use on the road. The courts accepted their use in this context as being unlawful, but this did not stop them fulfilling the criteria as motor vehicles for the purposes of the law.

The 'mechanical power' aspect of the classification of motor vehicle is also significant and its reach extends far further than, perhaps, the average vehicle owner/user might consider. In *Línea Directa Aseguradora, SA v Segurcaixa, Sociedad Anónima de Seguros y Reaseguros*[17] the Court of Justice had held that the compulsory insurance requirement established in Article 3 of the MVID encompassed a vehicle spontaneously catching fire during the 24 hours of it being parked inside a garage. A similar conclusion was reached in *R & S Pilling t/a Phoenix Engineering v UK Insurance Ltd*,[18] a case heard by the UK Supreme Court in one of the final cases at the appellate court before the UK's withdrawal from the EU. Here, and whilst misunderstanding the relevant EU law and its obligations from *Pfeiffer*[19] regarding consistent interpretation of Directives,[20] the Court

[15] See for example, *Chief Constable of North Yorkshire Police v Saddington* [2001] RTR 227 (UKHC) and *DPP v King* [2008] EWHC 447 (Admin).
[16] *Wastell v Woodward* [2017] 2 WLUK 717.
[17] Case C-100/18 *Línea Directa Aseguradora v S.A./Segurcaixa, Sociedad Anónima de Seguros y Reaseguros* [2019] ECLI:EU:C:2019:517.
[18] *R & S Pilling t/a Phoenix Engineering v UK Insurance Ltd* [2019] UKSC 16.
[19] Cases C-397/01 to C-403/01 *Bernhard Pfeiffer et al v Deutsches Rotes Kreuz, Kreisverband Walshut eV* [2004] ECLI:EU:C:2004:584.
[20] The Supreme Court concurred with the conclusion drawn by Judge Waksman QC that s.145(3) RTA88 could not be interpreted consistently with the MVID or the jurisprudence of the CJEU.

did, obliquely, recognise that a car in a garage without an attached battery and raised on a fork-lift truck at the time of a fire was still a 'motor vehicle' for the purposes of the compulsory insurance applicable. This is understandable. As far in the UK's jurisprudence as the 1960's, the English courts have explained what mechanical power in respect of vehicles means. In *Newberry v Simmonds*,[21] the vehicle in question had its engine removed but this did not stop the court holding it as, still, a mechanically propelled vehicle. This case can be contrasted with *Smart v Allan*[22] where a vehicle had no gearbox and no battery, with a rusted engine and a missing tyre. The courts distinguishing between a car which had been dismantled and one which was disintegrating (and thereby unlikely ever to be repaired). This line of reasoning, even in 1960's England, made sense when the Court of Justice held that an immobilised vehicle on private land (*Juliana*) did not stop being a motor vehicle for the purposes of the MVID.

The new Article clarifies the law on the requirement for motor vehicle insurance cover to those vehicles exclusively propelled by mechanical power (which, of course, will cover the emerging electric car market), but adds a new requirement which is likely to have negative effects on the protection afforded victims of accidents. This is due to the 'use of a vehicle' being linked directly to it as a 'means of transport' at the 'time of the accident.' It is immediately evident how this stipulation to the designation of a vehicle has the potential to limit the compulsory insurance cover applicable and enable insurers, for example, which operate in a Member State which has followed this element of Directive 2021/2118, to evade the responsibility for vehicles which were not, at the time, being used as a means of transport.

A further important aspect of the MVID and its requirement of compulsory vehicle insurance comes at Article 3:

> 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…
> Each Member State shall take all appropriate measures to ensure that the contract of insurance also covers:
> (a) … any loss or injury which is caused in the territory of those States;
> (b) any loss or injury suffered by nationals of Member States...
> The insurance… shall cover compulsorily both damage to property and personal injuries.

The result is the MVID ensuring that vehicles used in the territory of the Member State are covered by an insurance policy which, at a minimum, protects personal and property damage to third-parties (and at least to those minimums set by national law). The changes imposed by Article 1a of Directive 2021/2118 make alterations to this cover with linking liability for damage caused by the vehicle being determined at the time of the accident. The insertion of Article 1a seeks to retain some of the elements of *Vnuk*'s reasoning in respect of the confusion and ambiguity that had existed in the transposition of the law in several Member States. Advocate General Mengozzi's Opinion on *Vnuk* is where he noted nuances in the concept of motor vehicle use. Sixteen Member States had

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This is somewhat disconcerting especially when considered in light of Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECLI:EU:C:1990:395 and *Pfeiffer* n. 19.

[21] *Newberry v Simmonds* [1961] 2 QB 345.

[22] *Smart v Allan* [1962] 3 All ER 893.

transposed the MVID, not specifically identifying vehicles in respect of being used as a means of transport, but by adopting terminology including 'use,' 'circulation,' and 'utilisation.'[23] Such a lack of detailed instruction and, perhaps, terminological imprecision, had led to the diversity of national practices. However, this terminology may go against the Court of Justice's decision in *Línea Directa* where, it is recalled, the compulsory insurance required in Article 3 encompassed a vehicle spontaneously catching fire during the 24 hours of it being parked inside a garage. For the Court of Justice, the fact the vehicle was parked at the time of the incident did not prevent the application of the Article given being parked was an integral part of the vehicle's use as a means of transport.

