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A Sledgehammer to Crack a Nut? Directive 2021/2118 and Exclusions as Antidotes to Vnuk

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ABSTRACT

As part of EU legislation regulating the compulsory insurance of motor vehicles, the Motor Vehicle Insurance Directives (MVID) imposed onto Member States the obligation to ensure that civil liability for vehicles normally based in their territory is covered by insurance. In the 2009 sixth consolidating Directive (Directive 2009/103/EC), the law had become well established. Yet in 2014, the Court of Justice embarked on a journey of extending the scope of compulsory motor vehicle insurance, first through its ruling in Vnuk v Zavarovalnica Triglav, and continuing in Juliana, Andrade and Núñez Torreiro. Together, these authorities confirmed the broadening direction of the Court of Justice's interpretation of the MVID, contrary to its understanding by many Member States and various interested parties. This in turn led to an amending Directive enacted in December 2021 which attempted to clarify the regulation of compulsory motor vehicle insurance law for the Member States. An examination of the amending law is provided, with a focus on the exclusions available to Member States, with the consequence that States have been provided with the tools to remove or limit the most expansive and protective rights for third-party victims of motor vehicle accidents.

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

1 INTRODUCTION

In a movement to harmonise the rules regarding compulsory motor vehicle insurance across the EU, various motor vehicle insurance Directives (MVID) have been enacted. Collectively, the MVID comprises a series of six Directives founded between 1972 and 2009,¹ establishing a compensation system protecting drivers, passengers and third-party victims of motor vehicle accidents. The suite of Directives began in 1972, seeking to ensure the fulfilment of the common market and the free movement principles² by removing border checks³ on vehicles and establishing minimum standards of compulsory insurance.⁴

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¹ (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.

² Preamble to (The First Directive) Council Directive 72/166/EEC [1972] OJ L103/1.

³ The first Directive at Art. 1(4), having introduced the concept of the 'territory in which a vehicle is normally based', saw the rescinding of the Green Card scheme of intra-EEA border checks (the green card is a document which proves the driver of the vehicle has the minimum insurance cover required by the country in which they are using the vehicle). Hence, vehicles registered in a Member State / EEA country were presumed to be subject to a policy of insurance in that country and were able to travel within the EEA without carrying a Green Card.

⁴ J. Marson, H. Alissa, and K. Ferris, *Resolving the Inconsistency Between National and EU Motor Insurance Law. Was Factortame the Solution Nobody Sought?* German Law Journal, 22(1), 122 (2021) doi:10.1017/glj.2020.98.

The first MVID (now Art. 3 of the sixth MVID) required 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.’⁵ The second Directive 84/5 established compulsory cover for damage following an accident involving a motor vehicle to property and for the personal injury suffered by victims. It required the creation⁶ and application of a national guarantee fund (as insurer of last resort) to compensate the third-party victims of uninsured drivers and untraced vehicles (such as the Motor Insurers’ Bureau (MIB) in the UK and the Fundo de Garantia Automóvel in Portugal) and provided minimum guaranteed levels of compensation. It further placed limits to the use of contractual exclusion clauses in policies of insurance. The third Directive (90/232) sought to extend the protection of victims of motor vehicle accidents to include all passengers and with rights for those involved in accidents to have access to the details of the insurance companies providing cover. This latter point was developed in the fourth Directive (2000/26) with the creation of information centres, charged with the responsibility for maintaining details of the vehicles normally based in the territory of the Member States and the insurance undertakings providing cover. It also required a compensation body to be founded to ensure the fulfilment of the requirement for civil liability for damages to property and personal injury resulting from motor vehicle use to be covered by insurance. Directive 2005/14, the fifth MVID, placed additional restrictions on the exercise of insurance policy exclusion clauses and made special protection for the personal injuries and damage to property suffered by pedestrians, cyclists and other road users. The sixth, consolidating Directive (2009/103/EC) was enacted to draw together this developing law and ensure the full protection of third-party victims of motor vehicle accidents was secured across the EU.

At this point, and to frame the discussion as appears later in this paper, it is necessary to highlight the most significant Articles present in the sixth MVID as they apply to obligations on Member States. The first is Art. 3 which reads:

Each Member State shall, subject to Article 5, 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 insurance referred to in the first paragraph shall cover compulsorily both damage to property and personal injuries.

Article 5 permits derogations from the obligation for compulsory motor vehicle insurance in limited circumstances:

1. A Member State may derogate from Article 3 in respect of certain natural or legal persons, public or private; a list of such persons shall be drawn up by the State concerned and communicated to the other Member States and to the Commission.

A Member State so derogating shall take the appropriate measures to ensure that compensation is paid in respect of any loss or injury caused in its territory and in the territory of other Member States by vehicles belonging to such persons.

⁵ Council Directive 72/166/EEC on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability [1972] OJ L103/1, Art. 3(1).

⁶ As the Court of Justice ruled in Case C-63/01, *Samuel Sidney Evans v The Secretary of State for the Environment, Transport and the Regions and The Motor Insurers’ Bureau*, ECLI:EU:C:2003:650, a Member State has the authority to assign this responsibility to a pre-existing body.

It shall in particular designate an authority or body in the country where the loss or injury occurs responsible for compensating injured parties in accordance with the laws of that State...

2. A Member State may derogate from Article 3 in respect of certain types of vehicle or certain vehicles having a special plate; the list of such types or of such vehicles shall be drawn up by the State concerned and communicated to the other Member States and to the Commission.

Any Member State so derogating shall ensure that vehicles referred to in the first subparagraph are treated in the same way as vehicles for which the insurance obligation provided for in Article 3 has not been satisfied.

The guarantee fund of the Member State in which the accident has taken place shall then have a claim against the guarantee fund in the Member State where the vehicle is normally based.

Finally for the purposes of this paper, Art. 10 is relevant as setting out the details of the national guarantee fund body to which the victims of uninsured drivers and untraced vehicles may submit their claims for compensation:

1. 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 Article 3 has not been satisfied.

The first subparagraph shall be without prejudice to the right of the Member States to regard compensation by the body as subsidiary or non-subsidiary and the right to make provision for the settlement of claims between the body and the person or persons responsible for the accident and other insurers or social security bodies required to compensate the victim in respect of the same accident...

2. The victim may in any event apply directly to the body which, on the basis of information provided at its request by the victim, shall be obliged to give him a reasoned reply regarding the payment of any compensation.

Member States may, however, exclude the payment of compensation by that body in respect of persons who voluntarily entered the vehicle which caused the damage or injury when the body can prove that they knew it was uninsured...

