The problem of VNUK and the EU response: a critique of the law on compulsory motor vehicle insurance.

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THE PROBLEM OF VNUK AND THE EU RESPONSE. A CRITIQUE OF THE LAW ON COMPULSORY MOTOR VEHICLE INSURANCE

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ABSTRACT

In 2014 the European Court of Justice (ECJ) delivered its ruling in the case Vnuk v Zavarovalnica Triglav, extending the scope of compulsory motor vehicle insurance. The relevant EU legislation, the Motor Vehicle Insurance Directive, imposed a duty on Member States to take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in their territory was covered by insurance. In response to the ECJ's judicial activism in Vnuk and subsequent cases, an amending Directive was enacted in December 2021. In this paper, we offer a critical examination of the amending law and explain how, rather than ending the uncertainty created following Vnuk, the law on compulsory motor vehicle insurance law is now replete with uncertainty and has been subject to a reversal of the most expansive and protective rights previously enjoyed by third-party victims of motor vehicle accidents.

Keywords: Directive 2021/2118; Equivalence and effectiveness; Motor Vehicle Insurance Directive; Third-party victim; *Vnuk*.

I. INTRODUCTION

The current, sixth, Motor Vehicle Insurance Directive (MVID),[1] hereafter referred to as the MVID unless explicitly referring to a previous iteration, and having consolidated the previous Directives,[2] had two main purposes. First, it sought to facilitate the free movement principles of the EU, and secondly, it had developed through its previous iterations to place on an equal footing, some would argue,[3] the protection of third-party victims of accidents involving motor vehicles. Through this evolutionary cycle the ECJ adopted a broad and protective interpretation of the MVID with regards this final principle, culminating in the judgment in 2014 of *Vnuk*.[4] Member States including Germany and Ireland made submissions during the proceedings[5] regarding their unease with the interpretation of the MVID being purported by the ECJ, and later, Member States including the UK expressed their concern about adhering to the precedent established[6] and the potential negative consequences the case would have for victims, insurers

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[1] Directive 2009/103/EC [2009] OJ L263/11 of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability.

[2] (The First Directive) Council Directive 72/166/EEC [1972] OJ L103/1; (The) Second Council Directive 84/5/EEC [1984] OJ LL8/17; (The) Third Council Directive 90/232/EEC [1990] OJ L129/33; Directive 2000/26/EC (The Fourth Motor Insurance Directive) [2000] OJ L181/65; (The Fifth Directive) Directive 2005/14/EC [2005] OJ L149/14; and (The Sixth Directive) Directive 2009/103/EC [2009] OJ L263/11.

[3] Per Advocate General Mengozzi's opinion in Case C-162/13 *Damijan Vnuk v Zavarovalnica Triglav* ECLI:EU:C:2014:106 at para 32.

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

[5] https://publications.parliament.uk/pa/cm201719/cmselect/cmeuleg/301-xxxiii/30107.htm.

[6] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1407-REFIT-review-of-the-Motor-Insurance-Directive/feedback_en?p_id=39849, (all webpages last visited 15 Dec. 2022).

and the national compensatory bodies.[7] *Vnuk* was followed by further case law which expanded the scope of the compulsory motor vehicle insurance regime and led to the European Commission's review of the law and, ultimately to the amendment in December 2021, to the MVID by Directive 2021/2118.

In this paper we present the changes made to EU law and the MVID in respect of the compulsory insurance of motor vehicles and its implications for the law and the protection afforded third-party victims of motor vehicle-related accidents. We begin with an outline of the cases which created and extended the scope of compulsory motor vehicle insurance, before offering a critical assessment of the amending Directive and its most significant effects on the law and jurisprudence across the EU. We conclude our assessment by suggesting that the ECJ will be further called upon to provide certainty to key aspects of this new law, and given the reduction in protection afforded third-party victims of EU law, the European Commission may wish to rethink, over the five year period given for the assessment of the Directive, whether the restrictions imposed by Directive 2021/2118 are cost effective and proportionate to the exposure to risk and of being undercompensated now facing third-party victims.

II. VNUK

Vnuk concerned a Slovenian man, engaged on a farm which was situated on private land with no access to members of the public. Vnuk was standing atop ladders, placing bales of hay in a loft when a tractor entered the barn, reversing a trailer, which struck the ladders holding Vnuk, causing him to fall and sustain injury. The tractor was being used principally, not as a means of transport of persons, rather it was delivering bales of hay and therefore its use was more akin to an agricultural machine. The scenario could have been viewed as an employer's liability matter, however, Vnuk began legal proceedings against the insurer of the driver at fault. The insurer of the tractor did not consider itself responsible to provide compensation in these circumstances given that the accident occurred on private farmland and on which the tractor was exclusively used. Consequently, Vnuk found himself without a means to claim compensation. Under Slovenian law, there was no requirement for such a vehicle, subject to an accident in these circumstances, to be covered by an insurance policy and Vnuk argued that this restriction of the geographic scope of compulsory motor vehicle insurance was in breach of Article 3(1) of the First MVID[8] (the relevant Directive at the time of the accident). This point of law was questioned at the Slovenian Supreme Court which referred the matter to the ECJ for clarification. Article 3(1) provided:

> 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.

The ECJ began its analysis by addressing the meaning and extent of the 'use of vehicles'. This was a crucial starting point when assessing how Member States should interpret in which circumstances compulsory insurance of vehicles applied. The intervening Member States argued that the MVID had operated on the basis of the compulsory nature of insurance applying only to vehicles used on roads and public places, not to private land. Vnuk's argument was that the national court's interpretation of the word 'use' was too narrow because nowhere in the Directive was insurance restricted to the use of vehicles only on public roads. Before the matter

[7] https://www.mib.org.uk/mib-insight/refit-the-last-chance-saloon-for-avoiding-vnuk-chaos/.
[8] Directive 72/166/EEC.

was heard by the ECJ, Advocate General Mengozzi issued an opinion, acknowledging the history of the insurance obligation under Article 3(1) as based, initially, on the need to remove the insurance checks carried out at the borders of each Member State. It had, however, developed across numerous iterations, with a specific intention that protection be afforded to victims of road traffic accidents. Consequently, and given this developmental arc, Mengozzi asserted that the ECJ should interpret broadly the provisions of the MVID to be favourable to protecting victims[9] while continuing to interpret restrictively those provisions aimed or having the effect of excluding categories of persons from the obligation to pay compensation,[10] the MVID must be interpreted to protect individual victims of accidents on private land. Coupled with this were the national variations present in the interpretation of the wording of Article 3(1) in their transposing laws. For example, Luxembourg adopted a broad approach[11] where its national courts had held a vehicle covered by insurance against civil liability in respect of motor vehicles is, unless otherwise agreed, insured wherever it is, irrespective of whether or not the damage has been caused in a traffic incident. Alternatively, the Lithuanian Supreme Administrative Court was less generous in its interpretation, considering that the owner of the vehicle involved in an accident occurring in an enclosed area was not subject to the obligation to carry insurance.[12] Following its assessment, the ECJ concluded that compulsory insurance will apply throughout the EU to

> … 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.[13]

Thus, obligations for the compulsory insurance of vehicles was to be construed as applying regardless of their location, simply insofar as its use is *consistent with its normal function*. Indeed, that '… a tractor, possibly with a trailer attached, may, in certain circumstances, be used as 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.'[14]