The *time of the accident* dimension to the evolution seen in Directive 2021/2118 reflects the interpretation of the MVID issued by the Court of Justice and is a direct consequence of *Vnuk*, *Andrade* and *Núñez Torreiro.* In these cases, the Court of Justice pointed out that the geographic scope of the MVID was not restricted in that Directive, and, therefore, the latter was applicable to vehicles on private land, but held that these vehicles were required to be used according to their normal function, that is as a means of transport. The inclusion in Article 1a of Directive 2021/2118 of the vehicle being used as a means of transport at the time of the accident will limit the efficacy of the MVID as a protective source of rights for third-party victims. Further, we argue, the additional criterion goes much further than ensuring the continuation of legal certainty[24] and reflecting the existing case law of the Court of Justice.

Initially it may be hypothesised that this legislative instruction ends the previous contradiction established in the case law, especially between *Juliana,* and *Vnuk* and *Andrade*. Indeed, according to the Preamble, Directive 2021/2118 provides clarity to the concept of 'use of a vehicle.' On closer inspection, this may not be such an easy conclusion to draw. First, as noted previously in the academic literature,[25] the use of vehicles may not be entirely clear. Reference is made to vehicles as meaning those 'used as a means of transport.' This immediately relates to *Andrade* and the concern as to when liability is established, and liability cover will be needed. In *Vnuk*, the tractor that was used in the accident never left the private farmland on which it operated. It was being used to move a trailer at the time of the accident which would not, it seems from a reading of Recital 5, exempt it from being used as a means of transport. The Recital does not stipulate *what* is to be transported, hence the moving of bales of hay from one location to a barn would seemingly qualify. With *Andrade*, the tractor was being used to deliver herbicide and therefore this consequently led the drafters to insert the example of a vehicle not being a vehicle where it is used as an industrial or agricultural power source.

Previously[26] we concluded that the Court of Justice's case law had been expansive, but had ultimately left EU law in a state of flux. *Andrade* appeared to offer some boundary to the extent of liability for accidents occurring on private land, recognising that some vehicles and their *normal functions* manifest as multiple functions. However, the nature of the tractor in *Andrade* being used to dispense herbicide, and being

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[23] Case C-162/13 *Damijan Vnuk v Zavarovalnica Triglav d.d.*, ECLI:EU:C:2014:106 at [18].

[24] For commentary on the topic see J. Temple Lang, 'Legal Certainty and Legitimate Expectation as General Principles of Community Law', in U. Bernitz, and J. Nergelius. (Eds.), *General Principles of European Community Law,* (Kluwer, 2000), 163.

[25] J. Marson and K. Ferris, 'Too little, too late? Brexit day, transitional periods and the implications of MIB v. Lewis' see n. 2.

[26] See J. Marson and K. Ferris, 'For the want of certainty: Vnuk, Juliana and Andrade and the obligation to insure' n. 2.

stationary at the time of the accident, seemed to contradict the *Vnuk* precedent regarding the 'normal use of the vehicle' as being principally a means of transport. *Juliana* added further complexity in the conclusion that insurance was a necessary requirement for all vehicles, regardless of their location or readiness to be moved, it was only required that vehicles were capable of being moved (notwithstanding whether this necessitated some additional work to enable its functionality). The precedent in *Juliana* would at least imply that, whilst the victim in *Andrade* could not successfully be compensated for the injuries sustained when the tractor slipped down the terrace as it was not moving under its own volition and was, at the time, being used as an agricultural / industrial machine, its insurance and the liability pertaining to the insurer would have come into effect had it slipped whilst driving to the next location in the vineyard. Such a situation was untenable, leading to the proposal for reform of the MVID.[27]

While *Vnuk* imposed the requirement for compulsory insurance to motor vehicles on private land, *Juliana* extended this obligation to a vehicle which had been immobilised, and *Línea Directa* furthered this reasoning to a 'parked' car – yet determining a vehicle's use at the 'time of the accident' is uncertain. The links between the triumvirate 'motor vehicle as a means of transport,' 'use' and 'time of the accident' will have to be established. In many instances of motor vehicle accidents, the three criteria will be obvious. The tractor in *Vnuk* was being used as a means of transport where it struck the victim, therefore the direct links are easy to establish. This was less so in *Línea Directa*, but the Court of Justice did explain how a parked car, even one parked for a considerable period of time between two journeys is still a vehicle being used in accordance with its function as a means of transport.[28] Yet guidance on this matter is limited.[29] In *Línea Directa* the Court of Justice merely stated that whether a vehicle's engine was running at the time of the accident was not conclusive of its status as a motor vehicle,[30] but in respect of it being stationary and in a car park.[31] The most detailed commentary on the issue of time of the accident was provided in *Juliana*, but this simply culminates in a recognition,[32] that the use of vehicle and the obligation to insure are not identical concepts.

In the UK, case law adopted the reasonable man standard in attempts to determine a motor vehicle. In *Burns v Currell*[33] and predating the MVID, although using the same definition as used in s. 185 of the RTA88 which transposed the relevant aspects of the MVID in the UK, the judgment provided subjective conditions for identifying a vehicle for the purposes of this part of the law. In respect of vehicles which were intended for use on a road, the court held 'I prefer to make the test whether a reasonable person looking at the vehicle would say that one of its users would be a road user.'[34] It was held in *Burns v Currell* that a go-kart was not a vehicle according to the RTA88 as it could not be envisioned that a 'reasonable' person would take and use such a vehicle on the road. This might even be applicable to the use of the dumper truck in *Lewington v Motor Insurers' Bureau* because of the stipulation in UK law regarding the use of a vehicle on a road or