Thus, the consolidated sixth MVID established a system under which Member States were obliged to ensure the compulsory insurance of vehicles used in their territory. It permitted limited derogations of this obligation where either the legal person subject to the derogation or a national guarantee fund body which was required to be established could satisfy qualifying claims. These obligations were especially important throughout the EU as they provided a minimum system of protection for the third-party victims of accidents involving motor vehicles.

2 UNINTENDED CONSEQUENCES OF VNUK AND THE EMERGING CASE LAW

Since enactment of the sixth MVID, the law was clear with regards to the specific protection of vulnerable third-party victims and the regime of compulsory motor vehicle insurance. It had, through references made by Member States including the UK⁷ and Spain,⁸ identified the obligations on Member States. These included ensuring vehicles (broadly defined)⁹ were subject to insurance on roads ‘and other public places’,¹⁰ along with provision for State-maintained bodies to ensure such victims of uninsured vehicles and untraced drivers would be compensated in line with similar claims under civil liability schemes in the Member States.¹¹ However, the status quo changed in the Court of Justice’s 2014 judgment in *Vnuk*.¹²

In *Vnuk*, the Court of Justice heard a reference from Slovenia regarding an accident leading to a man being injured on a private farm by the driver of a tractor. Two issues were raised. One was in relation to the ‘use of vehicles’¹³ and the second was the consequences of the injury occurring on private land and the application of the insurance of the vehicle concerned. At the time, Slovenian law imposed no requirement for an insurance policy to cover injuries concerned with accidents involving the use of vehicles on private land. *Vnuk* was therefore unable to access compensation through the owner’s insurers. *Vnuk* argued, first before the domestic courts, and then vicariously through the reference to the Court of Justice, that the MVID required vehicles to be subject to compulsory motor vehicle insurance, and there was nothing in the MVID which restricted such an obligation to hold insurance for vehicles used on public roads. The Court of Justice agreed and ultimately held that for the purposes of Art. 3(1),¹⁴ a consistency in interpretation and application throughout the EU would be instructive and ensure third-party victims were equally protected. Therefore the ‘use’ of a vehicle, given in the present case a tractor may have several transport and/or industrial uses, could not be left to Member States to decide. Further, ‘vehicle’, again for the purposes of an interpretation of Art. 3(1), applies to ‘... any use of a vehicle that is consistent with the normal function of that vehicle.’¹⁵

⁷ Evidenced in *RoadPeace v Secretary of State for Transport and Motor Insurers’ Bureau* [2017] EWHC 2725.

⁸ *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.

⁹ Case C-162/13, *Damijan Vnuk v Zavarovalnica Triglav*, ECLI:EU:C:2014:2146 [59]; 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 [42]; Case C-648/17, *AAS, BTA Baltic Insurance Company, anciennement, Balcia Insurance SE v Baltijas Apdrošināšanas Nams ASECI*, EU:C:2018:917 [48]; Case C-100/18, *Línea Directa Aseguradora v S.A./Segurcaixa, Sociedad Anónima de Seguros y Reaseguros*, ECLI:EU:C:2019:517 [48]; and Case C-431/18, *María Pilar Bueno Ruiz and Zurich Insurance PL, Sucursal de España v Irene Conte Sánchez*, ECLI:EU:C:2019:1082.

¹⁰ Initially, the UK had transposed the MVID through compulsory motor insurance for vehicles used on roads. Even when ‘quasi-roads’ were the subject of legal action, its national courts would not purposively interpret the Road Traffic Act to comply with the MVID (see *Clarke and others v Kato, Smith and General Accident Fire & Life Assurance Corporation plc; Cutter v Eagle Star Insurance Company* [1998] UKHL 36). Subsequently, the legislation was amended to the effect that s. 143 of the Road Traffic Act 1988 requires that a person must not use a motor vehicle on a ‘road or public place’ unless there is in place a policy of insurance relating to the use of that vehicle.

¹¹ As noted above in the consideration of Art. 3 MVID.

¹² Case C-162/13, *Damijan Vnuk v Zavarovalnica Triglav*, ECLI:EU:C:2014:2146.

¹³ Within the meaning of Article 3(1) of the first MVID.

¹⁴ First Council Directive 73/239/EEC of 24 July 1973 on the Coordination of Laws, Regulations and Administrative Provisions Relating to the Taking-up and Pursuit of the Business of Direct Insurance other than Life Insurance.

¹⁵ *Supra*, *Vnuk* n. 12, para. 60.

The Court of Justice did not specifically address the question of the geographic scope of compulsory motor vehicle insurance, but it was soon being discussed in numerous outlets¹⁶ that the result of the *Vnuk* judgment was to require every vehicle used on public and private land to be covered by a policy of insurance. The following three cases discussed confirmed the *Vnuk* ruling and the Court of Justice's understanding of the scope of the MVID.

The case of *Juliana*¹⁷ involved Mrs Juliana, the owner of a car registered in Portugal, who decided to stop driving due to her failing health. Having immobilized and parked her vehicle adjacent to her house, Juliana let her insurance cover lapse. Later, and without Juliana's consent or knowledge, her adult son restored the car, drove it off road with two friends and crashed it. The accident resulted in the deaths of all three occupants. The law of Portugal provided:

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... [which can] be used, must be covered... by insurance covering that liability.¹⁸

Further, at Article 503(1) of Portugal's Civil Code, every person in control of any land-based motor vehicle, whether it was in use or not, is responsible for any damage caused by the inherent risks of the vehicle. This resulted in Juliana's liability for the damages and due to her failure to have a policy of insurance in place, the national guarantee fund body¹⁹ (the Fundo de Garantia Automóvel) satisfied the claim of just over €430,000 and sought to recover²⁰ the payment made to the claimant.²¹ Juliana's argument was that she was not responsible for the accident and she had no obligation to possess insurance cover for a vehicle that had been immobilized and stored on private land. The families of the two passengers, in claiming damages, cited the First MVID and its demands that each Member State carry adequate insurance to cover civil liability associated with vehicle use. It did not establish the geographic scope of the obligation placed on Member States.

A reference was made by the Portuguese Supreme Court to the Court of Justice. The Court reiterated that Art. 3(1) MVID has to be interpreted to mean that insurance cover is mandatory for the use of a motor vehicle, even if it is parked on private property, when it is registered in a Member State. Vehicles such as these remain 'motor vehicles' under the MVID definition and must be subject to compulsory insurance, if this were not the case there would be no responsibility on, nor available protection through, the national guarantee fund bodies.²²

¹⁶ See, for example, commentary from a law firm: <https://kennedyslaw.com/pt/thought-leadership/article/scope-of-compulsory-motor-insurance-a-loaded-gun/> (all webpages accessed 18 February 2023); a risk management and insurance institute: <https://www.airmic.com/news/motor-insurance-positive-signals-long-road-vnuk-solution>; a Member State seeking opinions on the judgment from affected parties: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/602216/motor-insurance-vnuk-v-triglav.pdf; and by academics: J. Marson, and K. Ferris, *For the Want of Certainty: Vnuk, Juliana and Andrade and the Obligation to Insure*. *Modern Law Review*, 82, 6, 1132 (2019).