III. JULIANA, ANDRADE AND NÚÑEZ TORREIRO

The *Vnuk* decision in 2014 understandably led to widespread concern as to the potential extension to the obligation for motor vehicles on private land to be subject to compulsory insurance. *Vnuk* had raised issues surrounding the definition of 'motor vehicle' and the geographic scope of the obligation to insure, and given the potential for an expansion to the requirements to insure which could be interpreted far beyond that intended by the ECJ, subsequent cases were scrutinised for clarity and a confirmation of this seemingly broad

[9] *Rafael Ruiz Bernáldez*, C-129/94, ECLI:EU:C:1996:143, at [18], and *Churchill Insurance Company and Evans*, C-442/10, ECLI:EU:C:2011:799, at [30]. That objective has also been reiterated recently (see *Katarína Haasová v Rastislav Petrík and Blanka Holingová*, C-22/12, ECLI:EU:C:2013:692, at [47] and [49], and *Vitālijs Drozdovs v Baltikums AAS*, C-277/12, ECLI:EU:C:2013:685, at [38] and [40]).

[10] *Mendes Ferreira and Delgado Correia Ferreira*, Case C-348/98, ECLI:EU:C:2000:442; *Elaine Farrell v Alan Whitty, Minister for the Environment, Ireland, Attorney General and Motor Insurers Bureau of Ireland (MIBI)*, Case C-356/05, ECLI:EU:C:2007:229; *Katarína Haasová v Rastislav Petrík and Blanka Holingová* ECLI:EU:C:2013:692; and *Vitālijs Drozdovs v Baltikums AAS*, C-277/12, ECLI:EU:C:2013:685.

[11] Judgment No 65/12 of the Luxembourg Court of Cassation of 20 December 2012.

[12] Judgment No N575-1685/2011 delivered on 23 September 2011.

[13] Case C-162/13, *Vnuk*, at [59].

[14] ibid, at [38].

interpretation of the law. However, the following three cases, *Juliana*,[15] *Andrade*[16] and *Núñez Torreiro*[17] provided anything other than the instructional guidance desired.

Beginning with *Juliana*, a Mrs Juliana, the owner of a car registered in Portugal had decided that due to her failing health she would stop using her car. Juliana immobilised the vehicle and parked it in the yard adjoining her home, and allowed the insurance cover to lapse. Sometime later, and without her consent and knowledge, Juliana's adult son made the car work, took it, drove it off road with two friends as passengers and crashed. All three of the car's occupants were killed as a result. The families of the two dead passengers brought a claim for compensation, based on the First MVID and its obligation on each Member State to ensure that civil liability in respect of the use of vehicles is covered by insurance. The Portuguese law as applied at the time of the accident required

> Every person who may have civil liability to pay compensation for financial damage and non-financial damage deriving from damage to property or personal injuries caused to third parties by any land-based motor vehicle… [They] must, to enable the vehicle to be used, be covered… by insurance covering that liability.[18]

Further, Article 503(1) of Portugal's Civil Code provided that every person with control of any land-based motor vehicle and who used this for their own needs was liable for the damage resulting from the risks inherent in the vehicle, whether or not the vehicle was in use. Consequently, the obligation for liability fell to the owner of the vehicle, Juliana, to insure, and in the event that the owner failed to take out coverage, they may be sued by the national guarantee fund body[19] (in Portugal this was the Fundo de Garantia Automóvel) to recover any payment made to the claimant.[20] Therefore, Portuguese law required compulsory motor vehicle insurance to be held for any 'land-based motor vehicle' and having satisfied the claim for damages, the Fundo de Garantia Automóvel sought recovery of €437,345.85 it paid in compensation to the passenger victims.[21] Juliana denied liability for the accident or that she was under an obligation to hold insurance for a vehicle parked on private land.

The Supreme Court of Portugal referred the matter to the ECJ which reiterated that the MVID at Article 3(1) had to be interpreted as meaning that for the use of a motor vehicle, insurance cover is obligatory when the vehicle is registered in a Member State and is capable of being driven, even if it is parked on private land. Such a vehicle remains a 'motor vehicle' for the purposes of the definition provided in the MVID and if it were not the case that the vehicle must be insured, the national guarantee fund body would be under no obligation to satisfy claims to protect third-party victims.[22]

Andrade involved the death of Mrs Maria Alves in March 2006. Alves was the victim in an accident at work where a tractor, delivering herbicide at a vineyard and, albeit parked on

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

[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,* C-514/16, ECLI:EU:C:2017:908.

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

[18] Art. 1(1) of Decreto-Lei No 522/85 — Seguro Obrigatório de Responsabilidade Civil Automóvel (Decree Law No 522/85 concerning compulsory motor vehicle insurance against civil liability) of 31 December 1985.

[19] *ibid* (Decree Law at Article 21).

[20] *ibid* (Decree Law at Article 25).

[21] Case C-80/17 *Juliana*, at [17].

[22] *ibid* para 46. In the context of the UK, in Cl. 5 of the Uninsured Drivers Agreement 2015 (as amended), the Motor Insurers' Bureau has no liability for any claim 'arising out of the use of a vehicle which is not required to be covered by a contract of insurance unless the use is in fact covered by a contract of insurance'.

a sloped terrace, slipped and crushed Alves. Alves' widower sought damages against, among others, the insurer with whom the owner of the vehicle had a policy against liability in respect of the use of the vehicle. Among other issues in the case, claims against two of the defendants had to be dismissed because the tractor was not involved in a 'traffic accident' which was capable of being covered by insurance against civil liability, per the law of Portugal. The key aspect here was that the accident had not occurred when the tractor was being used as a means of transport.[23] This situation of the compatibility of Portuguese law with the MVID, like *Juliana,* led to a reference to the ECJ which concluded 'the circumstances of the case that gave rise to [*Vnuk*] are such that it may be concluded that the normal function of a vehicle is to be in motion.'[24] It continued that the obligation to hold motor vehicle insurance was not dependent on whether a vehicle was moving or stationary, if its engine was running or turned off, or where the vehicle was being used (public or private land). It did concede that some vehicles can have different functions depending on the circumstances in which they are being used. Thus, a tractor for instance may be used as a means of transport, but it may also be used as a generator to power a herbicide sprayer. Depending on its particular use at the time of the accident would determine whether insurance cover was compulsory or not.[25]

On 20 December 2017, some three weeks after the *Andrade* judgment, the ECJ ruled on a case referred to it from Spain[26] where Sr Núñez Torreiro, an officer in the Spanish army, sustained injury following an accident in an all-terrain vehicle in which he was a passenger. This was a military vehicle which was being used in an exercise being conducted in a restricted area at the time of the accident. The vehicle was covered by insurance, but at the time it was a vehicle fitted with wheels being used on terrain that was only suitable for tracked vehicles.[27] The insurer of the vehicle denied Núñez Torreiro's claim for compensation as the accident occurred at a time when the vehicle at issue was being used on the terrain of a military exercise area. Access for all types of non-military vehicles was restricted, hence, argued the insurer, the terrain was not suitable for use by motor vehicles. The ECJ determined the all-terrain vehicle was a motor vehicle for the purposes of the MVID. A military vehicle with Anibal wheels was covered by the concept of a 'vehicle' as defined in Article 1(1) of the MVID, given that it is a 'vehicle intended for travel on land and propelled by mechanical power, but not running on rails.'[28] Its use was consistent with its normal function and therefore the vehicle was subject to compulsory insurance, save for the derogations allowed at Article 5 (see later). As Spain had not so designated this vehicle, and had not informed the Commission through a derogation list including this vehicle or the legal person so covered (the military), Spain's restriction of compulsory insurance to the use of vehicles on 'public and private roads or terrain suitable for use by motor vehicles' was contrary to a correct interpretation of the MVID.[29]