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[27] EU Commission. Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/103/EC. Brussels, 24.5.2018 COM(2018) 336 final 2018/0168 (COD).
[28] *Línea Directa*, n. 17 at [42-44].
[29] See Case C-648/17 *BTA Baltic Insurance Company*, EU:C:2018:917 at [37] and [40].
[30] ibid at [38] and [40].
[31] A similar point was made in *BTA Baltic* n. 29 at [37].
[32] *Juliana*, n 8 at [60].
[33] *Burns v Currell* [1963] 2 All ER 297.
[34] ibid, Lord Parker at para. 300C.

other public place. This would not have applied in respect of the MVID due to its broader concept of vehicle meaning '*any* vehicle intended for travel *on land*…' [authors' emphasis]. However, the Court of Justice ruled out any notion of the use of a vehicle being a subjective test. The classification of vehicle is made independent of the use that is, or may be made, of it.[35] Yet the discussion being presented here is important, as is the reference to UK law, precisely because of the amended Article 1 of the MVID by Directive 2021/2118. Instead of considering the UK's law which makes reference to vehicles being 'intended or adapted' for road use, replace this with the concept of determining causality as at the time of the accident. What is contemplated by the users is likely to be instructive as motor vehicles have often ceased being used as a means of transport where they are burger vans, mobile libraries, mobile catering vehicles, perhaps even mobile homes. In *Andrade*, it was held

> it is necessary to determine whether, at the time of the accident … that vehicle was being used principally as a means of transport, in which case that use can be covered by the concept of "use of vehicles" …, or as a machine for carrying out work, in which case the use in question cannot be covered by that concept.[36]

Consequently, the tractor in *Andrade* was, at the time of the accident, principally a machine for carrying out work and in such circumstances, the case fell outside the notion of the use of vehicle. If these vehicles are taking on some other purpose where an accident occurs, could it not be envisaged that insurers will attempt to escape liability by holding that, at the time of the accident, these vehicles were not being used as a means of transport, rather they are a business premises or temporary residence?[37] If the reasonable person would determine that, regardless of its parked position and use as a dispensary for consumables, the vehicle continues to be a vehicle even at the time of the accident it was not being used as a means of transport, surely it would be reasonable for all parties, and their insurers to hold similarly? In *Juliana*, the Court of Justice held that issues relating to the requirement to insure had to be made in advance of the accident and could not be retrospectively applied, according to, for example, the needs of the victim or the law as to be applied in the Member State.[38] Indeed, in his Opinion to the case, Advocate General Bobek remarked as a matter of legal certainty, it was untenable for the law to allow vehicles to 'drift in and out' of the duty to insure depending on their particular use or status when the accident occurred.[39] Yet this seems to be exactly what is happening as a result of Article 1a's amendment to the MVID. Whilst the MVID will now require insurance to apply to vehicles (albeit subject to the new Article 5), it did not follow the *Juliana* extension to the geographic scope of insurance[40] which might have been a

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[35] *Vnuk* n. 4 at [38].
[36] *Andrade* n. 9 at [40].
[37] And in so doing attempting to push responsibility for the claim to another insurer through, for example, employer's liability, park home insurance and/or public liability insurance cover?
[38] See Advocate General Bobek Case C-80/17 *Fundo de Garantia Automóvel v Alina Antónia Destapado Pão Mole Juliana and Cristiana Micaela Caetano Juliana*, ECLI:EU:C:2018:290 at [53].
[39] ibid at [54].
[40] Among others, for instance the extension of the concept of a vehicle as a means of travel: At para 75 of Advocate General Bobek's opinion in Case C-80/17 *Juliana* n. 38: 'In that regard, it is correct that the Court has Stated, notably in the judgment in *Andrade*, that the normal function of a vehicle is to be used as a means of "transport." However, I do not consider that by employing

sensible middle ground. Rather, the insurance may exist, but its application will depend on the specifics of the use of that vehicle at the time of the accident. The law as currently stands is confused as to the obligation to insure (*Juliana*), and the application of that insurance involving the use of motor vehicles when occurring at the time of the accident.

Option 2: Impose the responsibility for judgments in Vnuk *situations and which that do not fall in the scope of cover required under the MVID to the national guarantee fund bodies*

To begin, a remedy to national failures in ensuring a system of compulsory motor insurance exists for vehicles used on private land, for example those purely agricultural, construction, industrial and motorsport activities by imposing the obligation to compensate on a guarantee fund body is misguided. It is understandable that, given the nature of the vehicles listed above, if *Vnuk* were to be overruled and this was the fundamental issue with the Court of Justice's activism that was to be remedied, the very type of vehicles which caused problems in *Vnuk* and *Andrade*, along with the concerns expressed to the viability of motorsport as an industry, could be managed through the national guarantee fund. The MVID had established, in Article 10, the obligation on Member States to establish a national guarantee fund – essentially a compensatory body which would provide compensation to third-party victims of accident involving motor vehicles where the vehicle was either uninsured or the driver could not be identified. This led to its designation as 'insurer of last resort' but, and importantly, there was included a restriction to its remit. The national guarantee fund body is only liable to compensate for accidents involving those vehicles listed in Article 3, which means that the compensatory body is not responsible for claims caused by vehicles that may lawfully be derogated from cover. In such cases, Member States are required to ensure another means of compensation (which may be through a local authority and other securities) can satisfy claims. Hence, the significance of national compensatory bodies cannot be underestimated as they serve a purpose to ensure that an 'insurer of last resort' exists if compensatory protection and an insurance policy against accidents is missing.[41]

Such an obligation being imposed on a national compensatory body is understandable in seeking to offer protection, with the minimum change to the law and inconvenience being imposed on vehicle users and insurers. However, two elements immediately cause pause for thought. First, to impose such a change would require agreement between the parties (in the UK that was between the private limited company the Motor Insurers' Bureau (MIB) which occupied the role of the national guarantee fund, and the State) and on terms which are widely understood.