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

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 *Supra*, *Juliana* n. 18 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'.

Juliana was furthered by another reference from Portugal involving Mrs Maria Alves who died in March 2006 (*Andrade*).²³ An accident at work occurred when a tractor was operating at a vineyard. At the time of the accident, the tractor was parked on a sloped terrace dispensing herbicide and due to the weather, its spraying of liquid, the ground's surface and its own vibration during use it slipped down the terrace, crushing Alves. Alves' widower brought damages claims against, among others, the owner of the tractor. The key aspect for consideration in the case was how instructive was the fact that, at the time of the accident, the tractor was not being used as a means of transport.²⁴

Similarly to *Juliana*, this situation of Portuguese law and its compatibility with the MVID led to a reference to the Court of Justice, where the Court ruled that 'the circumstances in *Vnuk* support the conclusion that a vehicle's normal function is to be in motion.'²⁵ Thus, whilst *Juliana* held that the requirement for motor insurance to be applied to motor vehicles was guaranteed and vehicles could not fall in and out of such a requirement, the actual application of the insurance cover only applied when it was used as a 'means of transport.' This was the normal use of a motor vehicle. Thus, the Court used the case to reiterate that compulsory motor vehicle insurance did not depend on whether a vehicle was on the road or private land, whether it was in motion or stationary, or whether its engine was running or not. It conceded that some vehicles had different functions depending on the circumstances in which they are used. As an example, a tractor can be used as a means of transport and as a generator to power herbicide sprayers. It was this use of the vehicle at the time of the accident that would determine the application of the insurance policy.²⁶

The matter of compulsory insurance being applicable to motor vehicles on private land was reaffirmed in a case referred to it by Spain. The Court of Justice ruled on 20 December 2017,²⁷ just three weeks after the *Andrade* ruling, concerning a Spanish Army officer who was injured following an accident while riding in an all-terrain vehicle during a military exercise. A training exercise was being conducted in a restricted area when the military vehicle in which Señor Núñez Torreiro was travelling was involved in an accident. The vehicle was covered by insurance. At the time of the accident, the vehicle was equipped with wheels but was operating on terrain that was considered only appropriate for tracked vehicles²⁸ and the vehicle was travelling on land used exclusively by military vehicles. Núñez Torreiro's claim for compensation was denied by the vehicle's insurer. Non-military vehicles could not access the terrain and consequently, argued the insurer, the terrain was not suitable for motor vehicles and therefore this vehicle could not be considered a 'motor vehicle' for the purposes of the MVID. However, all-terrain vehicles, according to the Court of Justice, are motor vehicles given that the concept of a 'vehicle' as defined in Art. 1(1) of the MVID is one that is 'intended for travel on land and propelled by mechanical power, but not running on rails.'²⁹ The vehicle in *Núñez Torreiro* was used in accordance with its normal function. The Court repeated the derogations available to Member States through Art. 5 of the MVID against compulsory motor vehicle insurance, yet Spain had not informed the Commission of the derogation of this vehicle, this type of vehicle or of the legal person thereby covered externally by the State (the military). Consequently, Spain's restrictions on compulsory insurance to vehicles used on 'public and private roads or terrain suitable for motor vehicles' was contrary to the MVID.³⁰

²³ *Supra*, *Andrade* n. 9.

²⁴ *ibid* at [15].

²⁵ *ibid* at [19].

²⁶ 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.

²⁷ *Supra*, *Núñez Torreiro* n. 8.

²⁸ *ibid* at [11].

²⁹ *ibid* at [22].

³⁰ *ibid* at [35] and [36].

This tranche of case authority puts to rest questions regarding the scope of compulsory motor vehicle insurance. The Court of Justice’s lack of clear direction in *Vnuk* was addressed in *Andrade*³¹ and *Núñez Torreiro* where it noted that the use of vehicles, and thereby compulsory insurance, was not limited to road use ‘... that is to say, to travel on public roads, but that that concept covers any use of a vehicle that is consistent with the normal function of that vehicle.’³² *Juliana*³³ added to this by ensuring that vehicles, even parked vehicles which were not being used, insofar as they were capable of being moved, were to be insured. Vehicles could not move from an insured to an uninsured state depending on their use or location.

3 DIRECTIVE 2021/2118

The consequence of the progeny of cases from *Vnuk* to *Núñez Torreiro* led to a dramatic extension to the law on compulsory motor vehicle insurance. With insurance requirements being applied to vehicles on private land, the consequences for owners, users, third-parties and enforcement and regulatory agencies became quickly evident. Identification of vehicles used on roads and other public places is recognised and understood, with the Motor Insurance Database and the catalogue operated by the Driver Vehicle and Licensing Agency, including Automatic Number Plate Recognition technology providing mechanisms to track vehicles, ensuring vehicles are insured and providing an effective way for tracking vehicles if they are involved in an accident concerning a third-party. Vehicles used exclusively on private land typically did not require, nor have, the same features as roadworthy vehicles.³⁴ They did not have markings to help in the identification process or on which a registration of the vehicle could be maintained on a database, and this led to uncertainty as to the application of potential criminal offences and the ability of state authority bodies to enforce these in any circumstance.

Previously the law regulating compulsory motor vehicle insurance through the MVID was understood to apply to motor vehicles on public roads. The jurisprudence from the Court of Justice since *Vnuk* extended this obligation to private land and to vehicles (not just motor vehicles) insofar as they were being used according to their ‘normal function.’ This development of the geographic scope and vehicle reach of the law resulted in responses from Member States,³⁵ various private organisations, including from motorsport³⁶ and insurers,³⁷ and the EU regarding the accuracy of the Court of Justice’s interpretation of the MVID and what action may need to be taken in reply.³⁸ The conclusion of the EU’s investigation³⁹ was to acknowledge that the MVID was fit for purpose and did not require a seventh MVID being enacted, but would benefit from a clarification of the law, resulting in Directive 2021/2118.

³¹ *Supra, Andrade* n. 9 at [34].

³² *Supra, Núñez Torreiro* n. 8, at [28].

³³ 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.