The culmination of these cases led to the following interpretation being applicable to the MVID. Starting with *Vnuk*, the obligation for the compulsory insurance of vehicles was to be construed as applying regardless of their location, simply insofar as its use is *consistent with its normal function*. *Juliana* went further, requiring insurance cover when the vehicle is registered in a Member State and is capable of being driven, even if stored on private land and having been disabled. *Andrade* continued this theme by recognising the normal function of a vehicle is to be in motion and whilst vehicles can have different uses, depending on its

[23] Case C-514/16, *Andrade* at [15].
[24] *ibid* at [19].
[25] For commentary see J Marson and K Ferris, 'For the want of certainty: Vnuk, Juliana and Andrade and the obligation to insure' (2019) 82 *Modern Law Review* 1132.
[26] *José Luís Núñez Torreiro v AIG Europe Limited, Sucursal en España and Unión Española de Entidades Aseguradoras y Reaseguradoras (Unespa),* C-334/16, ECLI:EU:C:2017:1007.
[27] *ibid* at [11].
[28] *ibid* at [22].
[29] *ibid* at [35] and [36].

particular use at the time of the accident would be determinative of the application of motor vehicle insurance. Finally, *Núñez Torreiro* held that even military vehicles were to be considered 'vehicles' for the purposes of the MVID given the scope of the Directive covers vehicles intended for travel on land. There was no requirement for the vehicle to have been involved in a traffic accident for it to be subject to compulsory insurance.

The consequence was that the MVID, through the jurisprudence of the ECJ was in a state of flux. The 'stationary' vehicle in *Andrade* did not fall under the requirement for the application of compulsory motor vehicle insurance, yet the parked and disabled vehicle in *Juliana* did. The tractor in *Vnuk* was subject to compulsory insurance as it was being used in its normal function at the time of the accident, and this reasoning was extended to a military vehicle in *Núñez Torreiro* using a (possibly inappropriate) wheeled platform when the terrain called for a tracked vehicle. Where did the law stop regarding motor vehicles on land being subject to insurance? Was it all vehicles, some vehicles, would there be a distinction drawn between vehicle offences on public and private land, and could a motor vehicle really have its status changed during the operation of some work task? Was, for instance, using a tractor to deliver herbicide spray not indicative of *its normal function* (per *Andrade)* despite its slipping down a sloped terrace and killing a woman located at the flat strata below. The capacity of the compulsory motor vehicle insurance regime to include an unanticipated number and type of vehicle coming within range of the MVID, along with extensions to its geographic scope, led to calls for a review of the law. Following the conclusion of the public consultation exercise, a new Directive, 2021/2118,[30] was enacted to amend the MVID,[31] rolling back the development of the law, and intending to provide clarity to this area. It succeeded in respect of the aim with the former, yet seems to have appreciatively failed in the latter.

IV. THE MVID REVIEW: UNDERTAKING A THREE-POINT TURN

It is worth briefly expanding on the practical problems inherent in the *Vnuk* ruling which led to the review of the MVID, noting the potential for positive changes which could have informed legal certainty, effectiveness and equivalence of EU law. First, the decision and conclusions drawn were unexpected. A reading of the MVID did not prevent the application of compulsory motor vehicle insurance to vehicles on private land, but this had not been envisioned in any serious or meaningful way prior to the ECJ's judgment. *Vnuk*, by bringing off-road vehicles and accidents into scope of compulsory insurance, brought with it the unexpected reality of criminal offences potentially being applied as they would pertain to persons behind the wheel of a vehicle on a road. Many of these vehicles do not have, nor need to have, registration markings and therefore there is no readily accessible database for the checking of insurance cover and its enforcement. This might confuse the public as 'vehicles' and their normal use might seemingly be understood differently between individuals and in the event of injury, finding and identifying the vehicle involved in the accident may not be easy. This, it was considered by the UK government in its deliberations as to the effects and consequences of the ruling, whilst still a Member State, might lead to increased fraud in claims as the verification of accidents on private land would be difficult. Finally, the UK undertook a risk assessment through its Government Actuary's Department which considered comprehensive insurance schemes, unlimited third-party liability insurance, comprehensive insurance with limits as to liability (in the range £5m-£50m), and liability-only schemes covering a vehicle operating on a road. The result was that *Vnuk*-wide claims would be extremely expensive to cover (amounting to approximately £50 extra per insurance premium per annum). *Vnuk* further

[30] Directive 2021/2118 - Amendment of Directive 2009/103/EC relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability.
[31] Directive 2009/103/EC [2009] OJ L263/11.

resulted in concern being expressed in sections of the popular press, extrapolating the precedent from these cases to apply to all types of private-land based vehicles which led the Rapporteur, Dita Charanzová, to comment

> It was high time to clarify motor insurance rules, so that Europeans are better protected and treated equally in the EU when accidents occur and when insuring their vehicles… With this political agreement we have additionally managed to curb absurd overregulation of motorsports, e-bikes and given Member States the tools to exclude mobility scooters, kids' toys or lawnmowers.[32]

Whilst mooted that the MVID could, in the aftermath of the case law, have greater application beyond motor vehicles in their strictest sense, to extend this thinking to lawnmowers,[33] ride on golfcarts and even to motorsport was, when considered soberly, rather unlikely and unnecessarily alarmist.[34] Yet, the Commission was aware of the direction the MVID was taking and sought opinion on these developments through an evaluation of the functioning of the MVID.[35] Its conclusion was of satisfaction, generally, of the working of the Directive and that there was no immediate need for a Seventh MVID. Yet several areas were noted for targeted amendment of the Directive (which are not of immediate concern to the scope of this paper) but, at paragraph 3, the Commission recognised how motor-powered vehicles had newly entered the market since the inception of the MVID and had implications for the definition of 'vehicle' in the Directive. Therefore, the definition given to 'motor vehicle' should be based on their general characteristics, in particular their maximum design speeds and net weights, and should provide that only vehicles propelled exclusively by mechanical power are covered. The paragraph concluded, expressly, that wheelchairs intended for use by persons with physical disabilities should not be included in the definition, thereby allaying the fears of the over-reach of the requirement to hold compulsory insurance.

V. DIRECTIVE 2021/2118

We now discuss the main contributions of Directive 2021/2118 to the problems raised in *Vnuk*, *Juliana*, *Andrade* and *Núñez Torreiro* and its attempt to provide certainty to proceedings. However, these latest amendments[36] have created a not insignificant shift in the protections to third-party victims of motor vehicle accidents and the obligations on Member States to ensure the compulsory insurance of motor vehicles. We present these numerically to aid in adopting a coherent structure to their analysis, yet appreciate that this approach is somewhat artificial given the provisions in the Directive do cross boundaries.