Secondly, the funding model for such bodies would have to be changed as the MIB, for instance, is funded entirely through a levy against every insurer (and thereby insurance policy) issued. To hold increased liability to the MIB, leading to an increase in the levy, against policyholders who specifically are funding the protection against liability of vehicles excluded from the insurance regime would be a particularly difficult

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that term, the Court intended to refer to a specific "transport" function distinct from and logically narrower than that of "travel." (38) It would rather appear to me that the Court sought to distinguish use as a machine from the normal function of a vehicle. In my view, and in the light of Article 1(1) of the First Directive, a more accurate definition of the "normal function" of a vehicle is to be used for "travel".'

[41] See *Churchill and Evans* n. 5; and Case C-409/11 *Gábor Csonka and others v Magyar Állam* [2013] ECLI:EU:C:2013:512.

policy on which to gain agreement. Recently in the UK, in a case operating under the MVID, the UK's compensatory body was held liable for defects in the RTA88. Whilst the decision of the Court of Appeal in *Colley v Motor Insurers' Bureau*[42] was fundamentally flawed,[43] it did not prevent it from taking exactly this action and imposing a responsibility on the guarantee fund. Since the Fourth MVID, claims directly against the insurer of the person at fault have been actionable by third-party victims. The consequence has been access to compensation by the third-party victim on the most favourable terms and with the ability to secure the full compensation owed to the claimant. Claims against the national guarantee fund body, however, do not necessarily operate on the same terms in all Member States. To continue with the recent *Colley* ruling, the Court of Appeal commented that holding the UK national guarantee fund body (the MIB) liable for the injury sustained by a third-party victim was, '… ensuring compensat[ion] "at least up to the limits of the obligation" provided for in Article 3.'[44] However, we advocate this is not the case at all.[45] Having obligated the national guarantee fund body to satisfy Colley's claim, the terms on which it will handle Colley's compensation claim is not the same as if the insurer had been held responsible directly, and consequently the third-party victim suffers as they are subject to a claims regime which is based on poorer terms than those available in a contractual claim directly against the insurer.

In the UK, the guarantee fund body had been granted wide discretion as to its terms and various exemptions, over several amendments and iterations, which lessen the protection for third-party victims of untraced or uninsured drivers.[46] For example, operating on such terms, under Article 75 of its agreement, results in the body having no liability to meet subrogated claims[47] and, as demonstrated in *EUI Ltd v Bristol Alliance*[48] the distinction between the rights guaranteed under statute and those available under the agreement between the guarantee fund body and the State are sufficiently different to place victims seeking redress under the latter arrangement at a disadvantage.[49] Further,

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[42] *Colley v Motor Insurers' Bureau* [2022] EWCA Civ 360.

[43] See J. Marson and K. Ferris (2022) 'From Insurer of Last Resort to an Insurer of Convenience: The Court of Appeal and the Recanted Policy' *The Law Quarterly Review* (in press) for commentary on the errors and misunderstandings of EU law by the Court of Appeal.

[44] *Colley* n. 42 at [79].

[45] See J. Marson and K. Ferris (2022) 'When is an insured vehicle an uninsured vehicle? In Colley v MIB the Court of Appeal continues its struggle with EU motor vehicle insurance law' *Modern Law Review* (in press).

[46] See N. Bevan, 'Why the Uninsured Drivers Agreement 1999 Needs to be Scrapped' (2011) 2 *Journal of Personal Injury Law*, 123, and J. Marson and K. Ferris, 'The Uninsured Drivers' Agreement 2015 as a Legitimate Source of Authority' n. 2.

[47] A subrogated claim is one where another party should have been responsible for settling.

[48] *EUI Ltd v Bristol Alliance Ltd Partnership* [2012] EWCA Civ 1267.

[49] There are many examples of differences between claims directly against the insurer and those under the agreements made between the national guarantee fund and the State. One of the most significant is the ability of the guarantee fund body to identify any payment received by the claimant from another source (this might be from a private insurance policy or an employer's insurance policy) in respect of the proceedings and deduct these from any compensation issued. The MVID was designed to prevent double payments of claims, not to disadvantage a claimant from receiving fair compensation from the tortfeasor, or the guarantee fund, simply because they have a policy of insurance held privately. The nature of these national rules in the agreements far exceed the deductions allowed in the MVID at Article 10 and they even exceed the common law rights to permission deductions - see *White v White* [2001] UKHL 9 at [34] (UK House of Lords).

the agreements established between the MIB and the UK were based on procedural rules which were strewn with anomalies which often resulted in the claimant being subject to more onerous burdens to process their claim and/or being subject to fewer protective rights than had they been able to claim directly against the insurer of the tortfeasor.[50]

Option 3: Limit the scope of compulsory insurance to 'in traffic' vehicles that are used for transport and in areas to which the public has access

According to the Commission's proposal, compulsory insurance cover would have applied only to vehicles 'in traffic (or circulation to use terminology used in several Member States).' Such a suggestion would have narrowed the wide geographic scope of cover required after *Vnuk,* albeit its interpretation may have extended perhaps to include vehicles on private land, at least those areas to which the public has access. It had been mooted that even further restrictions to insurance should have been adopted. Here, compulsory insurance rules would have exempted vehicles used in 'closed areas*'* and not 'in traffic,*'* this being a condition that such vehicles would not be used, even occasionally, in areas where the public has access. Further, where a vehicle which required an insurance policy, due to its use in traffic, led to damage or injury, it would fall upon that insurer to satisfy the claim for compensation, even had this not been in such a closed area.[51]