³⁴ See *Lewington v MIB* [2017] EWHC 2848 for an example of the practical effects of vehicles, used exclusively in a quarry and without the necessity and fitting of rear lights, being stolen, taken onto an unlit public road at night and causing an accident where the third-party victim was unable to see the vehicle until she had to make an emergency manoeuvre to avoid a collision.

³⁵ Unsuccessful requests were made by Germany, Ireland and the UK to reopen the oral part of the procedure in *Vnuk*, see: https://www.apil.org.uk/files/sigreg/supporting_papers/2939SupportingPapers2.pdf.

³⁶ Such as the Motorsport Industry Association: <https://the-mia.com/page/Vnuk>.

³⁷ Including the UK’s national guarantee fund body, the Motor Insurers’ Bureau: <https://www.mib.org.uk/media-centre/news/2022/april/mib-welcomes-removal-of-eu-s-vnuk-ruling-from-uk-law/>.

³⁸ J. Marson, and K. Ferris, (2022) *Changing Lanes and Removing Rights: Quashing the Judicial Activism of the Court of Justice through Directive 2021/2118*. *European Law Review*, 47, 773 (2022).

³⁹ 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.

Here we discuss the changes introduced in Directive 2021/2118 to resolve the issues raised in the case law and outline the major consequences to the law. Ultimately, these amendments shift the position of third-parties in motor vehicle accidents across the EU to terms of protection much weaker than those enjoyed under the sixth MVID as enacted in 2009. It provides to Member States a series of opt-outs from protections for third-party victims which, if Directive 2021/2118 was to be the mechanism to remedy the problems emerging from the Court of Justice's case law, appears to have reversed much of the protections previously enjoyed by this specific group of victim. In the following sections we outline the main areas where Directive 2021/2118 adversely affects the protections provided through the MVID. We begin with a discussion of the development of the law where a vehicle will be subject to the application of motor vehicle insurance, but only where it is a 'vehicle' at the time of the accident. We continue by exploring the specific exemption to compulsory insurance, following quite extensive lobbying by the motorsports industry to reverse *Vnuk*. We then assess the implications to Art. 10 of the MVID which requires Member States to establish a national compensation fund body to satisfy claims of victims of uninsured vehicles and untraced drivers. These bodies act as insurers of last resort. We critique the developments to Art. 10 through the ability of Member States to now derogate from the compulsory motor vehicle insurance regime on specific public roads and in cases of 'serious offences' being committed. Collectively, these are areas where the new Directive either reverses the protections provided by *Vnuk*, or where it provides exemptions for Member States which have profound and negative effects for the protection of third-party victims. The implications of Directive 2021/2118 are to radically alter the landscape of protective motor vehicle insurance across the EU. These developments mirror many of the arguments advanced for the UK's withdrawal from the EU. We conclude the substantive discussion of the law with an acknowledgment of the synergies between the UK's approach to compulsory motor vehicle insurance and that being advanced by the EU. Finally we draw our conclusions with a plea for the legislators to carefully assess the effects of Directive 2021/2118 across the EU and to avoid the continued use of this tool to remedy the 'problems' created following *Vnuk*.

3.1 THE DEFINITION OF MOTOR VEHICLE USE AND ITS IMPLICATIONS FOR 'AT THE TIME OF THE ACCIDENT'

Beginning with the definition of a motor vehicle, the MVID had clearly established a comprehensive definition of vehicle and one which was typically broader than that adopted in national transposing legislation. At Art. 1 MVID, a motor vehicle is one '... intended for travel on land and propelled by mechanical power, but not running on rails...' Following *Vnuk*, it had been hypothesised that the MVID could consequently cover many more vehicles than currently understood, including mobility vehicles, e-scooters, even golf carts and ride-on mowers.⁴⁰ As such, Directive 2021/2218 takes the opportunity to exclude such vehicles from the scope of the MVID, a clarification that was largely welcomed, but it is the addition of Art. 1a into the MVID where some of the more significant problems begin with the concept of the vehicle's use.

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.

⁴⁰ <https://www.dailymail.co.uk/news/article-9282513/EU-law-insuring-ride-mowers-golf-buggies-mobility-scooters-chopped-Brexit.html> / <https://www.insurancebusinessmag.com/uk/news/auto-motor/abi-on-vnuk-removal-common-sense-has-prevailed-403832.aspx>.

The inclusion of this section attempts to synthesise the Court of Justice’s jurisprudence. In *Vnuk*, motor vehicles had to be covered by insurance on public and private land insofar as the vehicle was being used according to its normal function at the time of the accident. Similarly, another tractor involved in an accident in *Andrade* was held to not fall under the requirement for the application of insurance cover as it was not ‘moving’ (at least under its own volition) at the time of the accident leading to the death of a woman at the base of a terraced slope. In *Juliana*, the Court of Justice held that motor vehicles stored on private land, even where purposefully incapacitated, were subject to compulsory motor vehicle insurance. The test being was the vehicle capable of being moved. Finally, an all-terrain vehicle used in *Núñez Torreiro*, even in circumstances with it being fitted with a possibly inappropriate wheeled platform, was subject to compulsory insurance.

The outcome of s. 1a is a lessening of the protection available to third-party victims of accidents involving motor vehicles, and legal proceedings and references to the Court of Justice are likely to take place as a result of this inclusion in the Directive. The ‘use’ of vehicles is just that, primarily as a vehicle and not adopting some agricultural or industrial application at the time of the accident. In *Línea Directa*⁴¹ the Court of Justice held a vehicle parked in a garage for 24-hours before it spontaneously caught fire was subject to compulsory insurance per Art. 3 MVID. Being parked, even for an extended period of time, is an inherent quality of a motor vehicle and its ‘use’ as such. Yet motor vehicles have often ceased being used as a means of transport where they are burger vans, mobile libraries, mobile catering vehicles and so on. If they cause an accident during these tasks, according to Art. 1a of Directive 2021/2118, they would not be a motor vehicle. However, that the application of the compulsory motor insurance would fail to be applied, this is distinct from the requirement to hold a policy of motor insurance. In *Juliana*, the Court of Justice concluded the obligation to insure at the time of the accident could not be made *ex post facto*, rather it must be drawn *ex ante* and this aspect of the Court of Justice’s case authority is unaffected by Directive 2021/2118. Vehicles cannot drift into and out of insurance obligations based on their activity or mode of use at the time of the accident, at least as far as the obligation to hold insurance is concerned. It remains for parties and insurers to argue, and for direction from national courts and the Court of Justice, as to at which point a vehicle is operating in *the capacity of a vehicle* at the time of an accident.

