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## **Brexit means Brexit: What does it mean for the Protection of Third Party**

### **Victims and the Road Traffic Act?**

#### **ABSTRACT**

*The UK's referendum decision of 23 June 2016, where voters elected to leave the European Union (EU), will fundamentally change aspects of national law. Much debate has focused on the constitutional implications of the decision and the procedure by which the government seeks to facilitate the exit. Further, issues of substance including the part played by immigration and the control of the UK's borders have also dominated legal and political commentary. Yet there has been no critical examination of the effects it will have on motor vehicle insurance law. The statute governing much of the law (the Road Traffic Act 1988), along with the extra-statutory agreements providing protection for the third party victims of negligent uninsured drivers and untraced vehicles, are each profoundly influenced by EU directives. Given the Brexit decision and the resolution of the government to facilitate the UK's exit of the Union, we argue that the protective rights for such victims of motor accidents are likely to be reduced. Further, the advancement of the law, developed through the jurisprudence of the Court of Justice, will be lost.*

#### **1. INTRODUCTION**

The law relating to motor vehicle insurance is subject to governance from both national and EU law. Nationally, and at a statutory level, the Road Traffic Act 1988 (RTA88) regulates (*inter alia*) much of the requirements relating to compulsory third-party insurance. This requires that motor vehicles used on a road or other public place<sup>1</sup> are subject to a minimum of compulsory insurance to protect third party victims of a negligent driver. In the event that the victim suffers damage and/or loss due to the actions of an uninsured driver or an untraced vehicle, extra-statutory arrangements<sup>2</sup> (established between the Secretary of State for Transport and the Motor Insurers' Bureau (MIB)) take effect.

Since 1972 the EU has issued six directives on motor vehicle insurance law with the aim, initially, of facilitating the free movement of goods, services and people through a system of comparable minimum standards for motor insurance. Collectively they create a legal framework for ensuring that individuals injured by motor vehicles registered anywhere in the EU are guaranteed compensation and receive comparable treatment.<sup>3</sup> As outlined in the first motor vehicle insurance directive (MVID), member states were to “ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance.”<sup>4</sup> There were problems inherent in the use of broad terminology in the first MVID and specifically in its reference to “civil

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<sup>1</sup> RTA88 s.143.

<sup>2</sup> The Uninsured Drivers Agreement (UDA) 2015 and the Untraced Drivers Agreement (UtDA) 2003 (as amended).

<sup>3</sup> As underlined in the recitals to the first and second MVID.

<sup>4</sup> Art. 3(1) (The First Directive) 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.

liability... covered by insurance.” Such an inclusion provided member states with significant discretion in its implementation in national law and led to a series of (permissible) exclusions being applied. For example, exclusions of liability to passengers;<sup>5</sup> family members;<sup>6</sup> third party cover in the event of the driver being intoxicated;<sup>7</sup> and the insurance requirements applied to the seating area of vehicles<sup>8</sup> were each included in the national law of some member states. Subsequent MVIDs<sup>9</sup> removed some of the worst offending aspects of the first directive, as did the activism of the Court of Justice of the European Union (CJEU).

The second MVID extended the protection afforded to the victims of motor vehicle accidents by requiring member states to establish a national compensatory guarantee scheme tasked with providing compensation to the victims of uninsured drivers and untraced vehicles.<sup>10</sup> Further, it imposed restrictions on member states’ discretion to permit contractual exclusion clauses or restrictions of liability. Here member states

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<sup>5</sup> See *McMinn v McMinn and anr.* [2005] EWHC 827 (QB) in reference to liability under the RTA88 (s. 151(4)) and *Akers v Motor Insurers Bureau* [2003] EWCA Civ 18 with reference to liability under the MIB agreements.

<sup>6</sup> See Case C-348/98 *Vitor Manuel Mendes Ferreira and Maria Clara Delgado Correia Ferreira v Companhia de Seguros Mundial Confiança SA* [2000] ECLI:EU:C:2000:442.

<sup>7</sup> Case C-129/94 *Rafael Ruiz Bernáldez* [1996] ECR I-1829.

<sup>8</sup> See Case C-356/05 *Elaine Farrell v Alan Whitty* [2007] ECR I-3067.

<sup>9</sup> For instance the Second Council Directive 84/5/EEC on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles [1984] OJ L18/17 in Art. 2(1) resulted in specific exclusions of liability being held as void as against a third party claimant. This was a significant advancement as demonstrated in its application in Case C-129/94 *Rafael Ruiz Bernáldez* [1996] ECR I-1829.

<sup>10</sup> At Art. 1.4 Council Directive 84/5/EEC.

were required to ensure third-party motor vehicle insurance covered property damage and personal injury, it removed the ability of insurance policies to exclude members of the driver's family from third-party cover, and it imposed minimum amounts in compensation for property and personal injury claims. The third MVID<sup>11</sup> sought to remove the uncertainty as to the geographic scope of insurance policies as articulated in the first MVID,<sup>12</sup> thereby removing the existing disparities between the law of member states. It also introduced the concept of mandatory protection to cover all passengers. The aim was to provide “a high level of consumer protection” – hence viewing individuals in the member states not only in terms of them being potential accident victims but also as consumers purchasing insurance cover as required by EU law. The fourth MVID<sup>13</sup> required the creation of national information centres with responsibility for maintaining relevant information on motor vehicles, insurance policies, the green card scheme and so on. The fifth MVID<sup>14</sup> offered revisions to minimum compensation levels and the identification of cyclists and pedestrians as special categories of accident victims who, along with other non-motorised road users, were to be included in the coverage of all insurance policies. Most recently, the

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<sup>11</sup> (The) Third Council Directive 90/232/EEC on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles [1990] OJ L129/33.

<sup>12</sup> At Art. 3 Council Directive 72/166/EEC.

<sup>13</sup> Directive 2000/26/EC on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and amending Council Directives 73/239/EEC and 88/357/EEC (the Fourth Motor Insurance Directive) [2000] OJ L181/65.

<sup>14</sup> (The Fifth Directive) Directive 2005/14/EC amending Council Directives 72/166/EEC, 84/5/EEC, 88/357/EEC and 90/232/EEC and Directive 2000/26/EC of the European Parliament and of the Council relating to insurance against civil liability in respect of the use of motor vehicles [2005] OJ L149/14.

sixth MVID<sup>15</sup> was introduced and consolidated the previous five MVIDs. Further, it abolished boarder checks on insurance, requires all motor vehicles in the EU to be covered by third party insurance, prescribes minimum third party liability insurance cover, and provides for the prompt settlement of claims arising from accidents occurring outside of the victim's country of residence.

As such, the MVIDs place significant obligations on member states in terms of the provision of motor vehicle insurance to be regulated in their jurisdiction. It does not, however, cover all aspects of motor insurance. It places no obligations on 'comprehensive' motor policies (focusing instead on third party/liability cover), matters of civil liability and the calculation of compensation awards are determined in accordance with national law, and other significant issues are also out of scope, for example problems associated with the insolvency of an insurer,<sup>16</sup> are subject to national law, not the law and jurisprudence of the EU.

## 2. BREXIT MEANS BREXIT

The certainty of the law on motor vehicle insurance, and the relationship between UK and EU law will be fundamentally affected by the referendum decision of 23 June

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<sup>15</sup> (The Sixth Directive) 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 [2009] OJ L263/11.

<sup>16</sup> For instance, in Case C-409/11 *Csonka v Magyar Allam* [2013] EUECJ (11 July 2013), a claimant failed to recover compensation from the guarantee fund of Hungary where the negligent driver's insurers became insolvent (although in the UK such an instance would enable the claimant to recover from the Financial Conduct Authority).