A. Article 1: Motor vehicle and use

[32] https://www.europarl.europa.eu/news/en/press-room/20210617IPR06467/deal-reached-on-new-rules-to-better-protect-road-accident-victims.

[33] See N Bevan, 'Ignore at your Peril' (2014) 164 *New Law Journal* no. 7628, at 7.

[34] M Kirkpatrick, 'Vnuk Impact Analysis: Combined Report' (Government Actuary's Department, 2019). Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/965738/vnuk-impact-analysis-combined-report.pdf.pdf.

[35] European Commission 'Public consultation on REFIT review of Directive 2009/103/EC on motor insurance' Available at https://service.betterregulation.com/document/291305.

[36] This Directive entered into force on December 22, 2021 and has to be implemented in national regulation on December 23, 2023 at the latest.

The MVID defined a motor vehicle as one '… intended for travel on land and propelled by mechanical power, but not running on rails, and any trailer, whether or not coupled.'[37] This classification was broad, and certainly broader than the transposed laws in some Member States. As an example of a restrictive national interpretation of the MVID, s. 185 of the UK's Road Traffic Act 1988 (RTA88) defined 'vehicle' as being *'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 to which the public has access.[38] This sought to exclude from the scope of the national transposing law many vehicles and would, almost certainly, on an exclusively statue-based interpretation, have omitted the all-terrain vehicle used in *Núñez Torreiro*. Hence, the MVID had been transposed differently in Member States and consequently provided different levels of protection to EU citizens depending on where in the Union they were a victim. Given the latitude in interpretation facilitated by the designation, Directive 2021/2218 extended the classification of 'motor vehicle' so, at a revised Article 1, it means

> (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
> (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 point is inserted:
>
> 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

The designation of motor vehicle is considered in this section, with the 'use of a vehicle', whilst mentioned in the amended Article 1a, is examined later in respect of Article 3 and its definition of *use*. To begin with the amendment to Article 1 of the MVID, it is important to recall the broad commentary presented in the media as to the aftereffects of the *Vnuk* ruling. Not only was concern expressed regarding the expansion to the geographic scope of the MVID's reach, but also its ability to apply to many more vehicles due to the lack of defined criteria which had, previously, been implicitly attributed to motor vehicles only. The concern was presented that *Vnuk* had established that those electric vehicles on public streets, for example mobility scooters, and those 'vehicles' used on private land, for example ride-on lawn mowers, would now be subject to the insurance regime as had previously only applied to cars, and this further extended to possible criminal laws also being applicable. There are various national precedents which demonstrate the application of laws relating to vehicles being applied to, for instance, electric scooters[39] (despite not being designed, certainly primarily at least, for use on the

[37] Art. 1.
[38] See *Lewington v Motor Insurers' Bureau* [2017] EWHC 2848 (Comm).
[39] *Chief Constable of North Yorkshire Police v Saddington* [2001] RTR 227.

road),[40] and even to vehicles which are primarily being repurposed as mobile catering facilities.[41] Therefore, at Article 1(a) of Directive 2021/2118, a vehicle is described as one which is 'propelled exclusively by mechanical power.' The terminology used is not a radical departure from that used in the MVID, albeit that there are certainly more detailed and instructive definitions available through national laws and commentary.[42] The key inclusion is the word 'exclusively' which will exclude animal and human powered vehicles, but will include the full range of vehicles already in common usage (those with an internal combustion engine) and newer electric-powered and hybrid vehicles. Therefore, this is not an especially revolutionary change to the scope of vehicles being included in the MVID, including as it does vehicles which can be 'propelled'[43] as well as being *capable* of being propelled,[44] rather it seeks to exclude, explicitly, types of vehicle which had been within reach of *Vnuk's* inclusive scope.

The addition of Article 1(a) of Directive 2021/2118 to the designation in the MVID of 'vehicle' incorporates the *Juliana* ruling regarding the requirement for the motor vehicle to be subject to a policy of insurance, if not when the policy will be available for use and/or any exclusions to be relied on by insurers. Section 1a maintains the classification of motor vehicle and its protective scope, yet removes this safety by linking a motor vehicle with its being used as a means of transport at the time of the accident. In so doing, it possibly lessens the protection available to victims whilst broadening the scope of evading responsibility for insurers. This inclusion to the Directive has the potential to result in litigation and references to the ECJ to determine its scope and place within the existing case authorities.

B. Article 3: Use of vehicles (at the time of the accident)

Article 3 imposes the requirement for compulsory motor vehicle insurance and in its explanation with regards the use of a vehicle, the Article, when read in conjunction with Article 1a of Directive 2021/2118, expresses the intention that use of a vehicle as a means of transport is determined at the time of the accident. Here is the clear intention of the legislators to ensure that the thread running through *Vnuk* and its progeny of authorities, of compulsory insurance being applied to vehicles, and being consistent with their normal use, is preserved. It also had a secondary purpose of ending the uncertainty in the definitions of 'use' that had been present in the national transposing legislation. For example, the terms 'use', 'circulation', and 'utilisation' were effected in the transposition of Article 3(1) of the Directive by Bulgaria, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Latvia, Lithuania, Malta, Romania, Slovakia, Slovenia, Sweden and the UK. It was therefore a result of the terminological imprecision of the EU Directive that led to the diversity of national practices. Yet the 'use' of a vehicle has been given a broad interpretation by the ECJ in conjunction with those transposing laws in national courts. It was in *Línea Directa*[45] where the ECJ had held a

[40] *DPP v King* [2008] EWHC 447 (Admin).
[41] *Wastell v Woodward* [2017] 2 WLUK 717.
[42] See, for instance, the readily accessible list as weblinks available at https://www.lawinsider.com/dictionary/vehicle.
[43] *Línea Directa Aseguradora v S.A./Segurcaixa, Sociedad Anónima de Seguros y Reaseguros,* C-100/18, ECLI:EU:C:2019:517.
[44] Compare UK national authorities where in *Newberry v Simmonds* [1961] 2 Q.B. 345, a vehicle remained a vehicle for the purposes of the Road Traffic Act even though its engine had been removed (thus was considered 'capable' of being moved again) and *Smart v Allan* [1962] 3 All E.R. 893 where the car was in such a dilapidated state it was considered unlikely ever to be made serviceable again and hence was not a 'vehicle' for this part of legal regulations.
[45] *Línea Directa Aseguradora v S.A./Segurcaixa, Sociedad Anónima de Seguros y Reaseguros,* C-100/18, ECLI:EU:C:2019:517.

vehicle, having been parked in a garage for a period of 24 hours, in which time it had, seemingly without any outside agent involved, set alight, was subject to the compulsory insurance requirement outlined in Article 3 of the MVID. Its parked status did not prevent the vehicle from being in 'use' as a means of transport, as it being parked is an inherent characteristic of a vehicle. Similarly, the UK Supreme Court, in a unanimous decision in *Pilling v UK Insurance Ltd* found the repair work to a car in a garage amounted to 'use' of the vehicle. This movement away from vehicles being in 'use' for the purposes of its national law being associated with '… an element of control, management or operation of the vehicle while it is on the road'[46] demonstrated a greater affinity with EU law than a strict reading of the RTA88, despite the Court of Appeal having previously found the vehicle in *Pilling* not being *in use* at the time of its setting ablaze.