3.2 MOTORSPORT EXCLUSION

To reiterate the point, arguably one of the most significant outcomes from *Vnuk* was the requirement for vehicles, being used according to their normal function, to be subject to compulsory motor vehicle insurance. Given the broad interpretation assigned to vehicles in the sixth MVID, commentary soon followed from numerous sectors regarding the possible and probable consequences of the implications following *Vnuk* (although fears which did not materialise). It was envisioned that vehicles previously beyond the remit of the compulsory motor vehicle insurance regime would now be within its scope. These vehicles were, as noted above, subject to concern being raised as to the financial, practical and legal implications of the extension of the law in this respect.⁴² However, the main voices of disquiet and disagreement with the *Vnuk* ruling came from the motorsport sector.

Motorsports is an encompassing term, with competitive events across a range of motorised vehicles for amateur, professional and recreational purposes. Although far from an exhaustive list, this may involve cars, such as with autocross, endurance racing, formula racing,

⁴¹ *Supra*, *Línea Directa* n. 9.

⁴² M. Kirkpatrick, *Vnuk Impact Analysis: Combined Report*, Government Actuary’s Department (2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/965738/vnuk-impact-analysis-combined-report.pdf.

rally racing, stock car racing, and touring car racing among the most well-known examples. Motorcycling also has examples in the aforementioned list, along with MotoGP racing, speedway, supercross, and supermoto. Motorsports involving other vehicle types include kart racing, tractor pulling, even extending to land speed records. There are also numerous motorsports involving vehicles which do not compete exclusively on land. The list is important because the concern expressed by proponents of the industry regarding the negative effects of *Vnuk* surrounded the costs of the imposition of compulsory insurance. To the uninitiated, motorsports conjures up thoughts of Formula 1, the TORC series and perhaps extending to the world superkart championship. Yet there are approximately 5,000 organised motorsports events in just the UK,⁴³ and across the EU and the world, even the top tier competitive events results in an extensive list of organisers and events.⁴⁴ Thus, detractors claimed that comments about the demise of the industry⁴⁵ were, perhaps, hyperbole. The Fédération Internationale de l'Automobile (FIA) is perhaps the most exclusive and 'rich' of sporting bodies, and the necessity for compulsory motor insurance in this sector as being unachievable would seem somewhat groundless given the ability of the teams and organisers to settle any claim from a third-party victim for compensation due to a motor-vehicle related accident. The potential for concern was appropriate as the events moved down the scale to regional and local events, with the necessity of insurance cover for third-party losses a realistic and cautionary possibility. Motor racing typically takes place on private tracks with the vehicles being used according to their normal function, hence *Vnuk* being applicable. Also, across Europe, such events are conducted without insurance being applicable between the competitors (and certainly not compulsory insurance) for the results of accidents, given the costs would prove prohibitive. As expressed by Tony Campbell, MCIA.⁴⁶

The unintended consequences of [the MVID and *Vnuk*] could have had a devastating impact on the motorcycle industry and motorcycle sport... While high level motorsport, such as F1 and Moto GP would have survived, it would have been the grass roots motorcycle sport that would have suffered the greatest.⁴⁷

This was due to the requirement for compulsory motor vehicle insurance to apply now to vehicles being used on private land. Whilst Art. 5 of the sixth MVID provided for derogations from this obligation to Member States which wished to avail themselves of such a course of action, the areas for derogation were very limited and related to classes of vehicles. It also included a specific protection to third-party victims. Member States which did make use of Art. 5's derogation were required to ensure that Art. 3's obligation for the compulsory insurance of vehicles was met to the same extent. Whether this was via direct actions against the State (with, for example, injury and accidents caused with police vehicles, ambulances and other vehicles used by organisations in the public sector) or through claims to the national guarantee fund, the victims of accidents would be protected.

Following the Court of Justice's judgment in *Vnuk*, many lobby groups and interested parties from the motorsport sector raised concerns as to what they saw as the natural consequence of the decision and the evolution of the law as establishing in the Court of Justice.⁴⁸ Several were based in the UK,⁴⁹ but this was not the exclusive domain of the critical

⁴³ <https://www.motorsportuk.org/events/>.

⁴⁴ <https://www.motorsport.com/series/>.

⁴⁵ <https://www.youtube.com/watch?v=3IN6Lfm0RA0>.

⁴⁶ The Motorcycle Industry Association of Great Britain.

⁴⁷ <https://tinyurl.com/campbellquote532022>.

⁴⁸ For examples of extensive lobbying, see <https://www.youtube.com/watch?v=3IN6Lfm0RA0>.

⁴⁹ <https://www.carolenash.com/news/bike-news/detail/sigh-of-relief-as-vnuk-ruling-kicked-into-touch>.

commentary. Those lobbying the UK government and the EU sought legislative action to clarify the interpretation of the MVID which, as noted above, did not restrict the geographic scope of the requirement for compulsory insurance. Indeed, the UK Government was not only receptive to the restriction of the *Vnuk* ruling, it also backed the campaign to the EU for its reversal, but it was joined in the venture by the Auto Cycle Union, European motorcycle industry, FIM, MCIA, and NMC.⁵⁰ NMC Executive Director Craig Carey-Clinch remarked:

The ACU and the industry were active on the *Vnuk* issue from the moment the ECJ judgement was handed down in 2014, alerting the Government to its effects. Both led the lobby and created a strong coalition of sporting and other interests which was able to quickly secure government support... The NMC welcomes the result as it relates to motorcycle and other motorised sports, but remains concerned that the cancellation of the entire judgment could leave gaps where insurance protections are still needed. We would welcome a further discussion with Government about this.⁵¹

It is pertinent that a spokesperson for an industry which has been ‘saved’ from the most expansive aspects of *Vnuk* and its implications noted, first, the significance of the exclusion of the motorsport industry from the Court of Justice’s interpretation of the MVID. They continued that cancelling the entire judgment, which we understand to mean the protection of third-parties for accidents involving vehicles on private land, would be concerning. As to the first point, Directive 2021/2118 Art. 1 provides:

(2) Article 3 is amended as follows:

(a) the first paragraph is replaced by the following:

‘Each Member State shall, subject to Article 5, take all appropriate measures to ensure that civil liability in respect of the use of a vehicle normally based in its territory is covered by insurance’;

(b) the following paragraph is inserted after the first paragraph:

‘This Directive shall not apply to the use of a vehicle in motorsport events and activities, including races, competitions, training, testing and demonstrations in a restricted and demarcated area in a Member State, where the Member State ensures that the organiser of the activity or any other party has taken out an alternative insurance or guarantee policy covering the damage to any third party, including spectators and other bystanders but not necessarily covering the damage to the participating drivers and their vehicles.’