2016. The British exit of the EU (commonly referred to as Brexit) was announced on 24 June and has already led to numerous issues affecting the future legal and political relationship between the UK and the EU. It is trite comment, but this unprecedented step means that there will be no new EU laws to be transposed and interpreted, no references made by national courts to the CJEU,<sup>17</sup> no discussions needed as to the compatibility between the two sources, no enforcement mechanisms compelling damages payments for the consequences of the UK's breach of its obligations,<sup>18</sup> and no requirements for national law to comply with fundamental principles of EU law.<sup>19</sup> Of course, until the UK triggers the official exit mechanism and formally leaves, EU law including the MVIDs, applies to national law in its application and its (broad) interpretation.<sup>20</sup> As such, the areas in which the UK is in breach<sup>21</sup> of the MVIDs must

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<sup>17</sup> Via Article 267 of the Treaty on the Functioning of the EU (TFEU).

<sup>18</sup> Either at a national level through a claim of state liability (non-contractual tortious liability); or at an EU level through the Commission's action against the member state for failure to fulfill an obligation under the Treaties (Article 258 TFEU).

<sup>19</sup> Such as ensuring equivalence and effectiveness of national law with EU law.

<sup>20</sup> Per Sir Andrew Morritt C's judgment in *Vodafone 2 v Revenue and Customs Commissioners* [2010] EWCA Civ 446 at [37]: "In summary, the obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching. In particular: (a) It is not constrained by conventional rules of construction; (b) It does not require ambiguity in the legislative language; (c) It is not an exercise in semantics or linguistics; (d) It permits departure from the strict and literal application of the words which the legislature has elected to use; (e) It permits the implication of words necessary to comply with Community law obligations; and (f) The precise form of the words to be implied does not matter."

<sup>21</sup> For examples of breaches of the extra-statutory Uninsured Drivers' Agreement see James Marson and Katy Ferris "The Uninsured Drivers' Agreement 2015 as a Legitimate Source of Authority" (2016) *Statute Law Review* DOI: <https://doi.org/10.1093/slr/hmw043>.

still be remedied and the UK continues to be subject to enforcement actions at both EU and national levels for any failures to correctly transpose and apply the law.

Following the appointment of Theresa May to the position of Prime Minister in July 2016, she has continued to issue the mantra of ‘Brexit means Brexit’ when referring to comments on her position regarding the intention of the government to exit the EU. During her premiership May has insisted that the will of the electorate has to be respected and that an exit of the EU is the intention of the government. However, she has also cautioned that the exit negotiations are not to be rushed and the details will not be determined until the government’s objectives are clear. One of the key issues that will define the scope and content of those negotiations with the EU will be the restriction of immigration, indeed it has been referred to as a “red line” in any negotiated deal.<sup>22</sup> Yet, important questions remain unanswered in the announcements since the referendum result and despite the government’s white paper<sup>23</sup> published 2 February 2017. There is little detail on the basis on which the UK’s withdrawal negotiations will take place;<sup>24</sup> the level of accountability those negotiating the deal will have to the electorate and Parliament; the deal which the UK is seeking (and the one which it will accept); and what the precise implications will be, following Brexit,

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<sup>22</sup> <https://www.theguardian.com/politics/2016/aug/31/restricting-immigration-will-be-at-heart-of-brexit-deal-theresa-may-says> (accessed 2 October 2016).

<sup>23</sup> HM Government “The United Kingdom’s Exit from and New Partnership with the European Union” (2017) Cm 9417.

<sup>24</sup> It is also worth remembering that the terms of Brexit must be agreed with by the other 27 member states of the EU. This mechanism is not designed simply to allow a member state to unilaterally decide to leave and on which terms it wishes to continue any relationship.

for individuals (and citizens of the EU) living here and abroad,<sup>25</sup> and also for the businesses whose trade is dependent upon access to the Single Market.

On 2 October 2016 the Prime Minister announced at the Conservative conference in Brighton that a “Great Repeal Bill” will lead to the formal repeal of the European Communities Act 1972.<sup>26</sup> Further, and in the face of questions regarding the uncertainty with which this leaves the country, three further details were added in her speech. The first was that the Art. 50 of the Treaty on European Union (TEU) procedure will be triggered by the end of March 2017<sup>27</sup> (and will therefore pre-empt the passage through Parliament of the Great Repeal Bill).<sup>28</sup> Secondly, all present EU-

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<sup>25</sup> At present the government’s position appears to be no more strategic than “tit for tat” arguments regarding reciprocal arrangements with the EU and individual states. <https://www.theguardian.com/politics/2016/jul/28/theresa-may-on-brexit-tour-of-eastern-europe> (accessed 4 October 2016). Further, on 7 October 2016, The Telegraph reported that the Home Office (after discovering five in six EU nationals currently living in the UK could not be legally deported) will, prior to the UK’s withdrawal, issue 80% of the 3.6 million EU citizens living in the UK with permanent residency rights. The remaining 600,000 individuals will be offered “amnesty” to remain. [http://www.telegraph.co.uk/news/2016/10/07/every-eu-migrant-can-stay-after-brexit-600000-will-be-given-amne/?utm\\_source=dlvr.it&utm\\_medium=twitter](http://www.telegraph.co.uk/news/2016/10/07/every-eu-migrant-can-stay-after-brexit-600000-will-be-given-amne/?utm_source=dlvr.it&utm_medium=twitter) (accessed 8 October 2016). This is reiterated in the white paper (n 23) where at para. 6.4, p. 30 “The UK remains ready to give people the certainty they want and reach a reciprocal deal with our European partners at the earliest opportunity. It is the right and fair thing to do.”

<sup>26</sup> The Bill will replace the European Communities Act 1972 but its commencement date will be on “Brexit day”.

<sup>27</sup> “There will be no unnecessary delays in invoking Article 50. We will invoke it when we are ready. And we will be ready soon. We will invoke Article 50 no later than the end of March next year.” <http://www.bbc.co.uk/news/uk-politics-37532364> (accessed 2 October 2016).

<sup>28</sup> Likely to be announced in the Queen’s speech in May 2017.

based<sup>29</sup> or inspired laws will become national law and hence will remain unless and until they are formally withdrawn according to reviews undertaken by the relevant Secretary of State<sup>30</sup> (but will lead to the loss of the primacy of EU-based law). And thirdly, of particular interest in relation to the future of the UK's relationship with the EU, the Prime Minister remarked that the CJEU will no longer have jurisdiction in relation to legal issues arising in the UK. This, along with a requirement that the UK once again has the power to control immigration (and therefore restrict one of the central pillars of the European project – the free movement of people) in practical terms suggests the UK will pursue a “hard Brexit”, leaving the UK without a formal relationship with the EU and outside of the Single Market.<sup>31</sup> This is, of course, as yet uncertain as the negotiations of the UK's withdrawal have not started. What is clear, is that these aspirations suggest that a prolonged period of negotiation is inevitable if both the UK and the EU do wish to continue some post-Brexit relationship.

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<sup>29</sup> Which, interestingly, conflates Directives and Regulations (a distinction which has led to considerable debate and analysis in academic literature and judicial pronouncements).

<sup>30</sup> The Prime Minister announced on 17 January 2017 that such legislation will only be changed following “full scrutiny and proper Parliamentary debate,” yet a commitment to the creation of a full Act of Parliament is missing. It is quite possible that Statutory Instruments, and the limitations for Parliamentary interventions such instruments allow, will be the mechanism selected to facilitate reviews of this source of law.