Perhaps more interestingly given the history of the MVID were the next Recitals in the Preamble and their possible implications, essentially rolling-back the protective purpose of the MVID. At paragraph 5 it was expressed that the ECJ's decisions in *Vnuk*, *Andrade* and *Núñez Torreiro* had clarified the meaning of 'use of vehicles' insofar that motor vehicles are intended normally to serve as a means of transport, irrespective of their characteristics, and the use of such vehicles covers any use of a vehicle consistent with its normal function as a means of transport. This was notwithstanding the terrain on which the motor vehicle is used or whether it is stationary or in motion (yet made no mention of *Juliana*). However, the MVID will no longer apply if, *at the time of the accident*, the normal function of such a vehicle is 'use other than as a means of transport'. This could be the case if the vehicle is not being used within the meaning of Article 3 of that Directive, where its normal function is, for instance, 'use as an industrial or agricultural power source.'[47] In the interest of legal certainty,[48] it continued, it is appropriate to reflect that case-law in Directive 2009/103/EC by introducing a definition of 'use of a vehicle'.

Attempts by the EU to establish, clearly, when a vehicle should be subject to the application of insurance to protect third-party victims is to be welcomed given the confusion that had existed in the case law.[49] In *Vnuk*, the tractor was being used to transport bales of hay and given Directive 2021/2118 refers to vehicles being used as a means of transport, not restricting *what* is to be transported, this tractor would be a vehicle. Comparatively, in *Andrade* the tractor was moving between locations at a vineyard, and at those times it was being used as a vehicle. However, and pertinently for the issue of causation, when it slipped down the slope, injuring the victim, it had been stationary and used as a herbicide dispenser. Consequently, it was at the time of the accident being used as an industrial or agricultural power source, and would not qualify as a vehicle. *Andrade* was particularly instructive in this regard as, whilst it was concluded not to be a vehicle at the time of the accident, it did result in the ECJ recognising that the *normal function* (per *Vnuk*) of vehicles can manifest as multiple functions depending on the particular scenario and purpose in which it is being used. But whilst *Andrade* determined that the application of insurance was dependent on the function of the 'vehicle' at the time of the accident, for *Juliana*, insurance was required to be held to satisfy the requirement of the MVID, insofar as the vehicle *could* be used as a means of transport.

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[46] *Brown v Roberts* [1965] 1 Q.B. 1. See also *Elliot v Grey* [1960] 1 Q.B. 367 and *Pumbien v Vines* [1996] RTR 37.

[47] As noted at Directive 2021/2118, Recital 5 of the Preamble.

[48] A fundamental principle of EU law despite not appearing explicitly in the Treaties. It is enshrined in Article 49 of the Charter of Fundamental Rights of the European Union, 2000/C 364/01 and is a principle common to the legal systems of Member States. 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), at 163.

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

Juliana would suggest that had the tractor in *Andrade* been intentionally moved when it slipped down the hill crushing the victim, the insurance would have come into effect as it was, at that moment, a vehicle rather than a machine. This was important given the clear distinction between the use of a vehicle and the obligation to insure that vehicle.[50] In *Línea Directa* the car had been parked in a garage for a considerable period of time where it caught fire and caused damage. The ECJ held[51] it to be a vehicle as being parked between journeys was an integral aspect of the vehicle as a means of transport. However, despite this matter being so crucial to the operation of compulsory insurance, there was a paucity of definitive instruction to guide Member States and its citizens. Such a situation was untenable and led to the EU Parliament, in its proposal for amendment to the MVID, to remedy the uncertainty, albeit without teasing out the distinctions raised in these cases.[52]

It might be useful at this point to return, very briefly, to the designation of 'vehicle' and how the UK, as a former Member State and its legislation being the inspiration for the First MVID, dealt with this matter. This step is important when determining when a 'vehicle' is being used at 'the time of the accident'. *Burns v Currell*[53] was a case heard in the 1960's, yet its legislative provision for determining motor vehicle was the same as used in the RTA88 s. 185 (which itself was used as the transposing measure for the purposes of the MVID). Here, where the determining issue was whether the vehicle concerned was *intended* for use on a road, and adopting a reasonable man standard of proof, the court held

> I think that the expression 'intended'… does not mean 'intended by the user of the vehicle either at the moment of the alleged offence or for the future'. I do not think that it means the intention of the manufacturer or the wholesaler or the retailer; and it may be… that it is not referring to the intention as such of any particular purpose… 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.[54]

It was held in *Burns* that the go-kart was not a vehicle for the purposes of the Act, 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*[55] because of the stipulation in UK law regarding the use of a vehicle on a road or 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 ECJ 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.[56] 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. At paragraph 40 of *Andrade*, it was held

[50] Case C-80/17, *Juliana*, at [60].
[51] Case C-100/18, *Línea Directa*, at [42-44].
[52] 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).
[53] *Burns v Currell* [1963] 2 All ER 297.
[54] ibid, Lord Parker at [300C].
[55] *Lewington v Motor Insurers' Bureau* [2017] EWHC 2848 (Comm).
[56] Case C-162/13, *Vnuk*, at [38].

> 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.

The main area of contention that follows from the judgment and the interaction with Directive 2021/2118 is how the reasonable person will determine whether and to whom liability will fall in a variety of circumstances. A tractor that at one moment is a used as a means of transport which then immediately becomes an agricultural machine will lead to disputes between the parties, particularly when insurers challenge any responsibility for injury.[57] The reasonable third party may be confused why a burger van which clearly has been driven to a location ceases to be covered by a policy of motor insurance when it is parked and used to prepare and issue food to consumers. Further confusion lies at how the insurance regime will operate in practice. In *Juliana*, the ECJ considered that the obligation to insure at the time of the accident could not be made *ex post facto*.[58] Rather, for the purposes of legal certainty, that conclusion must be drawn *ex ante* as, at least according to the ECJ, vehicles cannot drift in and out of the obligation to insure dependent on what activity they happen to be engaged in or their mode of use at the time of the accident.[59] But if this is the case, and if we consider that *Juliana* might, as the newer instruction from the ECJ, impliedly repeal inconsistent aspects of *Andrade* where these issues *did* stop the application of compulsory insurance, why did the EU in Directive 2021/2118 specifically reverse the *Juliana*-established extension to the geographic scope of insurance[60] and insert the stipulation of a motor vehicle being one which 'is consistent with the vehicle's function as a means of transport at the time of the accident'? It might be argued that the EU was specifically seeking to legislate to avoid the extensions *Juliana* established, and thereby calling into question its authority as precedent. An obligation to insure is quite different from the application of the policy in specific circumstances, a point made correctly by the ECJ in paragraph 55 in *Juliana*, yet the EU has established the ability for vehicles to be excluded from the application of insurance cover when declared as not 'admitted for use on public roads in accordance with its national law.'[61] The ECJ in *Juliana* specifically avoided the opportunity to overrule the decision in *Andrade* in respect of accepting that 'there may be specific ways in which a vehicle is employed at a given time that can be identified as falling outside the concept of "use of vehicles", thus potentially negating liability for related accidents.'[62]