This proposal was not taken forwards in Directive 2021/2118 and perhaps for practical reasons. It did implicitly make reference to Article 3 of the MVID, which itself makes reference to 'road traffic accidents,' and likely had the intention of re-establishing the linkages between insurance and roads (as widely or narrowly one wishes to interpret such a word). However, it was a proposed system, so ambiguous, that its practical use

[50] J. Marson, H. Alissa and K. Ferris, 'Driving towards a more therapeutic future? The Untraced Drivers Agreement and conscious contracting', 25(1) *European Journal of Current Legal Issues*, (2021), http://webjcli.org/index.php/webjcli/article/view/740; J. Marson, H. Alissa and K. Ferris, 'Resolving the inconsistency between national and EU motor insurance law: Was Factortame the solution nobody sought?', 22(1) *German Law Review*, (2021), 122-146; J. Marson and K. Ferris, 'Too little, too late? Brexit day, transitional periods and the implications of MIB v Lewis' n. 2; J. Marson and K. Ferris, 'The compatibility of English law with the Motor Vehicle Insurance Directives: The courts giveth… at least until brexit day' n. 2; J. Marson and K. Ferris, 'For the want of certainty: Vnuk, Juliana and Andrade and the obligation to insure' n. 2; J. Marson, K. Ferris and N. Fletcher, 'EU motor insurance law in the UK, accidents on the road and responsibilities off it', *EU Law Analysis,* (2019) http://eulawanalysis.blogspot.com/2019/05/eu-motor-insuance-law-in-uk-accidents.html; J. Marson and K. Ferris, 'Motor vehicle insurance law: ignoring the lessons from King Rex' n. 2; J. Marson, K. Ferris and A. Nicholson, 'Brexit means brexit: What does it mean for the protection of third party victims and the Road Traffic Act?' n. 2; J. Marson, K. Ferris and A. Nicholson, 'Irreconcilable differences? The Road Traffic Act and the European Motor Vehicle Insurance Directives' n. 2; J. Marson and K. Ferris, 'The Uninsured Drivers' Agreement 2015 as a legitimate source of authority' n. 2; K. Ferris and J. Marson, 'Which is the applicable law in recovery of losses from an uninsured driver? Moreno v The Motor Insurers' Bureau [2016] UKSC 52', 22(3) *European Journal of Current Legal Issues,* (2016) http://webjcli.org/article/view/508/672.

[51] European Parliament. 'On the proposal for a directive of the European Parliament and of the Council amending Directive 2009/103/EC of the European Parliament and 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 ensure against such liability.' (COM(2018)0336 – C8-0211/2018 – 2018/0168(COD)). Available at: https://www.europarl.europa.eu/doceo/document/A-8-2019-0035_EN.html.

would have been very difficult to administer. What would amount to the use of vehicles sometimes in traffic and sometimes in closed areas? Vehicles used exclusively in closed areas, and their potential for being involved in motor vehicle accidents and, indeed, how their features because of this can exacerbate problems when used, in traffic, can be seen in the UK case of *Lewington v Motor Insurers' Bureau.* In this case dumper trucks used exclusively in a quarry were stolen and taken on the highway as part of the thieves' escape plan. Given that the vehicles were not insured because they were used in a closed area with no access by the public did not stop thieves taking them onto public roads. Such vehicles were designed for use exclusively on private land and therefore were not fitted with rear lights, they had no registration markings, and due to these facts, an accident occurred when another driver had no awareness of their presence on a dark, unlit road at night, until the driver had to perform an emergency manoeuvre to avoid hitting them and lost control of their vehicle, resulting in injury and damage when the car left the highway. The nature of the vehicles meant they, nor the drivers, were traced, yet this did not prevent the victim requiring compensation. Had the proposal been taken forwards, the Commission would have needed to create a new definition of 'in traffic*'* and provide detailed instruction as to how national courts would interpret these words to avoid scenarios like *Lewington v Motor Insurers' Bureau*. Even so, it is quite possible that 'in traffic' would likely have been interpreted by some Member States as areas 'where the public has access' and ultimately reduced to 'road or other public place*'* as per the UK and Spanish national legislation pre-*Vnuk*.

Of greater immediate concern is the extension in Directive 2021/2118 to amendments to Article 5 of the MVID and the 'public road' derogation. 'The notion of "use of vehicles" is not limited to use in a particular place or on a particular terrain or territory. It is "not limited to road use, that is to say, to travel on public roads."'[52] The quote from one of the most recent of the post-*Vnuk* triumvirate cases re-emphasises that the pre-Directive 2021/2118 MVID was not to be interpreted as being confined to public land. But it must be recalled that Member States had operated largely based on compulsory motor vehicle insurance being applicable to roads rather than private land, and this is understandable. Article 5 of the Third MVID had referred to victims involved in a 'road traffic accident.' Article 5 allowed for derogations from the compulsory motor vehicle insurance regime and this was a sensible addition. It allowed Member States to issue to the Commission a list of vehicles (types of vehicle, usually) which would not be subject to compulsory insurance because of the nature of the vehicle. Police force vehicles, ambulances and other such State-underwritten vehicles would be present as the State could satisfy claims for compensation as required. Directive 2021/2118 adds a further paragraph to Article 5: 'A Member State may derogate from Article 3 in respect of vehicles not admitted for use on public roads in accordance with its national law.' As Article 3 of the MVID provides for the general obligation on Member States to ensure civil liability for use of vehicles is maintained in the Member States, and whilst the reversal of the jurisprudence established since 2014 was largely expected, it was far from obvious that the EU would seek to replace one problem by opening other avenues for transpositional difficulties.

