

Slow moving motor-powered vehicles and EU Compulsory Motor Vehicle Liability Insurance: back to the future?

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Abstract

This paper focuses on the compensation of traffic accidents caused by new types of lighter and lower speed motor-powered vehicles, such as e-scooters, kick-scooters, electric bicycles, electric skateboards, segways, hoverboards or monowheels under the Directives of the European Union on compulsory motor vehicles liability insurance. Those new types of vehicles propelled by mechanical power have become very popular in road traffic. Unfortunately, there is also a growing tendency of them being unsuitably driven and causing accidents. While those accidents have been covered under the EU Directives since 1972, this situation will change completely because of the modification in 2021 of the definition of vehicle in Directive 2009/103/EC. The modified definition excludes some types of vehicles propelled exclusively by a mechanical power from the scope of this Directive on motor vehicles liability insurance. Consequently, those excluded vehicles are considered as “non-motor-powered vehicles”, implying that the protection of the person liable for a traffic accident caused by such a vehicle, and the injured party will be greatly diminished. The landscape of national (non)compulsory insurance and/or specific compensation rules will become more disparate than in the case of specific national exemptions from the insurance obligation, and legal uncertainty as to the applicable compensation system is increasing. The impact on the international traffic compensation system of Bureaux (“green card system”) is also briefly touched upon.

EU Motor vehicle liability insurance – lower speed motor-powered vehicles – definition of vehicle – protection

1. Introduction

The consolidating European Union Directive 2009/103/EC of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles and the enforcement of the obligation to insure against such liability¹ (hereafter EU MID), as modified in 2021 by Directive (EU) 2021/2118 of 24 November 2021, excludes certain types of motor-powered vehicles propelled exclusively by a mechanical power from the definition of vehicle, and consequently from the scope of the EU MID. This modification cannot be endorsed. Those excluded vehicles are now considered as “non-motor-powered vehicles”, which greatly diminishes the protection of the person liable for the accident caused with such an excluded vehicle, as well as of the injured party. Moreover, the impact is much greater than that of the current right of EU Member States to exempt certain types of motor-powered vehicles from the compulsory motor vehicle liability insurance obligation. There is a considerable risk that the expected disparity of national rules on the compensation of accidents caused by those excluded vehicles will catapult Europe back to the situation which existed prior to the foundation of the international traffic compensation system of Bureaux (“green card system”) in 1949 and the adoption of the First EU Directive on motor vehicle liability insurance in 1972.

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¹ [2009] OJ L263/11.

The opinion defended in this paper originated as a response to the proceeding to review the consolidating EU MID which were reactivated in May 2021. The review of the EU MID (REFIT) kicked off in 2016 with an evaluation by the European Commission (EC Commission), and what followed was a long journey, with public consultations in 2017 and 2018, before a compromise between widely differing views was reached.² The Proposal of the EU Commission was launched in 2018 (hereafter Proposal 2018),³ and the amending Directive (EU) 2021/2118 was adopted on 24 November 2021 (hereafter EU Amending MID).⁴

This paper focuses in particular on the compensation of traffic accidents caused by new types of lighter and lower speed motor-powered vehicles such as e-scooters, kick-scooters, electric bicycles, electric skateboards, segways, hoverboards, monowheels or unicycles. Whether those motor-powered vehicles should fall under the scope and protection of the EU MID was a hotly debated topic in the review process. Those new types of vehicles, exclusively or non-exclusively propelled by mechanical power, have become very popular in road traffic and have invaded various cities in EU Member states and the UK, even where it is illegal to ride them. Furthermore, there is a growing general perception that they could be part of a more sustainable and climate friendly mobility.