<sup>31</sup> The point being reiterated in the white paper (n 23) where the fifth of the 12 principles which will guide the government in exiting the EU is ‘controlling immigration’ (pp. 5, 7 and 25-). Further, at para 5.4 the Government “will design our immigration system to ensure that we are able to control the numbers of people who come here from the EU. In future, therefore, the Free Movement Directive [Directive 2004/38/EC] will no longer apply and the migration of EU nationals will be subject to UK law.” (p. 25). This suggests a future agreement where the UK remains part of the European Economic Area (EEA) is ruled out.

The mechanism of triggering the Brexit procedure and the legal route required to be taken were immediate questions to be addressed. Initially, the government had insisted it held a prerogative power to invoke Art. 50 TEU without the consent of Parliament.<sup>32</sup> Arguments were soon presented that, in the absence of legislative action in the first instance, this position may be constitutionally unsound. Prerogative powers cannot be used to change UK statute<sup>33</sup> as, whilst the royal prerogative may be used to create and accede to treaties, it may not be used to alter the law or to remove rights to which individuals enjoy in domestic law (in the absence of parliamentary intervention).<sup>34</sup> In *R (Miller) v Secretary of State for Exiting the European Union*,<sup>35</sup> the Supreme Court was required to identify whether an Act of Parliament was required prior to the government triggering Art. 50 TEU and whether the devolved governments could prevent Brexit. In answering these questions the Supreme Court (by a majority 8-3) has clarified the need for an Act of Parliament to enable the triggering of Art. 50 TEU. Consequently, on 26 January 2017 the government tabled its Brexit Bill.<sup>36</sup> Whilst brief,<sup>37</sup> the Bill is progressing through the House of Commons

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<sup>32</sup> The government's view was the conduct of foreign relations, which included accession to and withdrawal from international treaties, was a matter falling within its prerogative.

<sup>33</sup> *R (On The Application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61 at [44].

<sup>34</sup> See Lord Oliver comments, *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 at [499F-500C].

<sup>35</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

<sup>36</sup> The European Union (Notification of Withdrawal) Bill.

<sup>37</sup> The Bill, brief at merely 133 words and allocating five days of debate, has already created controversy and may lead to further legal challenge even beyond the triggering of Art. 50 TEU. It is a

prior to being debated by the House of Lords.<sup>38</sup> Further, the Supreme Court held (unanimously) that the government did not have to seek permission from the devolved governments prior to triggering Art. 50 TEU. It did not address the issue of the constitutional convention (known as the Sewel Convention)<sup>39</sup> whereby changes to the powers of a devolved institution require its consent prior to the enactment of such legislative measures. This was a matter to be determined within the political world and the Supreme Court was “neither the parents nor the guardians of political conventions; they are merely observers.”<sup>40</sup>

The uniqueness of a member state leaving the EU through it invoking a Treaty Article poses interesting questions for the UK. Article 50 TEU is the *lex specialis* for member states to withdraw from the EU. It is also considered preferable to Art. 48 TEU as it merely requires a qualified majority decision of the 27 member states rather than the vote of unanimity required by that provision.<sup>41</sup> As a matter of public international

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“Bill to confer power on the Prime Minister to notify, under Article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU.”

<sup>38</sup> It is anticipated that the Bill will finish its passage through the House of Lords by 7 March 2017. A European Council meeting takes place two days later where it is possible the UK will formally invoke Art. 50 TEU.

<sup>39</sup> Despite the inclusion and acknowledgement of the Sewel Convention in the Scotland Act 2016, this did not elevate its status to that of law. It remains a political convention and thus not a matter for the Court.

<sup>40</sup> at para [146].

<sup>41</sup> Article 48 TEU allows for the changing of the treaties and could be used to alter existing treaties to remove the UK from their scope.

law,<sup>42</sup> Art. 54 of the Vienna Convention of the Law of Treaties 1969 would also enable exit.<sup>43</sup> However, the Vienna Convention is of more interest in relation to the aftermath of the triggering of the Art. 50 TEU mechanism. Whilst Art. 50 TEU is silent on the matter of whether the application for withdrawal may be reversed (revoking the application), the Vienna Convention allows for such action *unless* this is specifically denied. The “point of no return” occurs two years’ after the notification under Art. 50 TEU and therefore it may be possible for further challenges to the process and terms of the UK’s withdrawal. Hence, the Supreme Court decision remains, of course, highly significant but it should not necessarily be seen as an end to legal proceedings on Brexit.

Art. 50 TEU envisages that once a declaration is formally made, the process of withdrawal will take up to a period of two-years to complete.<sup>44</sup> It is quite possible that this time period could be extended given the short time frame of two-years, the complexity of any future relationship between the UK and EU,<sup>45</sup> and the current lack of pre-Art. 50 TEU negotiations with the EU. The time frame is designed to facilitate

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<sup>42</sup> Reliance on principles of international law would seem contrary to the *sui generis* legal orthodoxy of EU law.

<sup>43</sup> Art. 54 allows for the withdrawal, by a party to an international treaty, on satisfaction that the withdrawal is in conformity with the terms of the particular treaty or at any time with the consent of the other parties (e.g. member states). Given the existence of Art. 50 TEU, this route would now be very unlikely and unnecessary.

<sup>44</sup> Art. 50(3) TEU.

<sup>45</sup> For instance, in the Prime Minister’s Brexit speech 17 January 2017, she indicated the UK wishes for a bespoke deal with access to the customs union and comprehensive free trade, but without the necessity of membership of the EU.

the conclusion of a new arrangement for the (leaving) member state to continue a relationship with the EU. The UK's position is that it will leave the EU, but wishes to continue a trading relationship and also to have access to the Single Market,<sup>46</sup> yet not to be a member of it.<sup>47</sup> This position was confirmed by the Prime Minister in her Brexit speech issued on 17 January 2017.<sup>48</sup> Whether such an agreement can be made on these terms remains questionable. For instance, the UK could attempt to conclude a future agreement on the basis of a European Free Trade Association<sup>49</sup> (EFTA) model.<sup>50</sup> Membership of the EFTA removes the requirement to follow rulings of the

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<sup>46</sup> As identified by the Carl Emmerson, Paul Johnson and Ian Mitchell 'The EU Single Market: The Value of Membership Versus Access to the UK' (2016) Institute for Fiscal Studies Report R119, 10 August: "Maintaining membership of the Single Market as part of the EEA could be worth potentially 4% on GDP – adding almost two years of trend GDP growth – relative to World Trade Organization (WTO) membership alone." <https://www.ifs.org.uk/publications/8411> (accessed 4 October 2016).

<sup>47</sup> As reported on 29 September 2016, the International Trade Secretary Liam Fox announced that he wants Britain to become a full independent member of the WTO. In the article he is paraphrased as remarking "Britain is instead expected to pursue a deal which will 'maximise access' to the Single Market while retaining the ability to make free trade deals." <http://www.telegraph.co.uk/news/2016/09/29/liam-fox-signals-britain-will-leave-the-single-market-in-hard-br/> (accessed 4 October 2016). Ultimately, the greater the access that non-member states have to the EU, the more they must adhere to market rules and the greater the financial contribution expected of them.

<sup>48</sup> The UK will not seek to remain a member of the Single Market but will seek a free-trade deal with the EU, and the legal jurisdiction of the CJEU over the UK will end

<sup>49</sup> Which has four member countries – Iceland, Liechtenstein, Norway and Switzerland.