The term 'public road' may seem self-explanatory, but it is a concept which has caused problems in the legal systems of Member States. The UK went through a period of interpretative complications with the RTA88 at s. 145(3)(a) where the RTA88 imposed the compulsory insurance of motor vehicles which were used on a 'road.' In *Clarke v*

[52] *Núñez Torreiro* n. 11 at [28].

General Accident Fire and Life Assurance Corporation plc,[53] following a minor road traffic accident occurring in a supermarket car park, the House of Lords was tasked with determining the geographic extent of the requirement for compulsory motor vehicle insurance. Article 5 of the Third MVID referred to parties involved in a 'road traffic accident' but the remainder of the Directive was silent as to the extent or limitation of the insurance obligation applying only to those on a road. A car park, being private land but one to which Members of the public have access, was not considered a road for the purposes of the RTA88, but the Lords did accept the disparity between the potentially broader interpretation of the MVID compared with the very narrowly defined national law. Nevertheless, given the lack of detail and instruction available as to the geographic scope of Article 5, the Lords refused to interpret the RTA88 as extending beyond the word 'road.' It was only after this case, some two years later, that the UK enacted the Motor Vehicles (Compulsory Insurance) Regulations 2000, amending s. 145 with the extension to *public road* with 'or other public place' to ensure compliance with the MVID.

Recital 8 of Directive 2021/2118's Preamble explains how the term 'public road' is to be understood. For the revised MVID, it means those 'areas not accessible to the public due to a legal or physical restriction or access to such areas, as defined by its national laws.' The Preamble describes how public roads are those which are not accessible to the public. This may be through physical restrictions, but it also concerns those areas where there is a legal restriction in place. Hence, such roads may not be subject to any physical barrier preventing vehicular or pedestrian access, only an instruction for those Members of the public not to enter. In the UK, campsites and caravan parks,[54] pay and display car parks,[55] even dockyards[56] have been held as a 'road' (being at least quasi-public areas) for the RTA88. In France, for instance, distinctions exist between roads (routes) and paths (chemins). Roads in France are public and thereby give access to the public, so vehicles using this area would not be subject to an exemption if requested. Yet paths (chemins) being either public or private, can belong to private or public entities (belonging, as they do with roads, to the broader category called '*voies'*). Private paths in private areas have their access (circulation) regulated by the owner of the property and it is not uncommon for cars and other motor vehicles to be banned from accessing a path, as is particularly the case with, for example, hiking trails. Still, owners of private paths can be subject to easement legal duties (*servitudes légale de passage*) if, for instance, a neighbour needs to use the path to access the property. The extent of access and how this will be used in the interpretation of what amounts to a public road, the extent to 'public' in the context of road and how the national law of Member States already adequately protects third-party victims of accidents involving motor vehicles remains to be seen. Private roads are inherently problematic, as access pathways to, for instance, a precinct of buildings, industrial estates and other places where access to Members of the public would not generally be invited are just some examples of where the derogation might apply, and these spaces are not uncommon, and wherever vehicles and the public may come into contact, there is potential for significant injury taking place. Without minimum levels of protection available, it ultimately leaves the matter to the public taxpayer to provide the compensatory remedy.

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[53] *Clarke v General Accident Fire and Life Assurance Corporation plc* [1998] 1 WLR 1647.
[54] *DPP v Vivier* [1991] 4 All ER 18.
[55] *Montgomery v Loney* [1959] NI 171.
[56] *Buchanan v MIB* [1955] 1 All ER 607.

The MVID has always had an expansive and protective concept of third-party motor vehicle insurance in respect of its geographic scope, if not being brought sharply into focus and Member States' attention with *Vnuk*, but this is the first time the MVID has seen fit to limit the requirement to public roads. It will undoubtedly be argued by some Member States that the purposeful inclusion of the word 'public' intends to be exhaustive and thereby limiting the application of the Directive, especially when the changes to Article 10 are considered.

The revision introduced by Article 5 is not limited to the derogation for vehicles not admitted for use on public roads. When the MVID has allowed derogations in previous iterations of the MVID, it has required Member States to establish a system for those vehicles to be treated in the same way as those vehicles which operate under Article 3. This typically means that victims of accidents involving vehicles on the derogated list which cause accidents and whose claims are unsatisfied must be allowed to claim against the national guarantee fund body. Had this situation been followed in the light of the introduction of Directive 2021/2118, the above discussion would have become largely academic as the victim would have access to a compensatory body from which to recover damages (albeit for national discrepancies that might exist between the claims-making process between actions against the national compensatory body and those directly against an insurer). Of course, the amending Directive adds another potential problem.

A new addition to the MVID is in subsection 6[57] which reads

> Where a Member State derogates, under paragraph 5, from Article 3 in respect of vehicles not admitted for use on public roads, that Member State may also derogate from Article 10 in respect of compensation for damage caused by those vehicles in areas not accessible to the public due to a legal or physical restriction on access to such areas, as defined by its national laws.

The addition of this new paragraph provides Member States with the ability to remove the safety net of the guarantee fund body and will, as a result, expose some third-party victims of motor vehicle accidents to situations where they will be undercompensated, if not fully uncompensated for their loss. Take as an example the vehicle used in *Lewington v Motor Insurers' Bureau,* a dumper truck used exclusively on private land (a quarry) or the tractor used exclusively on private farmland in *Vnuk*. It would not be impossible that a Member State could include such vehicles in a derogation list but, evidently, in each case the vehicles did cause injury to a third-party victim who, due to the application of EU law in the MVID, was able to secure compensation. A minded Member State could exclude these vehicles from compulsory insurance whilst also preventing the application of the national compensatory body from acting as insurer of last resort. One further point in this regard. With *Lewington v Motor Insurers' Bureau,* the vehicle concerned had been stolen and in its use, outside of the confines of the private land as anticipated by the owner, the accident occurred. From whom would a third-party victim claim if the vehicle which caused them injury was subject to the (now potentially broader) derogation list, was stolen and used on a public road? The possible consequence of the Article 5 amendment to Article 10 is to extend the derogation but without any of the safeguards previously available. Member States should think carefully about exercising this derogation given its potential for an unfair shifting of responsibility from

[57] Article 1(4)(6), Dir 2021/2118.

motor vehicle insurers (directly and through their Membership of national compensatory bodies) to other insurers or the taxpayer.