It is evident that whilst motorsport is, from 23 December 2023,⁵² excluded from the compulsory motor vehicle insurance regime, it may be considered an appropriate reaction to the possible interpretation and implications of the MVID following *Vnuk*. In respect of the motorsport’s exclusion, one may justify such an approach given that these vehicles only operate in controlled areas. Furthermore, the Member States are required to ensure specific insurance is available for damage or loss suffered by third-party victims. However, it is worthy of note that the details and extent of such cover is not included and will need clarification by the Court of Justice. It may follow the minimum levels of protection and equivalence to the measures contained in Art. 3 of the MVID, yet this is not specified and its explicit exclusion could be interpreted as being instructive. It could be concluded that such an explicit omission is intended to allow Member States to remove any requirement for the protection of third-party victims through

⁵⁰ *ibid.*

⁵¹ *ibid.*

⁵² The date by which the Directive’s provision enter into force.

insurance. Equally, the extent of the designated areas, the nature of restricted areas and the obligations on third-parties and Member States to take reasonable steps to not enter these, intentionally, unintentionally and recklessly will also require thought and direction as to minimum standards to ensure breach of the Directive is not committed.

Therefore, the use of vehicles and the exemptions provided to the motorsport industry may, potentially, reduce the protection for third-party victims⁵³ but at the minimum, the EU has put in place mechanisms for the protection of third-party victims through a system of insurance or compensation through a guarantee fund. This is in stark contrast to the revision to Art. 10 of the MVID which has the potential to do exactly what Craig Carey-Clinch had earlier warned and cancel the entirety of *Vnuk*'s protection.

3.3 PUBLIC ROAD DEROGATION AND ARTICLE 10

Article 10 establishes the requirement for Member States to institute a national guarantee fund, essentially a safety net and insurer of last resort, for uncompensated victims of uninsured drivers and untraced vehicles. By definition, the primary task of the body is to ensure that victims of uninsured drivers or untraced vehicles receive at least comparable levels of compensation they might have secured had the driver causing the accident been insured and a claim was brought against their insurer. Without this, the principle of equivalence and effectiveness of EU law (or the goals of the Directive) would be compromised. It is important to note, however, that the chosen body is only liable for claims caused by vehicles that fall under Art. 3, which means that the consequences of accidents involving vehicles on a derogated list (Art. 5) would not, ordinarily, be covered by the compensatory body. Member States should not misinterpret this exception to avoid liability towards victims of these vehicles. Instead, they must ensure other mechanisms of compensation, such as the bodies which own or have legal responsibility for the vehicles on the derogated list have available securities and alternative compensation programs through which claims may be settled. Further, this compensatory body would be excluded from providing compensation to such a victim where the body can prove that the victim was knowingly carried in an uninsured vehicle. This is the only exemption allowed for the guarantee fund body to deny responsibility for the third-party victim's claim.⁵⁴

Through Directive 2021/2118, however, the EU has introduced an exemption to compulsory motor vehicle insurance in Art. 5 which previously was restricted to a designation of vehicle, it is now linked to a geographic area. Previously, the types of exempted vehicle were those owned and operated by the State – police cars, ambulances, fire trucks and so on. The State was understood to be in a position to satisfy claims based on accidents involving these vehicles and the Member State was obliged, through Art. 10, to establish a national guarantee fund (compensatory body) through which a third-party victim could seek payment of damages if the driver was uninsured, the vehicle untraced, or in the present circumstances, the State failed to satisfy a judgment in the claimant victim's favour.

However, Directive 2021/2118 amends the MVID as follows, and Art. 1(4)(4)(5) and (6) are of particular significance:

⁵³ For example, differences often exist between claims from third-party victims directly against an insurer and those through some national compensatory body, such as those likely to be enrolled to provide the minimum protections in the compliance with the new Art. 3. See M. Channon, and J. Marson, (2021). *The Liability for Cybersecurity Breaches of Connected and Autonomous Vehicles*. Computer Law and Security Review: the International Journal of Technology Law and Practice, 43. doi:10.1016/j.clsr.2021.105628 (2021); and J. Marson, and K. Ferris, *The Problem of Vnuk and the EU Response. A Critique of the Law on Compulsory Motor Vehicle Insurance*. Journal of Business Law in press (2023).

⁵⁴ See Case C-300/10 *Almeida v Companhia de Seguros Fidelidade-Mundial SA* [2012] ECLI:EU:C:2012:656.

Article 1(4) continues

(4) in Article 5, the following paragraphs are added:

‘3. A Member State may derogate from Article 3 in respect of vehicles that are temporarily or permanently withdrawn and prohibited from use...

Any Member State so derogating shall ensure that vehicles referred to in the first subparagraph are treated in the same way as vehicles in respect of which the insurance obligation referred to in Article 3 has not been satisfied.

The guarantee fund of the Member State in which an accident has taken place shall then have a claim against the guarantee fund in the Member State where the vehicle is normally based.

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.

Any Member State derogating from Article 3 in respect of vehicles referred to in the first subparagraph shall 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.

The guarantee fund of the Member State in which an accident has taken place shall then have a claim against the guarantee fund in the Member State where the vehicle is normally based.

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.

‘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.’ The MVID at Art. 3 requires for the compulsory insurance of motor vehicles intended for travel on land, and *Vnuk* extended this to public and private land.⁵⁵ Directive 2021/2118 returns the law to the pre-*Vnuk* era where compulsory motor vehicle insurance is not required for vehicles used exclusively on private land. The Commission, following the conclusion of its review, explained how Member States should be furnished with the power to exclude from the compulsory insurance regime, motor vehicles which have not been admitted for use on public roads in accordance with national law. Recital 8 of the Preamble provides instruction of private road as 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.’ Those areas subject to physical restrictions are likely to be easier to identify given the nature of the barriers preventing access and/or entry. Those subject to legal restrictions to access are likely to be more difficult to readily identify and will rely on local knowledge, signage and other forms of notice-based instruction to convey the direction to persons.

The Recital does not provide specific guidance as to the nature of a public road. In the UK, dockyards⁵⁶ and caravan parks⁵⁷ have been labelled ‘roads’ and subject to the compulsory insurance regime. However, quasi-public areas have led to conflicting authorities including an internal roadway at a university campus being held to not constitute a ‘public place,’⁵⁸ as were

⁵⁵ ‘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”’ *Supra*, Núñez Torreiro, n. 8, para. 28.

⁵⁶ *Buchanan v MIB* [1955] 1 All ER 607.

⁵⁷ *DPP v Vivier* [1991] 4 All ER 18.