C. Article 5: Public road derogation and Article 10

'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"'.[63] We begin with this quote for the obvious reason that, until Directive 2021/2118's amendment of the MVID, the MVID was not restricted to only public land and roads, indeed it applied to public *and* private land. The Commission's Review gave it an opportunity to assess the

[57] 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?
[58] Opinion Advocate General Bobek Case C-80/17, *Juliana*, at [53].
[59] ibid, *Juliana*, at [54].
[60] See para 75 of Advocate General Bobek's opinion in Case C-80/17 *Juliana*.
[61] Directive 2021/2118 Article 5 amendment to the MVID.
[62] Opinion of Advocate General Bobek, Case C-80/17, *Juliana* at [79] and see [92].
[63] Case C-334/16, *Núñez Torreiro*, at [28].

direction taken by *Vnuk* as to the compulsory insurance of motor vehicles on private land. Prior to *Vnuk* et al., many Member States interpreted the MVID as being applicable to vehicles on roads, and widely defined, given, for example, the Third MVID[64] at Article 5 referring to parties involved in a 'road traffic accident'. Directive 2021/2118 adds the following passage to Article 5 of the MVID '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.' Article 3, it will be remembered, imposes the obligation on Member States to take all appropriate measures to ensure that civil liability in respect of the use of a vehicle is covered by insurance. The derogation allows a Member State to issue the Commission with a list of vehicles which would not be subject to compulsory insurance, typically because the body responsible for such vehicles has its own provision for covering any claims by a third-party victim. Vehicles owned by the State (military vehicles, ambulances, police vehicles and so on) would be those vehicles typically on the list.

In its broad explanation as the rationale for the amendments to the MVID, the Commission noted it should also be possible for a Member State not to require compulsory motor insurance for vehicles that have not been admitted for use on public roads in accordance with its national law. The reversal of the jurisprudence established since 2014 was largely expected as a result of the Commission's Review, but in passing this amending Directive, the EU has replaced the consequences of the ECJ's activism with an entirely new set of problems which appear to create practical and legally challenging scenarios which may need time to fully appreciate and resolve. Beginning with the term 'public road,' it may appear to be quite self-explanatory in respect of Member States which have clear demarcation between roads, and paths, public accessible routes and private only access points. But the legal systems of some Member States may prove more challenging to identify with clarity and, as a consequence, to enforce. It will be remembered that whilst a Member State, the UK struggled with the concept of the term 'public road', having first interpreted the term restrictively in the RTA88 s. 145(3)(a), and then being forced to consider its definition in the spirit of the Third MVID which, at Article 5, had made reference to the compulsory insurance of vehicles relating to 'road traffic accidents.' Even when faced with a situation involving a vehicle collision at a supermarket car park, the House of Lords in *Clarke v General Accident Fire and Life Assurance Corporation plc*[65] refused to interpret the RTA88 in compliance with the MVID as this was private land, not a 'road' per the RTA88, albeit the Lords conceded it was land to which members of the public had access. It was only after this case, some two years later, that the UK enacted the Motor Vehicles (Compulsory Insurance) Regulations 2000 which amended the RTA88 by extending the words 'public road' in s. 145 to include 'or other public place' to comply with the MVID.

As far in the jurisprudence of the UK as 1932, and in relation to the interpretation to be given to the word 'public' in the Road Traffic Act 1930, in *Harrison v Hill*[66] the word was held as identifying a special class of persons who have occasion to visit premises for the purposes of business or social engagements. A similar designation is provided in Recital 8 of the Preamble, where private road is an 'area not accessible to the public due to a legal or physical restriction on access to such areas, as defined by its national laws.' The physical restriction is perhaps a practicality of the Directive which is easier to identify. Areas which are, for example, fenced off from public access (Formula One track and testing areas, given the specific exemption granted to the industry to which it belongs,[67] and building sites) will be easier to

[64] Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles.
[65] *Clarke v General Accident Fire and Life Assurance Corporation plc* [1998] 1 WLR 1647.
[66] *Harrison v Hill* [1932] JC 13, [1931] SLT 598 at p. 16.
[67] Article 1(2)(b).

identify. It is those areas which are legally restricted which may create confusion and litigation. By their nature, there will likely be no physical barrier or obstruction to deter access, but signage and notice-instructions may be presented which may go unheeded by the public (drivers and pedestrians). Again, starting with the UK, as previously noted, car parks are now areas considered public rather than private and therefore they would not be subject to possible derogation. Dockyards[68] and caravan parks[69] have also been similarly labelled 'roads' and subject to the compulsory insurance regime, yet these quasi-public areas have too led to conflicting authorities. In *Cowan v DPP*,[70] an internal roadway at a university campus was not a 'public place' for the purposes of the RTA88, private land adjoining a private club[71] and a company car park accessed by staff and customers[72] have each been held as not constituting a public place. Granted, these matters, as with so many concerned with the application of the RTA88, were criminal cases and therefore caution has to be exercised in extrapolating their authority for the civil MVID, but they are used to highlight that identifying legal restrictions to roads and public places is not necessarily a simple exercise. The most recent national authority discussing a public place in respect of the RTA88 was *Brown v Fisk.*[73] The case involved an injury sustained by the claimant from use of the defendant's car in a yard owned by a bonfire society. The issue under consideration was whether the yard could be considered a public road for the purposes of s. 151 RTA88. In its summary judgment, the High Court held the area not to be a public place, albeit this was a conclusion reached expressly without adopting a purposive interpretation in respect to the MVID. The value of the case is in the consideration of the authorities regarding public roads in respect of the RTA88. Ultimately the essence of a public place / road is the actual use of it by members of the public, a use which is at least tolerated by the owner, and the purpose of that use.[74] Hence this was a remote location;[75] the premises were for a private members' club rather than for members of the general public;[76] the only members of the public who did make use of the yard were those seeking directions elsewhere, dog walkers who entered the place by mistake (and left again following the realisation of their error) hence being more akin to trivial matters for accessing the place;[77] and persons making specific deliveries to the society, none of which could be seen as activities involving members of the public which would make it a public place/road.

If we continue this discussion in respect of a current Member State, France distinguishes between roads (routes) which gives access to the public, and paths (chemins) which can be either public or private (as they belong to a looser category called 'voies'). The 'circulation' or use of vehicles on private chemins is largely dictated by the owner, and often vehicles and pedestrians are not provided with access. Yet, the owners of these private chemins may be subject to *servitudes légale de passage* in circumstances where, for example, neighbours require access to the property. The frequency of the access, the extent of the power to compel access and the scope of applications to request such access will each impact on the