Option 4: Exclude certain types of vehicle from the MVID's requirement for compulsory cover

This final option expressly identified certain types of vehicle that would be likely to form a group exempt from compulsory insurance. These would be similar to the list noted in the Commission's 'Option 3' proposal and this would have applied regardless of whether the vehicles were used on roads or other public places. *Lewington*, in the UK context, had demonstrated the problems with such a policy and it is clear that the Commission noted this option last as 'this option would not ensure the necessary level of protection of victims.'[58] Were the Commission to have continued with this reasoning, its Option 3 proposal would have been a more sensible, if far from ideal solution. However, the resultant changes in Directive 2021/2118 have the potential to lessen the protection to victims to a greater extent than even legislating on the basis of Option 4 would have produced.

As noted above, from this proposal to Directive 2021/2118, Member States are able to exclude a range of vehicles from the scope of compulsory vehicle insurance. Beyond this category of vehicles (such as those 'exclusively intended for use by persons with physical disabilities') Recital nine of the Preamble in Directive 2021/2118 identifies elements of the MVID which feature as guiding principles. It begins by reiterating the requirement of compulsory motor vehicle insurance being linked directly, as noted in Article 3, to the normal function of the vehicle as a means of transport, but extends this provision in a potentially dangerous way.

> In certain Member States there are provisions regarding the use of vehicles as a means of deliberately causing personal injury or damage to property. Where applicable, in the most serious offences the Member States should be allowed to continue their legal practice of excluding such damage from compulsory motor insurance or of reclaiming the amount of insurance compensation that is paid out to the injured parties from the persons responsible for that injury or damage.

Member States are hereby permitted to exclude from insurance regimes the damage and loss caused in situations where a motor vehicle is used either as a weapon (for example where the vehicle was used as a car bomb or weaponized to kill pedestrians)[59] or as a means to cause personal injury (for instance when using the vehicle to commit suicide). Interestingly, the UK has a history of allowing such exclusions, when expressly prohibited from doing so in the MVID. In the MIB's 2015 Uninsured Drivers Agreement (UDA) with the UK, at Clause 9

> [The] MIB is not liable for any claim, or any part of a claim, where the death, bodily injury or damage to property was caused by, or in the course of, an act of terrorism within the meaning of Section 1 of the Terrorism Act 2000.

[58] Commission Roadmap n. 13.
[59] J. Peter Rothe, *Driven to Kill: Vehicles as Weapons*, (University of Alberta Press, 2008).

The Agreement's reference to the specific anti-terrorism legislation to provide the scope for the prohibited action led to an unnecessary broadening of the MIB's exclusion of responsibility.[60] Following feedback and critique of this addition in the 2015 UDA, the clause was removed in the amended 'Supplementary Agreement' in 2017 to avoid enforcement proceedings by the Commission. On reading of the new guidance and the amended Article 3 referring to the normal use of a vehicle as a means of transport, it seems the UK's approach in 2015 would now actually be compliant with its permitted exclusions, given use of a car for the purposes of an act of terrorism would satisfy most readings of a 'serious offence.' An example of a vehicle being used as a means of deliberately causing personal injury or damage to property can be seen in *EUI Ltd v Bristol Alliance*. The driver was insured, but as he used the vehicle in an attempt to commit suicide by driving into a business premises the insurer denied responsibility. It argued that had it known of the driver's intention to use the vehicle for this purpose, no policy would have been sold to him. Furthermore, the insurer's contract excluded cover for any damage that arose because of a deliberate act of the policyholder. The exclusion clause read that the insurer could deny responsibility for 'any loss, damage, death or injury arising as a result of a "road rage" incident or *deliberate act* caused by the insured or any driver insured to drive the car' (authors' emphasis).[61] The exclusion clause was accepted by the UK Court of Appeal with the property insurer not entitled to recover from the insurer. Whether such a situation would qualify as a 'serious offence' for the MVID is less clear without authority to guide any conclusions, but the provision does open a potentially harmful exclusion to compulsory motor vehicle insurance, especially given that the MVID permitted only one exclusion to compulsory third-party motor vehicle insurance.[62] Nevertheless, the Directive's guidance continues with a qualification to the use of this power by Member States

> In order not to reduce the protection granted by Directive 2009/103/EC, such legal practices should be allowed only if a Member State ensures that in such cases the injured parties are compensated for such damage in a manner that is as close as possible to how they would be compensated under Directive 2009/103/EC.

Thus, Member States may allow insurers to exclude insurance coverage for motor vehicles used as a means of deliberately causing personal injury or damage to property, if there is in place a system, such as the national compensatory body, to accept responsibility for the payment of damages. As noted above, claims directly against an insurer compared with similar claims against the guarantee fund body are markedly distinct and largely less favourable to the claimant. Therefore, while a victim in these circumstances will have the national guarantee fund from which to recover damages, this will be on poorer terms than available had the insurer not been permitted to abdicate its responsibilities in this matter. These are not equal and equivalent sources of protection for third-party victims.