<sup>50</sup> Which would allow participation in the single market (not, however, with regards the Common Agricultural and the Fisheries Policies) but do so based on the application of the fundamental freedoms of EU law. It would require a continued, albeit reduced, financial contribution to the EU budget but

CJEU (delivered after 1991), yet it would be subject to the EFTA Court (albeit this court often produces rulings of a non-binding nature and its jurisdiction is significantly smaller than that of the CJEU). Alternative mechanisms to continue a relationship with the EU has included associate membership or as a customs union,<sup>51</sup> as a member of the World Trade Organization<sup>52</sup> or via a free trade arrangement and so on.<sup>53</sup> Brexit appears to lead the way for a separation of EU law from national law. Those favourable to the idea of the UK remaining a trading partner with the EU may have hoped for a “soft Brexit” with its light-touch of EU law, although it is questionable whether this would appease the majority of voters who wished for the UK to exit the EU. Given the recent statements by the Prime Minister and the Secretary of State for Exiting the EU, and in particular the hard line the UK is adopting in seeking full control over immigration and associated policies (as per the Government’s white paper),<sup>54</sup> it appears unlikely that such an agreement can be concluded on these terms. Consequently, the analysis in this article is taken from the perspective of a hard Brexit and the implications this will have on the RTA88.

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without the contribution to the formation of EU law, and it would release the UK from the direct scope of CJEU rulings, but this may be a pyrrhic victory as the EFTA Court follows the CJEU.

<sup>51</sup> Which would allow very limited access to the single market, but would mean no financial contribution to the EU budget, no requirement to apply the fundamental freedoms of EU law, not being subject to CJEU rulings, and no contribution to the formation and conclusion of future EU law.

<sup>52</sup> Which would allow no direct access to the single market, would mean no financial contribution to the EU budget, no requirement to apply the fundamental freedoms of EU law, not being subject to CJEU rulings, and no contribution to the formation and conclusion of future EU law.

<sup>53</sup> Such by concluding a relationship based on an EFTA and bilateral trade agreement (per Switzerland), a WTO and Free Trade Agreement etc.

<sup>54</sup> n 23.

Beyond the detail of the MVIDs and their effect on the RTA88, the application of key principles of EU law, including equivalence and effectiveness, appear in jeopardy.

### 3. BREXIT: THE CONSEQUENCES FOR RTA88

The interaction between national law and EU law, and the decades of case law that have developed within this relationship, is based on a system of the UK's surrendered sovereignty in specific areas of EU competence, and the primacy of EU law over inconsistent national provisions. The MVIDs have sought to harmonise minimum standards for motor insurance across the member states and in so doing have significantly increased the protection of third party victims of motor vehicle accidents,<sup>55</sup> whilst simplifying the process of claims and making the awards of compensation consistent.<sup>56</sup>

If we begin by assuming that the UK will simply withdraw from the EU and leave the Single Market, thereby not being bound by EU law, the UK will be free of the interference of the CJEU and will no longer have to transpose future MVIDs or give effect to the existing MVIDs (save for those elements already transposed into national law after "Brexit day"). Thereafter, the UK will revert to the scope and national

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<sup>55</sup> See, for instance, *Byrne (A Minor) v The Motor Insurers Bureau and the Secretary of State for Transport* [2008] EWCA Civ 574 where the national law restricted the rights of a child victim of an untraced driver by requiring that a claim for compensation through the MIB had to be made within three years of the accident. For the victims of a traced driver (and hence a claim against the tortfeasor or his insurers), the period for the lodging of the claim did not begin until the child reached majority. The Court of Appeal changed the law to remove this defect by applying the requirements in the MVID.

<sup>56</sup> See *Moreno v The Motor Insurers' Bureau* [2016] UKSC 52.

mechanisms of statutory construction in RTA88 without the need for interpretation with the MVIDs<sup>57</sup> or guidance from the jurisprudence of the CJEU. This would simplify the process of interpreting national law in this area (including both the extra-statutory and statutory provisions), but would not create, in the medium-term at least,<sup>58</sup> any clarity, or roadmap to legal certainty without express direction as to the foundations of judicial interpretation to be applied in the post-Brexit era.<sup>59</sup>

History has demonstrated that courts in the UK have often been reluctant to provide a purposive and broad interpretation of national law to ensure compliance with the MVIDs. In *Clarke v Kato and Cutter v Eagle Star Insurance Ltd*<sup>60</sup> the House of Lords was charged with interpreting s. 192 RTA88. Section 192 provides the definition of “road” as “any highway and any other road to which the public has access.” This was pertinent as the cases involved injuries sustained by the claimants caused by motor vehicles in car parks. The claimants argued that in providing an interpretation of s. 192 consistent with the MVIDs required the courts to extend the meaning of the word

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<sup>57</sup> Or indeed, unless enacted and with a transposition date within this time-frame, a potential seventh MVID - On 8 June 2016, the European Commission published its “Inception Impact Assessment” proposing the “adaptation of the scope of Directive 2009/103/EC on motor insurance.” This will possibly lead to the European Parliament enacting a (seventh) directive to amend the sixth MVID. See [http://ec.europa.eu/smart-regulation/roadmaps/docs/2016\\_fisma\\_030\\_motor\\_insurance\\_en.pdf](http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_fisma_030_motor_insurance_en.pdf) (accessed 5 October 2016).

<sup>58</sup> In February 2016, the government presented a report to Parliament “The process for withdrawing from the European Union” Cm 9216 where it concluded that withdrawal from the EU could “... lead to up to a decade or more of uncertainty.” (para 2.9).

<sup>59</sup> Indeed, it may be necessary, via the branch of the civil service dedicated to facilitating Brexit, for a new method of statutory interpretation to be developed to aid with consistency and determinacy.

<sup>60</sup> *Clarke v Kato and Cutter v Eagle Star Insurance Ltd* [1988] All ER (D) 481.

“road” to include a car park. The Lords unanimously refused. Lord Clyde, providing the only judgment, held it was theoretically possible to offer a consistent interpretation of the RTA88 with the MVID but chose not to.<sup>61</sup> However, following intervention by the European Commission, despite this judgment, the Department for Transport was required to enact the Motor Vehicles (Compulsory Insurance) Regulations 2000 No. 726 to broaden the meaning of the word road by adding “or other public place.”<sup>62</sup> Further, in *White v White & MIB*<sup>63</sup> the Lords, whilst ultimately providing a purposive interpretation of the (extra-statutory) Uninsured Drivers Agreement (UDA), argued that as the UDA was established between the Secretary of State and the MIB (a private company), this was nothing more than a private law agreement and hence was not susceptible to a *Marleasing*-compliant<sup>64</sup> interpretation. These cases are presented as examples of the national courts adopting a narrow and restrictive application of statutes which seek to protect vulnerable third party victims of motor vehicle accidents. The judiciary had the benefit of guidance from the CJEU (through the reference procedure) to assist them achieve a consistent application of EU law, yet decided against this. Even when theorizing whether a broader application of national law to comply with an EU law with primacy should be adopted, in each aspect the judiciary decided, rather, to provide a very restrictive and literal

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<sup>61</sup> Largely because the distinction between a road and a car park, reflected as it is in the ordinary use of words, was reinforced when considered in light of the language of the RTA88. To provide a consistent interpretation with the MVID would have meant a strained construction of the Act.

<sup>62</sup> This change had practical effects for the geographic scope of ss. 143, 145, 146, 165 and 170 RTA88.

<sup>63</sup> *White v White & MIB* [2001] UKHL 9.

<sup>64</sup> Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECJ.

interpretation.<sup>65</sup> The EU has developed the MVIDs to offer increased protection to third party victims and this is reflected also in the jurisprudence of the CJEU. On the contrary, even though the victims in the cases above were seeking compensation and had a route available to them through EU directives, the national judiciary decided against applying the law consistently.

With regards to the current interpretation and scope of the RTA88, ss. 143,<sup>66</sup> 145,<sup>67</sup> 148,<sup>68</sup> 150,<sup>69</sup> 151(4),<sup>70</sup> 152,<sup>71</sup> 185,<sup>72</sup> and 192<sup>73</sup> are at present in breach of EU law. How will Brexit affect the future of these transgressions?