⁵⁸ *Cowan v DPP* [2013] EWHC 192 (Admin).

private land adjoining a private club⁵⁹ and a company car park only accessed by staff and customers.⁶⁰ Similarly, in *Brown v Fisk*⁶¹ the High Court held a yard used by a private society not to be a public place (a decision made without adopting a purposive interpretation of the MVID). A public place / road is determined by the actual use of it by members of the public, a use which is at least tolerated by the owner, and the (public, not private) purpose of that use. The situation is not much clearer in current Member States such as France which distinguishes roads/routes which provide access to the public, and paths/chemins which may be public or private areas. Vehicles use on private chemins is a matter predominantly decided by the owner. It is not uncommon for no access to be provided to vehicles or pedestrians. However, to confuse the situation these owners of private chemins may be subject to *servitudes légale de passage*. In such instances, owners are compelled to provide individuals, such as neighbours, with access to the area. Whether examples of this form of access will have no effect on the designation of private road and follow similar conclusions to those drawn in *Brown v Fisk*, remains to be seen. In the alternative, Member States may bestow the area with a public road title, allowing the State to exclude vehicles used exclusively on such public roads from insurance. This scenario establishes a level of unhelpful uncertainty in the interim between the Directive's adoption and prior to judicial direction.

Of immediate concern is the insertion into Arts. 5 and 10 MVID by Directive 2021/2118 where the Member State chooses to exempt vehicles on certain public roads from the compulsory insurance regime. This also exempts the national guarantee fund body from providing compensation. The result is an uncompensated victim, trying to attach culpability to a driver and a vehicle which may not be subject to insurance registration and the other forms of identification typically used in accidents involving motor vehicles. This is a potentially disturbing addition to the MVID post 2023. Vehicles used exclusively on private land have been shown to cause significant injury to third-party victims (such as in *Vnuk* and *Andrade*), they may also be taken, perhaps unlawfully, onto public roads where they can cause an accident (per *Lewington*) and with Art. 1(4)'s insertion into Arts. 5 and 10 of the MVID, such victims will have no insurer, or national compensatory body from which to recover damages. Possible claims may be made on the basis of public liability policies, but these are wholly dependent on employers / businesses holding such insurance cover, and their applications in each case. It would be wise to expect several cases to the Court of Justice on this matter where Member States apply Art. 1(4)'s provisions into national law.

3.4 ARTICLE 10 AND THE 'SERIOUS OFFENCES' DEROGATION

Art. 10 provides to third-party victims recourse to a fund from which to recover damages. However, national guarantee fund bodies have often been reluctant to provide compensation outside of their terms of reference with the contracting Member State.⁶² Specifically, the guarantee fund body takes over responsibility for unsatisfied insurance claims where the driver in question was subject to compulsory insurance cover. In respect to Art. 5, those vehicles on private roads which have been designated by the Member State as exempt from compulsory insurance would not have come under the remit of, in the UK at least, the guarantee fund body's agreement with the State. This is a matter that will need to be revisited across the EU to clarify the contractual obligations, and their correct incorporation, to ensure the parties' legal position.

It should also be considered that whilst the EU at Art. 10 and Recital Nine instruct Member States to provide a compensatory regime similar to that required at Art. 3 with third-

⁵⁹ *Pugh v Knipe* [1972] RTR 286.

⁶⁰ *R v Spence* [1999] EWCA Crim 808.

⁶¹ *Brown v Fisk & Ors* [2021] EWHC 2769 (QB).

⁶² See *Colley v Motor Insurers' Bureau* [2022] EWCA Civ 360.

party victims' claims directly against the tortfeasor or their insurer, the reality is often different, with the victim experiencing less advantageous claims procedures. The substantive and procedural differences between claims by the third-party victim against the tortfeasor and against the national guarantee fund body have been the subject of comment and criticism.⁶³ It was often the case in the agreement between the UK and the MIB (the private company contracting with the UK as its national guarantee fund) the claimant was subject to more onerous burdens to process their claim, and/or had fewer protections than if they had been able to claim directly against the tortfeasor's insurer.⁶⁴ This included the rules for presentation of information, rights for the national guarantee body to unilaterally deny compensation to the victim, and a system of forced arbitration whose impartiality was subject to debate.⁶⁵ Yet when the matter was considered by the Court of Justice, despite those inconsistencies in approach, when taken as a whole and given that the judicial system did not make it excessively difficult to access compensation, it was held no breach of EU law had occurred.⁶⁶

A final substantive issue that emerges from Directive 2021/2118 is at Recital Nine and its introduction of an exemption to the liability of insurers, if Member States wish to exercise this discretion, which had not been present in the MVID previously.

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.

Regardless of the wording used in this Recital, the MVID has previously been explicit. The only exemption from compulsory insurance cover for third-party victims was where the victim had voluntarily allowed themselves to be driven in a vehicle, and the insurer could 'prove' the passenger understood that the vehicle had been stolen.⁶⁷ No other exemptions were permitted. What Recital Nine facilitates is for the removal of insurance provisions in the event of serious offences. Problematically, these exclusion clauses will most likely be contained within the contract with the assured, leaving the validity and efficacy of such exclusion clauses to be explored and litigated by third parties. In the UK this was evidenced in acts of terrorism based on use of a vehicle (but was an action clearly not permitted by the MVID and quickly removed)⁶⁸ and, perhaps more commonly, the use of a motor vehicle to commit suicide. The UK had previously, and contrary to the MVID, permitted the use of such an exclusion clause in these very circumstances, with the Court of Appeal endorsing the use of a clause based on

⁶³ See J. Marson, and K. Ferris, *Motor Vehicle Insurance Law: Ignoring the Lessons from King Rex* Business Law Review 38, 5, 178 (2017); 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?* 39 (2) Statute Law Review 211 (2018); J. Marson, K. Ferris, and A. Nicholson, *Irreconcilable differences? The Road Traffic Act and the European Motor Vehicle Insurance Directives*. Journal of Business Law 1, 51 (2017); and J. Marson, and K. Ferris, *The Uninsured Drivers' Agreement 2015 as a Legitimate Source of Authority*. Statute Law Review, 38, 2, 133 (2017).

⁶⁴ A right recently confirmed by the Court of Justice in Case C-618/21, *AR and Others*, ECLI:EU:C:2023:278. See J. Marson, and K. Ferris, *Extra-contractual Rules and Third-party Rights of Direct Action: The Court of Justice Defines Claimants' Rights and Insurers' Obligations in Motor Vehicle Agreements* European Law Review in press (2023) for commentary.

⁶⁵ *Supra*, Marson and Ferris, *The Uninsured Drivers' Agreement 2015 as a Legitimate Source of Authority*, n. 64.

⁶⁶ *Supra*, Samuel Sidney Evans, n. 6.