[68] *Buchanan v MIB* [1955] 1 All ER 607.
[69] *DPP v Vivier* [1991] 4 All ER 18.
[70] *Cowan v DPP* [2013] EWHC 192 (Admin).
[71] *Pugh v Knipe* [1972] RTR 286.
[72] *R v Spence* [1999] EWCA Crim 808.
[73] *Brown v Fisk & Ors* [2021] EWHC 2769 (QB).
[74] The court referring to the following authorities in drawing this conclusion: *Pugh v Knipe* [1972] RTR 286, [1972] 2 WLUK 25; *Richardson v DPP* [2019] EWHC 428 (Admin); *May v DPP* [2005] EWHC 1280 (Admin); *Paterson v Ogilvy (David)* 1957 JC 42, [1957] 2 WLUK 98; *Harrison v Hill* 1932 JC 13, [1931] 10 WLUK 22; *R v Spence (Colin Michael)* (1999) 163 JP 754, [1999] 3 WLUK 407; and *DPP v Vivier* [1991] 4 All ER 18.
[75] *R v Spence (Colin Michael)* (1999) 163 JP 754, [1999] 3 WLUK 407.
[76] *Pugh v Knipe* [1972] RTR 286, [1972] 2 WLUK 25.
[77] *DPP v Vivier* [1991] 4 All ER 18.

designation of public road. Private roads, for instance those which lead to a group of buildings, industrial estates and quarries, where the public at large would not be invited and to which the general public would not have access are a few examples where a derogation could apply. Coupled with this development in the law is a further element in the revised Article 5. The derogation, as with the original MVID, also requires the Member States to ensure that those vehicles are treated in the same way as vehicles in respect of which the insurance obligation referred to in Article 3 has not been satisfied. Hence, the national guarantee fund would ensure that third-party victims have a source from which to claim damages in the event of an uninsured vehicle (here read vehicle on the derogated list) causing them injury and loss (as noted in Article 10). The negative effects of this amendment would not have been so profound had it not been a further paragraph at subsection 6 and its implications for the national guarantee fund body and its role as 'insurer of last resort'. It was at Article 5(2) of the MVID where a clause permitted Member States to prepare a list of vehicles that were to be derogated from the scope of compulsory insurance. Even where the State established and provided to the Commission such a list of vehicles, Article 10 of the Directive imposed an obligation on the Member State to ensure that these vehicles must be covered by the national compensatory guarantee scheme. The potential for concern exists with Directive 2021/2118 and its explicit reference to the compulsory insurance of motor vehicles on 'public roads' in its Preamble. Article 5 of the MVID is amended as follows

> 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…
>
> 6. 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 obligation on Member States to establish a national compensatory body ensured there would exist an 'insurer of last resort' to compensate victims in the event that no policy of insurance existed against the driver at fault. Article 10 provides the instruction to fulfil this function:

> Each Member State shall set up or authorise 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 Art 3 has not been satisfied.

As noted above, this used to be limited in application to a list of vehicles submitted to the Commission by the Member State in very narrow circumstances, and it was not geographically restricted. By allowing States to extend this to vehicles not accessible to the public according to national laws will allow Member States to, potentially at least, expose third-party victims to situations where they will be undercompensated. The cases identified in this paper (*Vnuk*, *Lewington*, and *Núñez Torreiro* in particular, and this is certainly not an exhaustive list) involved accidents relating to vehicles used exclusively on private land and where members of the public would typically not be admitted. Previously, the MVID had permitted Member States to derogate vehicles from those subject to compulsory insurance, and these were limited often to State-owned vehicles which had access to adequate resources to compensate victims. Yet the MVID did not allow vehicles to be derogated due to their physical location. The

implications of this development to the MVID are yet to be realised, but assuming a Member State decides to permit, for example, vehicles used in a quarry, which do not leave the confines of that private land and are used exclusively in an area which is restricted from entry by members of the public, what insurance or liability regime will apply if a third-party victim is injured through use of that vehicle? If *Lewington* is used as an example, it is not uncommon for such vehicles to be stolen, use public roads as a means of escape or in furtherance of a crime, but remain uninsured and leave a third-party victim without recourse to an insurer from which to claim. This is exactly a situation where Article 10 and the national guarantee fund body would save the day in its role as insurer of last resort and protect against such an uninsured vehicle. Nevertheless, the limitation to the guarantee fund body's obligations to intervene in these circumstances will expose victims to injury, loss and with no first-party insurer or insurer of last resort from which to secure compensation. Some national guarantee fund bodies have demonstrated an unwillingness to be placed in a position to provide compensation beyond the scope of the agreement they hold with the respective Member State,[78] so any expectations that they will voluntarily accept to meet the demands of claimants in such circumstances is optimistic at best.

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.

VI. EXCLUSIONS AND EQUIVALENCE

Recital nine of the Preamble to Directive 2021/2118 outlines the MVIDs principles, among which is the assertion that for Article 3 of the MVID, the concept of compulsory motor vehicle insurance continues to be based upon the normal use of the vehicle, namely its use as a means of transport. This has been used as the premise for the Recital to permit Member States to allow the use of an exclusion to compulsory insurance which has the potential, only seen during the UK's membership, limiting the liability of insurers and which following the introduction of Directive 2021/2118 may be replicated by existing Member States:

> 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.

This Recital raises two immediate problems which had not been present in the MVID prior to Directive 2021/2118's intervention. The first problem, and perhaps the more common example where this Recital will take effect and negatively impact on third-party victims is in instances of using a vehicle to commit suicide. Here the vehicle will, contrary to *Vnuk* and the MVID, be used to deliberately cause damage or injury rather than as a means of transport. The matter which will require instruction from the ECJ is whether attempts to use vehicles for the purposes of suicide amounts to a 'serious offence' which will permit its use as an insurer's exclusion of

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

liability. In the UK, in *EUI Ltd v Bristol Alliance Ltd Partnership*[79] the Court of Appeal had endorsed the use of an exclusion clause in a contract of motor vehicle insurance to deny instances of loss caused by the assured's 'deliberate act.' This was despite the MVID restricting the exclusion from compulsory insurance of vehicles exclusively to situations where the victim, as a passenger, had allowed themselves to be carried in the vehicle in the knowledge that it was stolen.[80] The second problem can be viewed, with a practical example, not from exclusions of liability purported by insurers, but by the national guarantee fund body. In its Uninsured Drivers' Agreement 2015 with the Motor Insurers' Bureau (MIB), at cl 9 the UK accepted that the MIB was '… 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.' This iteration of the agreement between the UK Member State and the MIB, as national guarantee fund body, was established in the advent of *Vnuk* and sought to focus on the exclusion of the MIB's liability where the vehicle was being used in a manner contrary to its normal function (for example using the vehicle as a car bomb rather than as a means of transport). This, however, led to two problems. The first was the definition used in the legislation to determine the act of terrorism. It was unnecessarily broad and incorporated many actions which would not have led, at least to the ordinary, reasonable person, concluding an act of terrorism. Secondly, it allowed the MIB to exclude its responsibility to meet the unsatisfied claims from third-party victims in a manner not permitted in the MVID. This agreement was subject to academic criticism highlighting this breach of EU law[81] and, in a Supplementary Agreement established in 2017, cl 9 was amended to remove this breach. Yet despite the UK's potential breach of the MVID with its 2015 agreement with the MIB, Recital nine allows exactly this action to be taken by Member States, this time applying to insurers, and brings to life, again, those very fears for the protection of vulnerable victims outlined previously[82] as even where recovery of compensation might proceed against the national guarantee fund body, this is not necessarily on the same terms as those directly against the insurer. The Recital's reference to 'serious offences' is a much lower test to satisfy than the definition of terrorism in the 2000 UK Act, and will have even greater potential for insurers to escape liability, and this, it should be remembered, will likely occur within contractual documents with the assured, leaving third-parties to explore and litigate the validity and efficacy of such exclusion clauses.