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<sup>65</sup> Most recently, the Court of Appeal was charged with interpreting ss. 145, 143(1)(a) and 143(1)(b) RTA88 in respect of a third party victim of an insured driver who, argued the claimant, had “caused or permitted” an unidentified and uninsured driver to use a motor vehicle. In *Sahin v Havard and Riverstone Insurance (UK) Ltd* [2016] EWCA Civ 1202 the Court of Appeal disregarded EU jurisprudence and a national decision held weeks before its judgment (*Allen v Mohammed and Allianz Insurance* (2016), Lawtel, LTL 25/10/2016) to erroneously (we argue) provide a restrictive interpretation of the RTA88. The second MVID provided the required protection to the claimant and it is likely a case to the Supreme Court will be made to ensure the correct purposive interpretation of the RTA88 is provided. For commentary on the case see James Marson and Katy Ferris “Misunderstanding and Misapplication of Motor Insurance Law. Will the Supreme Court come to the Rescue?” (2017) *European Journal of Current Legal Issues* (*forthcoming*).

<sup>66</sup> The duty to insure. This section of the RTA88 breaches Arts. 1 and 3 of the sixth MVID.

<sup>67</sup> The requirement of third party insurance cover. This section of the RTA88 breaches Arts. 1 and 3 of the sixth MVID.

<sup>68</sup> Limitations on certain exclusions within the holder’s insurance policy. This section of the RTA88 breaches Art. 3 of the sixth MVID.

<sup>69</sup> The private use of a vehicle. This section of the RTA88 breaches Arts. 3 and 12(1) of the sixth MVID.

Section 143 is a requirement for insurance against third-party risks and that such insurance must comply with minimum standards. At s. 143(1)(a) this requires that “a person must not use a motor vehicle on a road [or other public place] unless there is in force... such a policy of insurance... as complies with the requirements of this part of the Act.”<sup>74</sup> As noted above, whilst this part of the RTA88 was extended to include vehicles on a road or other public place, the use of the term “public” is problematic with regards to EU law. Essentially, it refers to places where the public can be expected to be and to which they have access. Hence, a private road leading to a group of buildings, where the public at large would not be invited (although social visitors, tradespeople and so on would be) is not within the scope of the section.<sup>75</sup> Campsites and caravan parks,<sup>76</sup> pay and display car parks,<sup>77</sup> and even dockyards<sup>78</sup> have been held to satisfy the definition of a “road”, but the problem exists in relation to the use of the word “public” and the inherent restrictions this creates. In the recent

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<sup>70</sup> The (constructive) knowledge of theft or unlawful taking. This section of the RTA88 breaches Art. 13.1 of the sixth MVID.

<sup>71</sup> Exceptions to indemnity under s. 151. This section of the RTA88 breaches recital 15 of the sixth MVID.

<sup>72</sup> The definition of a motor vehicle. This section of the RTA88 breaches Arts. 1 and 3 of the sixth MVID.

<sup>73</sup> The definition of road or other public place. This section of the RTA88 breaches Arts. 1 and 3 of the sixth MVID.

<sup>74</sup> Similar requirements are placed on authorised insurers at s. 145 RTA88.

<sup>75</sup> *Harrison v Hill* 1932 JC 13; 1931 SLT 598.

<sup>76</sup> *DPP v Vivier* [1991] 4 All ER 18.

<sup>77</sup> *Montgomery v Loney* [1959] NI 171.

<sup>78</sup> *Buchanan v MIB* [1955] 1 All ER 607.

case of *Vnuk*<sup>79</sup> the CJEU has highlighted the incompatibility between RTA88 s. 143 (and s. 185)<sup>80</sup> and the MVIDs. Here an individual on a farm in Slovakia was injured by a driver of a tractor and trailer. As the vehicle was never taken from the private land on which the farm was situated, no insurance policy was held to cover for any accidents associated with this vehicle. The CJEU was tasked with identifying whether the MVIDs extended to requiring insurance to be held merely for road registered vehicles or to all motor vehicles, properly used, regardless of the fact that national law did not require compulsory motor insurance to be held. Advocate-General Mengozzi identified the MVIDs as seeking to protect individual victims of accidents on public *and* private land, and the CJEU's judgment confirmed the need for insurance of motor vehicles in such a location.<sup>81</sup> Yet, the UK still maintains the "black-hole" that currently exists in national motor insurance law as regards the protection of third party victims of non-road registered vehicles (such as quad-bikes or vehicles used in purely agricultural, construction, industrial, motor sports or fairground activities). There is no requirement under the RTA88 for such vehicles to be subject to insurance and therefore the third party victim would be unable to claim from a contractual insurer, no statutory insurer would exist, and the MIB would also be unwilling to settle the claim. The MIB only has a responsibility to act as insurer of last resort in cases of no insurance, but only where the vehicle was legally required to be subject to an insurance policy (and evidently these classes of vehicle are not so required under the current interpretation of national law).

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<sup>79</sup> Case C-162/13 *Damijan Vnuk v Zavarovalnica Triglav* [2014] Judgment 4 September.

<sup>80</sup> Which should, following *Vnuk*, adopt the definition provided in Art. 1 of the sixth MVID.

<sup>81</sup> Case C-162/13 *Damijan Vnuk v Zavarovalnica Triglav* ECLI:EU:C:2014:106 Opinion of Advocate General Mengozzi delivered on 26 February 2014 at [43].

Further, the definition of “motor vehicle” provided in s. 185 is, following the implications of *Vnuk*,<sup>82</sup> too restrictive to comply with the MVIDs.<sup>83</sup> In interpreting that term (and as a result determining the circumstances in which motor vehicle insurance is compulsory), a court would revert to the current national interpretation (although at the time of writing it would be more accurate to refer to the content of ss. 143 and 185 as *remaining* (rather than *reverting*) due to the continued inaction of the UK and which is unacceptable until a formal UK withdrawal from the EU).<sup>84</sup> Unless either Parliament chooses to change the law, the judiciary hear a case which offers an opportunity to provide a consistent interpretation (and they take that route), or a successful enforcement action is taken against the state by a third party victim, it is more likely that the national law in this area will not be changed and a gap in the protection of victims will remain. A proposed seventh MVID may be established by the European Parliament<sup>85</sup> to clarify the implications of the *Vnuk*<sup>86</sup> ruling, but given the time frame for the creation and required transposition of directives, it is unlikely to affect the law in the UK, although presumably the UK may contribute to the consultation process whilst still a member state.

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<sup>82</sup> Case C-162/13 *Damijan Vnuk v Zavarovalnica Triglav* [2014] Judgment 4 September.

<sup>83</sup> It breaches Arts. 1 and 3 of the sixth MVID. For commentary see Nicholas Bevan “Ignore at your Peril” (2014) 164 *New Law Journal* 7628, 7.

<sup>84</sup> It was expected that changes would be made to the RTA88 before the end of 2016 to comply with the implications of the *Vnuk* ruling (see <http://www.ajginternational.com/news-insights/articles/insights/motor-fleet-insurance/> - accessed 8 October 2016).

<sup>85</sup> [http://ec.europa.eu/smart-regulation/roadmaps/docs/2016\\_fisma\\_030\\_motor\\_insurance\\_en.pdf](http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_fisma_030_motor_insurance_en.pdf) (accessed 5 October 2016).

<sup>86</sup> Case C-162/13 *Damijan Vnuk v Zavarovalnica Triglav* [2014] Judgment 4 September.