⁶⁷ See Case C-129/94, *Rafael Ruiz Bernáldez*, ECLI:EU:C:1996:143.

⁶⁸ See *Supra*, Marson and Ferris, *The Uninsured Drivers' Agreement 2015 as a Legitimate Source of Authority*, n. 64 for discussion.

the assured's 'deliberate act.'⁶⁹ Recital Nine 'returns' the situation of exemptions for insurers based on what the Member States, as confirmed by the Court of Justice, understand 'serious offences' to mean, but ultimately a lessening of protection for third-party victims will be the result. This is despite protections where the national guarantee fund body will provide a source of funding to ensure victims will not be left uncompensated. However, the same arguments as previously explained above regarding differences in access to remedies will apply and likely result in such victims being, at least, undercompensated compared to the previous position under the MVID.

4 LESSONS FOR BREXIT

Directive 2021/2118 imposes obligations on Member States to have transposed the effects of the Directive into their legal systems no later than 23 December 2023. The Directive was approved by the EU on 24 November 2021, reversing *Vnuk* and clarifying to the Court of Justice how the MVID should be interpreted from that point. One of the reasons cited for the UK's withdrawal from the EU was to prevent such examples of EU rights as the *Vnuk* extension to compulsory insurance⁷⁰ and 'taking back control' of its law-making powers.⁷¹ The UK was also found to breach many aspects of the MVID and evidently failed to correctly transpose much of the law during its membership⁷² (indeed, it never amended the Road Traffic Act 1988 to incorporate the *Vnuk* ruling, although its effects were seen in the Court of Appeal's case authority).⁷³ Given that the UK did not formally reverse *Vnuk* until the passing of the Motor Vehicles (Compulsory Insurance) Act 2022 on 28 April 2022, and that the revocation only applies to that aspect of the MVID and its interpretation, rather than enabling the much greater scope of restrictive measures as outlined in this paper through Directive 2021/2118, it brings into focus the weakness of the UK's argument for Brexit based on this aspect of EU law, and it demonstrates a broadening division between the law in each jurisdiction and the rights of third-party victims of motor vehicle accidents depending on where their accident takes place.

Directive 2021/2118 does bring EU law more in line with the restrictive motor vehicle insurance regime as favoured by the UK. The UK, both through its legislature and the judgments of appeal courts⁷⁴ have often not felt able to provide a purposive interpretation of the MVID against conflicting national laws or have disagreed with the jurisprudence of the Court of Justice. Yet a divergence between the laws of the UK and that of the EU does little to facilitate the effective cross border travel between the jurisdictions. It would have proved advantageous, even had this been undertaken 'silently' so as not to cause political ill-will amongst an already fractious government, for the UK to have followed the EU with its amendments to motor vehicle insurance law. Given that the Road Traffic Act 1930 was the inspiration for the first MVID, and the infrastructure for adherence to the MVID through the continuation of the MIB, for example, continues, strategic legislative alignment would have assisted in continued and, whilst not seamless, certainly more uniform protection for vulnerable victims of motor vehicle accidents throughout the EU.

5 CONCLUSIONS

⁶⁹ *EUI v Bristol Alliance Partnership* [2012] EWCA Civ 1267.

⁷⁰ <https://www.gov.uk/government/news/motorists-to-avoid-annual-eu-price-hike-thanks-to-brex-it-powers>.

⁷¹ <https://www.actuarialpost.co.uk/article/brexit-advantageous-for-motor-insurers-in-some-circumstances-9655.htm>.

⁷² *Supra, RoadPeace Ltd*, n. 7.

⁷³ *Motor Insurers' Bureau v Lewis* [2019] EWCA Civ 909.

⁷⁴ See, for example, *White (A.P.) v White and The Motor Insurers Bureau* [2001] UKHL 9; *R & S Pilling t/a Phoenix Engineering v UK Insurance Ltd* [2019] UKSC 16; and *Supra, Colley*, n. 63.

The fact that *Vnuk* had such a profound effect on the law regulating compulsory motor vehicle insurance is both surprising and unsurprising. Having entertained the notion that actually the MVID did not provide a geographic restriction on compulsory insurance, and ruled accordingly, the Court of Justice in subsequent cases had to contend with Member States criticising the judgments and a Commission review of the implications of the Court's activism. The Court of Justice had thus altered the status quo, this ultimately resulting in the enactment of Directive 2021/2118 given that post-*Vnuk* motor vehicle insurance was likely to require EU intervention. *Vnuk* had in one sense improved protection of third-party victims of motor vehicle accidents by requiring compulsory motor vehicle insurance for vehicles used on both public and private roads, but it created logistical problems that would be increasingly problematic to resolve. Depending on the use of the vehicle, the owner of a motor vehicle on private land might be subject to criminal charges, the registration requirements for these vehicles might need to be altered, and the enforcement proceedings against a vehicle and driver at fault would pose particularly difficult problems in their initial application. As a result, vehicles that were not, presumably, intended by the legislators of the MVID to be in scope of compulsory insurance were brought into the scope following *Vnuk*. However, the EU Commission's actions as an antidote to these consequences have resulted almost in overcorrection. In its review, the Commission should pay close attention to the use and exploitation of the exclusions permitted through Directive 2021/2118, and ascertain the practical effects experienced by third party victims of accidents involving motor vehicles. It might also assess the inevitable changes to the Road Traffic Act 1988 in the UK and determine, how closely does it wish to align itself with a former Member State which has so often attempted to avoid and exclude protective rights to this particular vulnerable group. It might be more appropriate, as the EU moves forwards in this jurisdiction, to reconsider the role and efficacy of the national guarantee fund bodies and to determine whether the law in this regard would have benefited from closer examination than with the compulsory insurance of vehicles on public and private land.

As we have noted in this paper, Directive 2021/2118 has gone far further than simply restricting compulsory motor vehicle insurance to public and quasi-public roads. It allows Member States to facilitate exclusion clauses to limit the responsibility of insurers; they can exempt vehicles used exclusively on specific roads; and ostensibly allow vehicles to drift in and out of being a motor vehicle for the purposes of the application of compulsory motor vehicle insurance. The safeguard of a national guarantee fund body to settle claims is not without significant problems and will ultimately leave third-party victims in an undercompensated situation compared with claims directly against the tortfeasor and/or insurer. It seems the EU has with Directive 2021/2118 not only reversed the jurisprudence post-*Vnuk*, it has taken compulsory motor vehicle insurance law in a direction much more aligned to that of the UK, the only Member State to withdraw its membership specifically to avoid many of the obligations established in the MVID. The irony of this situation should not be lost.