Perhaps seeking to mitigate against the worst effects of this Recital, Member States are instructed

> 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. Yet it is worth reflecting on the experience of the UK in directing claims from victims of uninsured drivers from a tortfeasor/insurer to the national compensatory body. The UK's MIB, the company which contracted with the UK government to fulfil the role as

[79] *EUI v Bristol Alliance Partnership* [2012] EWCA Civ 1267.
[80] See *Rafael Ruiz Bernáldez*, C-129/94, ECLI:EU:C:1996:143.
[81] J Marson and K Ferris, 'The Uninsured Drivers' Agreement 2015 as a legitimate source of authority' (2017) 38(2) *Statute Law Review* 133.
[82] Ibid.

national compensatory body under the MVID, was subject to a number of criticisms in respect of 'ensur[ing] that… 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' (authors' emphasis). 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. It would distract from the purpose of this paper to explain the history of the UK's breaches in this area, and indeed, the matter has been chronicled effectively elsewhere,[83] but to give some examples to demonstrate the potential problems of this aspect of the MVID and where it is open to abuse by a recalcitrant Member State, we present some of the more obvious problems. In situations where the claimant and the MIB have disagreed either about the MIB's role or the extent to its responsibility in an accident involving the third-party victim, there did exist a system of appeal to challenge any decision and/or arguments regarding the compatibility between national and EU law. In the UK's transposition of parts of the MVID, it allowed for a claimant under the Uninsured Drivers' provision to submit an appeal if they disagreed with the decision of the national compensatory body. Such an appeal had to be made to an arbitrator and further appeals to the High Court were allowed, subject to procedural and substantive rules, but automatically to a victim alleging serious irregularity[84] which affects the arbitration. Further appeals to national appellant courts were available and this, held the ECJ,[85] resulted in third-party victims having access to the same decision-making process and awards-making regime as existed for claimants directly against an insurer. That this system did not render it practically impossible or excessively difficult to exercise the right to compensation complied with the Second MVID in respect to the principle of effectiveness.[86] Closer scrutiny of the Agreement demonstrated fundamental differences between the Second MVID and the 1999 UDA[87] regarding the presentation of information[88] and the national compensatory body's ability to deny to the victim compensation if it was not satisfied with the claimant's response. This provision was not in the

[83] J Marson, H Alissa and K Ferris, 'Driving towards a more therapeutic future? The Untraced Drivers Agreement and conscious contracting' (2021) 25(1) *European Journal of Current Legal Issues* 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?' (2021) 22(1) *German Law Review* 122; J Marson and K Ferris, 'Too little, too late? Brexit day, transitional periods and the implications of MIB v Lewis' (2020) 45(3) *European Law Review* 415; J Marson and K Ferris, 'The compatibility of English law with the Motor Vehicle Insurance Directives: The courts giveth… at least until brexit day' (2020) 136 *Law Quarterly Review* 35; J Marson and K Ferris, 'For the want of certainty: Vnuk, Juliana and Andrade and the obligation to insure' (2019) 82(6) *Modern Law Review* 1132; J Marson, K Ferris and N Fletcher, 'EU motor insurance law in the UK, accidents on the road and responsibilities off it' (2019) *EU Law Analysis* 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' (2017) 38(5) *Business Law Review* 178; 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?' (2018) 39(2) *Statute Law Review* 211; J Marson, K Ferris and A Nicholson, 'Irreconcilable differences? The Road Traffic Act and the European Motor Vehicle Insurance Directives' (2017) 1 *Journal of Business Law* 51; J Marson and K Ferris, 'The Uninsured Drivers' Agreement 2015 as a legitimate source of authority' (2-17) 38(2) *Statute Law Review* 133; 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' (2016) 22(3) *European Journal of Current Legal Issues* http://webjcli.org/article/view/508/672.

[84] Arbitration Act 1996 s. 68.

[85] *Samuel Sidney Evans v The Secretary of State for the Environment, Transport and the Regions and The Motor Insurers' Bureau*, C-63/01, ECLI:EU:C:2003:650.

[86] Case C-63/01, *Evans,* at [54] and [58].

[87] See J Marson and K Ferris, 'The Uninsured Drivers' Agreement 2015 as a legitimate source of authority' (2-17) 38(2) *Statute Law Review* 133 for discussion.

[88] Cl. 7(1)(b) and (c).

MVID and effectively prevented the claimant from their right to recover compensation as encapsulated in the Directive.

Continuing the theme of arbitration as a means of dispute resolution regarding the transposing laws of the MVID in the Member States, the UK, in its most recent Agreement between the government and compensatory body and relating to the MVID, granted the exclusive power to the Secretary of State to appoint the arbitrator. It was at Clause 17(3) where decisions were made on the basis of written submissions only (hence no examination of witnesses was available and the scope for appeal based on the subsequent findings was reduced, especially those made on the facts of the case), the decision of the arbitrator was final, the national compensatory body, one of the parties to arbitration, paid the fee of the arbitrator, and it appeared that the arbitrator was precluded by restrictions in their terms and remit to consider EU law in their deliberations. Collectively, if not individually, these provisions should have been sufficient to breach the EU principle of legal certainty, yet it is worth remembering that this very system was discussed in *Evans* by the ECJ which held it did not breach the MVID. There is nothing in the amended Directive to prevent another Member State to act in a similar manner with claimants experiencing different procedural, if not substantive, rules as were claimants in the UK until its withdrawal from the EU. They effectively restricted, reduced or removed a third-party victim's right to compensation that would have been available in claims directly against an insurer, a position ostensibly endorsed by the ECJ.

VII. CONCLUSIONS

Vnuk was a judgment that had a profound impact on the law relating to compulsory motor vehicle insurance. It is also true that in subsequent case law, the ECJ in attempting to further define and clarify the interpretation of the MVID, created more problems than it solved and in so doing allowed Member States to hypothesise as to the negative effects this might have on national compulsory motor vehicle insurance. That Directive 2021/2118 has provided Member States in the EU with the instruction to reverse *Vnuk* and to restrict compulsory motor vehicle insurance to those vehicles operating in their normal function, widening too the derogation of vehicles from compulsory motor vehicle insurance which are not intended for use on a public road, may be conceived as a win for most insurers and policy holders. Yet it is a fundamental loss to third-party victims of serious injury which occurs on private land by uninsured vehicles, and, the very policy holders who have saved further expense on their premiums will merely find that the insurance company avoids its potential responsibility for providing compensation, where the policy holder in their role as tax payer, will provide the compensation and redress for the injured party. Some victims will be protected through public liability and employers' liability insurance schemes, but it must be patently obvious that the extension provided in *Vnuk* was largely positive in protecting victims, especially in comparison to the costs to be borne by the assured. The new direction provided through the amended MVID has the potential, as we have raised throughout this paper, to cause great uncertainty in the scope of the Directive to first- and third-parties. It has also, without question, reduced the protection of the rights of third-parties who will continue to suffer catastrophic injuries and be undercompensated. Such individuals now carry the risk of having no legal recourse to any party which is capable of satisfying a judgment in their favour. It remains our opinion that there must be a Seventh MVID to remedy these issues and to protect, once again, the victims of motor vehicle accidents on private land.