Section 148 RTA88,<sup>87</sup> providing the statutory restriction on exclusion clauses in motor insurance policies, was subject to interpretation by the Court of Appeal in *EUI v Bristol Alliance Partnership*.<sup>88</sup> Here, the driver of a motor vehicle attempted to commit suicide by driving his car into a department store and in so doing struck another motorist's vehicle and caused damage to the building.<sup>89</sup> The contractual insurance policy included a clause excluding the insurer's liability for any action taken by the driver with the intention of causing deliberate damage. As such, the driver was considered to be ostensibly uninsured therefore leaving the owner of the building (and of the other vehicle) unable to recover its losses from the driver's insurers. Further, the extra-statutory protection offered through the UDA 1999 was ineffective as it, at that time, it excluded subrogated claims.<sup>90</sup> The reason the insurer was permitted to avoid the policy was that such an action was not expressly excluded by the RTA88. At s. 148(2) eight "matters"<sup>91</sup> (exclusions) are listed, which, if used by an insurer to avoid a policyholder's claim under that policy would be held as void. Therefore, if the insurer's attempt to exclude its liability on the policy was for a

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<sup>87</sup> Interestingly, there is no equivalent provision to this section of the Act in the Road Traffic (Northern Ireland) Order 1981.

<sup>88</sup> [2012] EWCA Civ 1267.

<sup>89</sup> *EUI v Bristol Alliance Partnership* [2012] EWCA Civ 1267.

<sup>90</sup> UDA 1999 cl 6(1)(c)(ii).

<sup>91</sup> The eight matters include the age or physical/mental condition of persons driving the vehicle; the condition of the vehicle (for example, a car's illegally worn (bald) tyres); the number of persons that the vehicle carries; the weight/physical characteristics of the goods which the vehicle carries; the time at which/areas within which a vehicle is used; the horsepower/cylinder capacity or value of the vehicle; the carrying on the vehicle of particular apparatus; or the carrying on the vehicle of any particular means of identification other than that required by law.

reason (or “matter”) included in this section of the Act, the insurer would still have to satisfy a third party’s claim for damage or loss suffered as a consequence of the accident. The eight “matters” did not expressly prevent the use of an exclusion of liability for the consequences of deliberate damage and hence the Court of Appeal had to determine whether the list of matters in s. 148(2) was illustrative or exhaustive. The Court of Appeal considered the compatibility between s. 148(2) and the MVID Art. 5 even though, at an EU level, the issue was clear.<sup>92</sup> Section 148(2) RTA88, as held by the Court of Appeal, contained an exhaustive list and thus the clause prevented the insurers for the damaged building from recovering damages from the driver’s insurers. It is difficult to see how this conclusion can be justified since consistent case law from the CJEU in *Bernaldez*,<sup>93</sup> *Correia Ferreira v Companhia de Seguros Mundial Confiança SA*,<sup>94</sup> *Candolin v Vahinkovakuutusosakeyhtio Pohjola*,<sup>95</sup> *Farrell v Whitty*,<sup>96</sup> and *Churchill v Wilkinson and Tracey Evans*<sup>97</sup> identifies the exclusions as merely illustrative. On the face of it, the decision in *EUI* appears to be wrong, and therefore constitutes a breach of EU law. The MVIDs’ permitted exclusions refer to the very restrictive “right” of insurers to cancel insurance policies, and ultimately,

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<sup>92</sup> At Recital 15 of the sixth MVID it is required that (subject to one exception) an insurer’s liability to compensate third-party victims of motor vehicle accidents is and remains independent of the contract and any contractual restrictions therein between the insurer and the policyholder.

<sup>93</sup> Case C-129/94 *Rafael Ruiz Bernáldez* [1996] ECR I-1829.

<sup>94</sup> Case C-348/98 *Vitor Manuel Mendes Ferreira and Maria Clara Delgado Correia Ferreira v Companhia de Seguros Mundial Confiança SA* [2000] ECR I-6711.

<sup>95</sup> Case C-537/03 *Katja Candolin, Jari-Antero Viljaniemi and Veli-Matti Paananen v Vahinkovakuutusosakeyhtiö Pohjola and Jarno Ruokoranta* [2005] ECR I-5745.

<sup>96</sup> Case C-356/05 *Elaine Farrell v Alan Whitty* [2007] ECR I-3067.

<sup>97</sup> Case C-442/10 *Churchill Insurance Company Limited v Benjamin Wilkinson and Tracy Evans v Equity Claims Limited* [2011] ECR I-00000.

given the nature of the driver's actions in *EUI v Bristol Alliance Partnership*,<sup>98</sup> whilst motorists are required to ensure that any use of motor vehicles is covered by a minimum of third party cover, insurance companies are seemingly not required to provide the same. This facilitates the insurers in evading liability, it enables insurers to benefit from using the "Article 75 procedure"<sup>99</sup> to handle claims on poorer terms for the victim of an accident than would be available through a contractual claim, and following Brexit will enable the industry to continue this practice without questions of compatibility with a higher source of law being raised. Until Brexit, the UK should delete the "matters" from the s. 148(2) RTA88 as their existence (wrongly) implies that other exclusions are permitted.

The RTA88 holds that in the unauthorised or non-contractual use of the vehicle, no third party cover is provided in the policy (with the exception of the eight "matters" specified in s. 148 RTA88). Consequently, where the insurance policy restricts the use

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<sup>98</sup> *EUI v Bristol Alliance Partnership* [2012] EWCA Civ 1267.

<sup>99</sup> Article 75 (of the MIB's Articles of Association) is an intra-insurer protocol. It applies where the insurer asserts it has the right to repudiate or to avoid the contract (such as when the policyholder misrepresents facts or fails to disclose). Here the insurer applies to the court for a declaration under RTA88 s. 152(2) that the insurance contract is void. It gives effect to third party victims of insufficiently insured drivers seeking access to compensation where the contractual insurer becomes a statutorily-required insurer (standing in place of the MIB). The insurer here operates under the UDA and consequently the third party victim suffers from access to poorer terms than would be available through claims against the insurer on a contractual basis. Art. 75 insurers have no liability to meet subrogated claims (a subrogated claim is one where another party should have been responsible for settling) and, as demonstrated in *EUI* the distinction between the rights guaranteed under statute and those available under the UDA are sufficiently different to place victims seeking redress under the latter arrangement at a disadvantage.

of the vehicle to social and domestic purposes only, it correspondingly does not provide contractual cover where the vehicle is used for commercial purposes. Section 150 provides that a policy restricted to social, domestic and non-commercial use will however cover a fare paying passenger if criteria are met. This has led to a series of unfortunate incidents, and required the national courts to be creative in ensuring the protection of the third party when s. 150 RTA88 was breached.<sup>100</sup> Again, the MVIDs, as part of their broad social policy remit, requires for the protection of passengers and third-party victims, and that they be compensated according to comprehensive application of the MVIDs.<sup>101</sup>

A conundrum exists between RTA88 s.151(5),<sup>102</sup> which obliges the insurer to fulfil the coverage required under a policy of motor insurance, regardless of a breach by the policyholder, and s. 151(8), providing the insurer with a right to recover sums paid out to the third party victim under the policy from the policyholder.<sup>103</sup> The interaction between these sections of the RTA88, and the breach of the MVIDs, was demonstrated in *Churchill Insurance v Wilkinson and Tracey Evans*.<sup>104</sup> The victim

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<sup>100</sup> See for instance *Seddon v Binions* [1978] RTR 163 and *Keeley v Pashen* [2004] EWCA Civ 1491.

<sup>101</sup> As noted in *Churchill v Wilkinson* [2012] EWCA Civ 1166 and Case C-409/11 *Csonka v Magyar Allam* [2013] EUECJ (11 July 2013).