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[60] See J. Marson and K. Ferris, 'The Uninsured Drivers' Agreement 2015 as a legitimate source of authority' n. 2 for commentary.
[61] *EUI Ltd v Bristol Alliance* n. 48 at [13].
[62] The MVID permitted the exclusion from compulsory insurance of vehicles in only one respect - the victim was a passenger who allowed himself to be carried in the vehicle in the knowledge that it was stolen. No other exclusion was permitted to this category of victim – see *Ruiz Bernáldez* n. 5.

Conclusions

It was perhaps inevitable that the EU had to intervene in the post-*Vnuk* system of compulsory motor vehicle insurance. In applying the requirement of compulsory insurance to vehicles on public and private land, the Court of Justice had in one respect further protected the third-party victims of accidents involving motor vehicles, yet it had also created logistical problems which were increasingly difficult to reconcile. Motor vehicles on private land, if not insured, could result in the owners being subject to criminal proceedings which would be difficult to enforce, not simply due to the possible lack of clear registration of such vehicles but also the identification by the victim of the vehicle and driver at fault. It also led to vehicles coming into the scope of compulsory motor insurance which were unintended, presumably, by the legislators of the consolidated MVID. Mobility vehicles, vehicles used exclusively on private land and those in the motorsport industry immediately spring to mind, and disquiet existed in some quarters regarding the ever-increasing activism of the Court of Justice. However, and compared with the initial proposals by the Commission's Roadmap for reform in this area, the result of the EU's actions has been almost an over-correction as an antidote to these consequences.

Directive 2021/2118 has certainly revoked the expansive effect of *Vnuk* and its progeny of case authorities, but has in turn created several problems, identified in this article, which will make it easier for insurers and national guarantee fund / compensatory bodies to avoid their responsibilities, and in turn make it more difficult for innocent third-party victims to access compensation for their injuries. The MVID had never restricted the application of compulsory motor vehicle insurance to roads and other public places (despite some Member States interpreting it as such), and it seemed obvious with the *Vnuk* ruling that it should extend to private land where vehicles were being used. Individuals were being injured by vehicles in these areas, and there was little evidence presented which identified either that the numbers of such accidents were so small as to invoke a *de minimis* doctrine, or that insurance cover was so expensive in these circumstances to be prohibitive. Indeed, the UK's own research through its Government Actuary's Department suggested an increase in premiums of approximately £50 per policy following *Vnuk*. It is worth reflecting on that finding. A £50 increase in funding to protect against injuries resulting from motor vehicle accidents on all land, and ensuring funding for the national guarantee bodies so they could provide compensation in the event of unsatisfied third-party claims seems a relatively low cost to benefit ratio.

Even the adoption of the Commission's proposals would have been a more moderate response to the expansive case law of the Court of Justice. It would not have been difficult to amend the MVID to remove from its scope a list of vehicles (as exists now) and even industries to remedy the main concerns from *Vnuk*. The motorsport industry could have been removed from scope with relative ease, as could inclusion of mobility vehicles, scooters and those listed in Article 1a of Directive 2021/2118 on a derogated list. These measures would have resulted in concerns from these sectors being allayed, with direction provided as to the specific circumstances in which compulsory motor vehicle insurance was to be operationalised (for example a broad *Juliana* approach or a more restrictive *Andrade* interpretation). These, limited, actions would have had the effect of curtailing the perceived activism of the Court of Justice, and providing Member States with mechanisms to limit, as some would have argued, the practical problems of establishing and enforcing compulsory motor vehicle insurance in areas not readily accessible to the public. However, the response through Directive 2021/2118 has been, we argue, an even greater shift away from the protective and expansive rights-based

system established in successive MVIDs than most commentators would have envisioned. Exclusions to the operation of compulsory motor insurance for vehicles when not functioning as a means of transport; allowing derogations for vehicles not admitted for use on public roads; and granting further exemptions to the national guarantee fund bodies will unquestionably lead to a reduction in the compensation available to third-party victims. It will, further, move the payment of compensation away from the tortfeasor and insurer to the taxpayer, and allow Member States to take advantage of lessor obligations to regulate this jurisdiction. Beyond these observations, Directive 2021/2118 has created far more questions than it provided answers to those raised in the Court of Justice's jurisprudence. Matters which had not caused concern regarding the geographic scope of the MVID are now central areas for debate, transposition, and will require reference to the Court of Justice for guidance. Ultimately, the five-year period incorporated into the Directive for its review will allow these concerns to be assessed based on data and analysis, but applying foresight to the tactics to be adopted by many Member States will likely result in a lowering of protection for third-party victims and a shifting of responsibility away from the assured, tortfeasors and insurers, with in some cases no immediate source of compensation identified.

It is unfortunate that the EU has taken this decision, and we suspect Directive 2021/2118 will require revision through a Seventh MVID to, perhaps not re-reversing the *Vnuk* ruling, but certainly challenging the reduction in rights. Third-party victims of accidents involving motor vehicles, such as passengers, have been noted as a special category of victim and require specific protection, yet this has now been removed. The review of this law will, we expect, identify these negative effects and lead to greater protection returning to such groups. It is with a sense of regret that it will take several negative consequences and under-compensated victims of motor vehicle accidents before this occurs.

Our ultimate conclusions on this development to compulsory motor vehicle insurance law is that rather than being an antidote to the judicial activism of the Court of Justice, it is now, more than perhaps ever in the history of the MVID, where such activism is needed to mitigate the negative consequences of Directive 2021/2118 and to place the third-party victim back, centrally, into the spirit and understanding of the MVID.