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The President of the Forum of Insurance Lawyers (FOIL) **Nigel Teasdale** considers the implications of the motor insurance law review in UK and Europe, following *Vnuk*.

When a tractor and trailer, working in a Slovenian farmyard, backed into the ladder on which Damijan Vnuk was standing, causing him personal injury, he could hardly have anticipated the incident would result in the UK Government being forced to consider whether golf buggies used on private land will be required to have compulsory insurance. However, as a result of the decision in Mr Vnuk's compensation claim in the European Court of Justice (ECJ) in 2014, that is the current position.

Unexpectedly, his compensation claim having been unsuccessful in his own jurisdiction, in *Damijan Vnuk v Zavarovalnica Triglav (C-162/13)* the ECJ found that the tractor involved in the accident should have been insured, even though it was being used on private land for agricultural purposes, as it was a vehicle being used for a purpose "consistent with its normal function". This was a much wider interpretation of the obligation of compulsory motor insurance than the UK (and other Member States) had understood to be the case, resulting in UK domestic law no longer reflecting the requirements of the newly-interpreted Motor Directive.

Construction vehicles, golf buggies, Segways, ride-on lawnmowers, motor sports vehicles, mobility scooters, electric bikes, fork-lift trucks, motorised ride-on children's toys, dodgem cars, and quad bikes could now all be required to have compulsory insurance, wherever they are being used. The impact of such a change would be very significant. For example, the motor sports sector is worth more than £10bn to the UK economy but the difficulty of obtaining insurance to cover sports vehicles could render the industry non-viable. At the other end of the vehicle spectrum, there are thought to be up to 350,000 mobility scooters in use in the UK, with a requirement for compulsory insurance likely to be financially onerous. Hardly surprising, then, that the Government has described the *Vnuk* judgment as "a complete game-changer as far as motor insurance is concerned".

The UK Government is concerned at the challenges and potentially costly consequences arising as a result of *Vnuk*. On 21 December the Department for Transport published a consultation paper on the implications and ways in which its effects might be reduced. The European Commission has already recognised the consequences of the judgment and, according to the Government, has indicated it may review the Directive, although it has yet to reach a conclusion on the issue.

The consultation paper considers the effect on UK insurance if the *Vnuk* decision becomes law as it stands (what the Government calls the Comprehensive Option); and the impact of a possible amendment to the Motor Directive proposed by the Commission last summer (the UK Government's preferred approach to the problem). It is clear from the language used that the Government feels legally obliged to consult, in order to abide by the rules as long as the UK remains within the EU, but is not in favour of the reforms and, if changes are implemented, these could be withdrawn post-Brexit.



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The Comprehensive Option

Under the 'Comprehensive Option', the definition of 'motor vehicle' would remain as it now stands under the Motor Directive: *"any motor vehicle intended for travel on land and propelled by mechanical power, but not running on rails, and any trailer, whether or not coupled."* The law would require third party insurance to be in place when a vehicle is used *"in a way that is consistent with the normal function of the vehicle."*

Under this approach, compulsory cover would extend much wider than now under the Road Traffic Act 1988. In addition, the requirement for insurance would be based on the use of the vehicle, not where it is being used, extending the requirement for insurance to use on private land.

The Amended Directive Option

Under the Commission's proposal, third party cover would be required when a "motor vehicle" is "used in traffic". This change to the Directive would still have the potential to include vehicles currently outside the compulsory insurance regime, but only where they are "used in traffic". The Commission's suggested definition of the phrase is *"where the use of a vehicle is for the transport of persons or goods whether stationary or in motion, in areas where the public has access in accordance with national law."*

The Government assumes that definition would broadly equate to the UK insurance requirement for cover *"on a road or other public place"*. The consultation acknowledges there may be circumstances where the concept of public access is not straightforward, for example, land which the public actually uses where there is no physical barrier and no prohibition sign, but where use is not expressly permitted by the landowner. However, unlike under the Comprehensive Option, the compulsory insurance requirements would not apply to purely private land.

The consultation raises the possibility that the phrase *"in accordance with national law"* may have different consequences in Scotland, where the Land Reform (Scotland) Act 2003 establishes rights to be on, and to cross, certain types of land, which may broaden the definition of land to which the public has access.

It is anticipated that the Amended Directive approach would put motor racing outside the compulsory insurance regime, as racing usually takes place on private land with no public access to the areas where racing occurs, but this is still subject to confirmation from the Commission. The extension of the definitions of vehicles, however, does raise the prospect of a range of motorised equipment requiring insurance if used in public areas, for example, golf buggies used on the golf course if it is subject to public rights of way, or quadbikes used on a farm track used in practice by the public without express consent.

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Issues for the MIB

The Motor Directive allows Member States to derogate from the motor insurance requirements both for types of vehicle and certain vehicles with a special plate. If a Member State allows such vehicles to be used without insurance, compensation must still be available to an accident victim involving the vehicles. The vehicle user could then be pursued by the MIB to recover the compensation paid, encouraging the purchase of insurance by users of derogated vehicles.

The Government is considering using its powers of derogation to exclude certain types of vehicles from compulsory insurance, whether under the Comprehensive Option or the Amended Directive Option. It considers it may be appropriate to derogate low risk vehicles, a move which would have the least impact on the MIB resources.

Broad characteristics which might be taken into account in deciding which vehicles to derogate might include the maximum speed of the vehicle; its weight; whether a licence is needed to drive it; the frequency and cost of accidents; the cost of insurance at present; and how difficult it would be to enforce insurance requirements. Obviously the more vehicles that are subject to derogation, the greater the burden on the MIB, and ultimately on policyholders using vehicles not subject to derogation.

Should the type of vehicles requiring insurance be extended, the Government is considering how this would be enforced. Most of the vehicles coming within scope under either of the options do not have licensing and registration requirements. The consultation recognises it would be very expensive and burdensome to maintain a central record of the types of vehicles which would be newly in scope. A lighter approach would be to rely on enforcement agencies making random checks on insurance or after an accident.

Traceability is an important issue: most newly in scope vehicles do not have a registration plate. The Government is considering whether some form of number plate scheme for these vehicles should be introduced.

Potential for fraudulent claims

Extending the circumstances in which a claim can be brought either against an insurer or the MIB risks increased fraud. More accidents will occur away from CCTV surveillance, involving vehicles without traceable markings. For example, an owner might be tempted to insure only one of his vehicles and claim it was the vehicle involved in any accident.

The most obvious way to reduce fraud would be to require any off-road accidents involving vehicles under compulsory insurance requirements to be reported to the police, but it could become onerous if every time a mobility scooter bumps into a pedestrian in a shopping mall it becomes a police incident. Overlapping with the issues considered in the recent MOJ consultation on soft tissue injury claims, the DfT asks whether, if a personal injury claim is brought, the victim should prove he or she has been assessed by a doctor.

Until the UK exits the EU it remains bound by all EU rights and obligations. Doing nothing is not an option. Whilst much of the Government's energy is focussed currently on a future outside the EU, the DfT is finding that life within Europe presents considerable challenges. Indeed, The Times reported that Ministers were believed to have been outraged by the requirement to implement the rule change in the UK. ●

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