<sup>102</sup> Section 151 RTA88, which imposes the duty on insurers to satisfy judgments against persons insured or secured against third party risks, is qualified against s.152 RTA88. Section 152 RTA88 outlines exclusions from liability and imposes procedural obstacles prior to the insurer being liable for any sum awarded.

<sup>103</sup> In the event that he caused or permitted the use of the vehicle which gave rise to the liability.

<sup>104</sup> Case C-442/10 *Churchill Insurance Company Limited v Benjamin Wilkinson and Tracy Evans v Equity Claims Limited* [2011] ECR I-00000.

was also the policyholder and subject to the insurer's award of compensatory payments as a result of the accident (s. 151(5)). She was also subject to a clawback of the award under s. 151(8). It is in the automatic application of s. 151(5) where the statutory provision breaches Art. 13 of the sixth MVID. Given that the drafting of RTA88 included the coexistence and application of these sections for the protection of insurers, the Brexit result would enable a decision based purely on English law, and there would be no further need (requirement or indeed availability), as occurred here, for a reference to the CJEU to assist in the consistent interpretation of national law with an EU parent directive. How far post-Brexit judicial interpretation would follow previous case law determined in conformity with the MVIDs, and how many decisions would be made exclusively on the basis of national legislative instruments is difficult to determine at present. It will be interesting (if not also adding a further element of unwanted uncertainty) to see whether courts, free from the requirement of exercising a purposive statutory interpretation, will continue to follow the orthodoxy already established in statutory interpretation. The RTA88, at s. 151(4) breaches the MVIDs by imposing what is termed "constructive knowledge" on a third party victim of a motor vehicle accident. Here motor insurers may exclude liability

"in respect of the death of, or bodily injury to, or damage to the property of any person who, at the time of the use which gave rise to the liability, was allowing himself to be carried in or upon the vehicle and knew *or had reason to believe* that the vehicle had been stolen or unlawfully taken" (authors' emphasis).

The MVIDs require that insurers, seeking to exclude liability to third party victims,

prove knowledge rather than impose it constructively through the wording “had reason to believe.” National courts continue to interpret the wording of the statute giving effect to constructive knowledge,<sup>105</sup> and even where the CJEU has held contrary to this, national courts may now ignore its previous rulings as being part of a paradigm of compliance with EU law which no longer exists. It is to be hoped that in the negotiation stage of the UK’s withdrawal from the EU, definitive instruction on this matter will be issued to provide much needed certainty on the future application of motor vehicle insurance law. In each of the issues outlined above, either the national law (in transpositional deficit) or the (incorrect) interpretation of the law provided in national courts delivers weaker protection for third party victims than is available through the EU directives.

#### 4. CONSEQUENCES FOR ENFORCEMENT AND THE PRINCIPLE OF EQUIVALENCE

A “hard” Brexit would remove the areas of breach outlined above. As the conflicts between national and EU law occur on the basis of non-transposition and incorrect interpretation, by “converting” all EU law currently transposed into national law, such problems would be removed. The UK would also be free to establish agreements with the MIB on the terms of its choosing. Until this happens (not expected to be concluded before the end of 2019), the UK is obliged to give effect to EU law and its rights and protections afforded to individuals in member states.

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<sup>105</sup> Found in RTA88 151(4) and UDA 2015 cll 7 and 8.

The CJEU respects the national procedural law of member states and seeks to have as little interference with their operation as possible. Of course, this approach must be tempered with regard to legitimate expectations and the underlying principle of primacy through which the EU operates and is underpinned through effectiveness<sup>106</sup> and equivalence (as articulated in *Rewe*).<sup>107</sup> In relation specifically to the equivalence between national law (here the MIB agreements) and the sixth MVID, it was in *Carswell v Secretary of State for Transport and MIB*<sup>108</sup> where the High Court held<sup>109</sup> that equivalence does not require a perfect copy of the national civil procedures. Whilst true, the CJEU has also repeated on several occasions that “measures liable to seriously compromise the attainment of the result proscribed by [a] directive”<sup>110</sup> are to be prohibited, and if the disconnect between the EU law and the implementing national law is sufficiently significant, national judges have not merely the power, but the duty, to set aside the offending national provisions.<sup>111</sup> Similar conclusions as to transpositional measures which “constitute a substantial procedural defect, render a

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<sup>106</sup> The principle establishes a worthy and appropriate ideal, nonetheless it is in its application that the state gains an advantage for internal systems which may fall short of “complete” effectiveness, yet will not breach EU law. The test is that the national law or provision does not render it impossible or excessively difficult in practice to access the right. Even with the current deficiencies, it could be argued that the collectively the RTA88, UDA 2015 and the Untraced Drivers Agreement 2003 (as amended) satisfy this broad objective.

<sup>107</sup> Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989 at [5].

<sup>108</sup> [2010] EWHC 3230 (QB).

<sup>109</sup> at [15-18].

<sup>110</sup> Case C-129/96 *Inter-Environnement Wallonie ASBL v Région Wallonne* [1997] ECR I/7411.

<sup>111</sup> Case C-555/07 [2010] *Küçükdeveci v Swedex GmbH & Co KG* ECLI:EU:C:2010:21.

technical regulation adopted in breach [of either the articles of the directive in question] inapplicable.”<sup>112</sup>

Further, the CJEU allow member states to determine their own procedural rules when applying / providing access to EU rules, insofar as they correspond with principles of EU law. Ultimately, the onus is placed on member states to ensure that the EU rights of individuals are safeguarded at a national level. However, such a simple premise is frequently lost in the complexity of national provisions and requires the invoking of the primacy of EU law<sup>113</sup> to ensure conflicting national provisions are set aside.<sup>114</sup> For example, it will be remembered that *Mangold*<sup>115</sup> and *Küçükdeveci*<sup>116</sup> impose on the national courts of member states powers to disapply conflicting national legislation (this in relation to anti-discrimination law amounting to a general principle of EU law). In other respects, where a national court was faced with conflicting EU and national law, and no consistent interpretation was possible without adopting a *contra*

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<sup>112</sup> Case C-443/98 *Unilever Italia SpA v Central Food SpA* [2010] ECR I-7535 at [50].

<sup>113</sup> Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629 and Case C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] ECR I-2433.

<sup>114</sup> In *R v Secretary of State for Transport, ex p Factortame (No 2)* [1990] UKHL 13, famously the requirement of injunctive relief to prevent the application of incompatible national legislation was required of “any legislative, administrative or judicial practice which might impair the effectiveness of Community law” at [20]. However, in Joined Cases 10/97 and 22/97 *Ministero delle Finanze v IN. CO. GE/90 Srl and Others* [1998] ECR I-6307, the CJEU preferred the rendering of the national provision as inapplicable.

<sup>115</sup> Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981.

<sup>116</sup> Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co. KG* Judgment of 19 January 2010.

*legem* interpretation, the domestic court would apply the national law.<sup>117</sup> Beyond this position, providing a consistent interpretation of EU law, first established in *Marleasing*,<sup>118</sup> has progressed to impose this binding duty on all the authorities of member states (including their courts).<sup>119</sup> In *Pfeiffer*,<sup>120</sup> the CJEU held national courts must operate under the presumption that the “member state... intended entirely to fulfil the obligations arising from the directive concerned.”<sup>121</sup>

In relation to the MVIDs, whilst their remit has expanded during the development of the directives, the first MVID was enacted to facilitate the free movement of persons and goods (similarly a general principle of EU law). The third MVID<sup>122</sup> has been held in *Farrell v Whitty*<sup>123</sup> to be directly effective, and it could be argued that if given this interpretation, the national courts would be required to follow the *Mangold*<sup>124</sup> and *Küçükdeveci*<sup>125</sup> authorities and disapply conflicting principles contained in the RTA88, the UDA 2015 and the Untraced Drivers Agreement (UtDA) 2003 (as amended). Had the government intended to negotiate Brexit on the basis of maintaining access to the Single Market, this would have required adherence to the

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<sup>117</sup> Case C-334/92 *Miret v Fondo de Garantia Salarial* [1995] 2 CMLR 49.

<sup>118</sup> Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR.

<sup>119</sup> Case C-397/01 to C-403/01 *Bernhard Pfeiffer et al v Deutsches Rotes Kreuz, Kreisverband Walshut eV* [2004] ECR I-8835.

<sup>120</sup> Case C-397/01 to C-403/01 *Bernhard Pfeiffer et al v Deutsches Rotes Kreuz, Kreisverband Walshut eV* [2004] ECR I-8835.

<sup>121</sup> at [119].

<sup>122</sup> Council Directive 90/232.

<sup>123</sup> Case C-356/05 *Elaine Farrell v Alan Whitty* [2007] ECR I-3067.

<sup>124</sup> Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981.

<sup>125</sup> Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co. KG* Judgment of 19 January 2010.

free movement principles upon which it is based and the MVIDs would have continued in force (even following a review of existing legislation as part of the powers expected to be contained in the Great Repeal Bill). It would have also been difficult for the UK to restrict the obligations to provide effectiveness and equivalence of EU law when these sources would have continued to be part of the national legal system.

However, it appears the current approach taken by the government will see the end of each of these requirements and impositions. With the removal of the free movement principles,<sup>126</sup> the UK will be free of the requirements to provide enforcement mechanisms to challenge the state for losses associated with breach of EU law. That enforcement, so linked with legal certainty in relation to the application of directives where the national law lacks clarity, precision and an unequivocal legal framework,<sup>127</sup> is removed and will greatly reduce individuals' ability to hold the state to account.<sup>128</sup> Despite a general lack of effectiveness of state liability since *Francovich*,<sup>129</sup> in motor insurance the success of several cases<sup>130</sup> has demonstrated not only the sufficiently

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<sup>126</sup> Enshrined in the fundamental premise of free movement of people and largely equated with immigration (but frequently (and incorrectly) conflated with the migrant crises in the Middle East).

<sup>127</sup> Case C-87/14 *European Commission v Ireland* [2015] ECLI:EU:C:2015:449 at [41].

<sup>128</sup> James Marson and Katy Ferris "Collective Redress: Broadening EU Enforcement Through State Liability?" (2016) 27 *European Business Law Review* 3, 325.

<sup>129</sup> Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci and others v Italy* [1991] ECR I-5357.

<sup>130</sup> *Moore v Byrne v Secretary of State for Transport & MIB* [2007] EWHC 879 (QB); *Secretary of State for Transport & MIB* [2008] EWCA Civ 574; *Carswell v Secretary of State for Transport & MIB* [2010] EWHC; and *Delaney v Secretary of State for Transport* [2015] EWCA Civ 172.

serious nature of the UK's transgressions,<sup>131</sup> but also how such cases can highlight the breaches and compel changes in the conflicting law.<sup>132</sup> The UK's procedural rules will be able to continue the application of harsh strike-out provisions replete in the UDA<sup>133</sup> and UtDA 2003 (as amended).<sup>134</sup> By subsuming EU based law into the national law, comparisons with an EU parent directive will be voided as will the principles of equivalence and effectiveness, and the powers derived from *Mangold*<sup>135</sup> and *Küçükdeveci*<sup>136</sup> will be lost in the ability to review primary legislation.

## 5. IMPLICATIONS AND CONCLUSIONS

It must be remembered that, at the time of writing and until the UK formally exits the EU (on Brexit day when the Great Repeal Bill commences), the MVIDs and the jurisprudence of the CJEU have primacy over national law. They oblige the UK to not only transpose any new provisions of these sources of law, but they also inform the scope and application of the UK's statutory and extra-statutory provisions relating to motor vehicle insurance. That is the theory and underlying *acquis* on which the EU is

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<sup>131</sup> Going beyond mere technical breaches.

<sup>132</sup> Nicholas Bevan "No Through Road" (2015) 165 New Law Journal 7648, 7.

<sup>133</sup> For example, see cll 12-13 UDA 2015; cll 7-12 in UDA 1999.

<sup>134</sup> See for instance cl 2 which imposes a binding authority on the representatives of child / mentally incapacitated claimants to conclude agreements as if these claimants had capacity. This disadvantages the claimant compared with protections available under the Civil Procedure rules. See Nicholas Bevan "An Untidy Arrangement" (2014) 164 New Law Journal <http://www.newlawjournal.co.uk/content/untidy-arrangement> (accessed 9 October 2016).

<sup>135</sup> Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981.

<sup>136</sup> Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co. KG* Judgment of 19 January 2010.

based. Brexit seems likely to change this relationship and revert the UK back to its pre-1973 legal position. Despite the MVIDs becoming fully national law following the enactment of the Great Repeal Bill, given the history of the conflict between national and EU law on the matter of motor vehicle insurance, the reluctance of the Secretary of State to admit to problems with the transposition of the MVIDs and the rulings of the CJEU, and the liability being imposed on the State for the consequences of its breaches of EU law, it is probable that offending aspects of the (EU-based) law will be removed. The parts of the MVIDs which are currently missing from national law are unlikely to be transposed prior to Brexit. This will have negative consequences for those innocent third party victims of negligent and uninsured / untraced drivers. Decades of previous case law advancing the rights of victims will be put in jeopardy. As noted above, much statutory interpretation, from the higher courts in particular, has been based on a purposive/teleological method, and this incorporates both reference to EU law in the form of the MVIDs and the interpretations provided by the CJEU. The changes to the wording of the RTA88, and interpretation provided by the judiciary (both domestically and by the CJEU) are embedded and entwined with national law. To separate EU law from the RTA88 would likely necessitate a new Act and a comprehensive review of existing laws and liaison with interested parties (in particular the insurance industry which has such a marked impact on the UDA and UtDA). Existing restrictions on executive discretion and reviews of the agreements concluded between the Secretary of State and the MIB will no longer be subject to external scrutiny (and enforceable correction). Brexit will certainly facilitate the continuation of a conservative, austerity-based ethos to prevail which will lead to contractual relationships being the primary source of protection with the state being a begrudging and reluctant safety net.

Beyond these fundamental principles being changed, practical problems will also be created. A “hard” Brexit will require individuals based in the UK driving to the EU (or even simply visiting and being involved in a vehicular accident) to have in place bespoke insurance cover. They will be unable to rely on an (EU regulated) central guarantee fund body facilitating their claim for compensation for accidents occurring in another member state.<sup>137</sup> Such contractual relationships will change. Currently, the MVIDs provide a comprehensive and inclusive package of safety features and guarantees regarding social policy requirements for victims of accidents. The national law, conversely, offers restricted cover and the application of permissible contractual exclusions. The fourth MVID<sup>138</sup> enabled extensive provision for cross border claims and direct rights of action which are also likely to be lost following Brexit.

Brexit may mean Brexit, but it marks a fundamental shift in the rights of third party victims of negligent driving and the development of statutory protections. Given the disparity between the UK and the EU in this area, this does not bode well for the protective rights currently accessible to injured motorists, passengers and pedestrians.

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<sup>137</sup> Nicholas Bevan “Where to Sue?” (2014) 164 *New Law Journal* 7605, 14.

<sup>138</sup> Council Directive 2000/26/EC on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and amending Council Directives 73/239/EEC and 88/357/EEC (the Fourth Motor Insurance Directive) [2000] OJ L181/65.