Unfortunately however, there is also a growing tendency of those new types of vehicles being involved in traffic accidents. A quick search on the internet shows that the number of crashes involving e.g. an e-scooter is rising sharply.⁵ The key issue related to the scope and application of the EU MID is that not only the rider of those new types of vehicles could be (severely) injured: since many are being unsuitably driven, “oftentimes it’s not the

² See <ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1407-REFIT-review-of-the-Motor-Insurance-Directive_en>; <www.europarl.europa.eu/legislative-train/theme-an-economy-that-works-for-people/file-revision-of-the-motor-insurance-directive>; <www.europarl.europa.eu/legislative-train/api/stages/report/current/theme-an-economy-that-works-for-people/file-revision-of-the-motor-insurance-directive> accessed 10 December 2021.

³ Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/103/EC of the European Parliament and the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to ensure against such liability, COM(2018) 336 final - 2018/0168(COD) Brussels 24 May 2018 <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018PC0336&from=EN> accessed 10 December 2012; EU Commission, *Commission Staff Working Document Impact assessment* (SWD(2018)247 final, Brussels 24 May 2018) 158 pages; European Commission, *Commission Staff Working Document Impact assessment* (SWD(2018)248 final, Brussels 24 May 2018) 2 pages.

⁴ Directive (EU) 2021/2118 of the European Parliament and of the Council of 24 November 2021 amending 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 [2021] OJ L430/1.

Member States shall adopt and publish the measures necessary to comply with this Directive by 23 December 2023, with the exception of measures related to some amendments to be taken by 23 June 2023 (EU Amending MID, art 2, 1). On 22 June 2021 the European Parliament and Council of the EU negotiators reached a provisional agreement on the revised rules <www.europarl.europa.eu/news/en/press-room/20210617IPR06467/deal-reached-on-new-rules-to-better-protect-road-accident-victims> accessed 10 December 2021. On 21 October 2021, the agreement was approved by the European Parliament, *EP legislative resolution of 21 October 2021* (P9_TA(2021)0433), based on *Position of the European Parliament of 21 October 2021* (P9_TC1-COD(2018)0168) replacing the amendments adopted on 13 February 2019 <www.europarl.europa.eu/doceo/document/A-8-2019-0035-AM-061-061_EN.pdf>, <www.europarl.europa.eu/doceo/document/TA-9-2021-0433_EN.html>, <www.europarl.europa.eu/news/en/press-room/20211014IPR14929/parliament-adopts-new-rules-to-improve-protection-of-road-accident-victims> accessed 10 December 2021, and the Council of the EU formally adopted the directive on 9 November 2021 <www.europarl.europa.eu/legislative-train/theme-an-economy-that-works-for-people/file-revision-of-the-motor-insurance-directive> accessed 10 December 2021.

⁵ See e.g. reference in footnote 6.

scooter driver who's the one getting injured".⁶ Consequently, if e.g. an e-scooter crashes into a pedestrian or other road user and the rider is held liable, the question of the liability insurance cover is fundamental.

Since 1972 accidents caused by those types of lighter and lower speed motor-powered vehicles have been covered under the EU Directives on motor vehicle liability insurance, protecting the liable person as well as the injured party. This situation will completely change under the EU Amended MID, which excludes many new types of lighter and lower speed motor-powered vehicles propelled exclusively by mechanical power from the definition of vehicle, and consequently from the scope of the EU Amended MID.

Hereafter, we will briefly set out the objectives and the key features of the EU MID (Part 2). Subsequently, the evolution of the definition of vehicle will be outlined (Part 3), and the arguments justifying this exclusion of certain types of motor-powered vehicles will be analysed (Part 4). Then the impact of the exclusion of those vehicles on the protection of the liable driver and the injured party will be discussed (Part 5), as well as the question whether this exclusion would be preferable to an exemption from the insurance obligation as defined in the EU MID (Part 6). Finally, the impact on the international traffic compensation system of Bureaux ("green card system") will be touched on (Part 7).

2. Objectives and key features of the EU MID

To date, the application of tort law to compensate physical injuries or material damage caused by those new types of vehicles has not been questioned.⁷ Therefore, the key issue remains whether and to what extent the liability caused by the use of these new types of lighter and lower speed motor-powered vehicles could or should be insured. This question primarily concerns the person liable for accidents caused by such a vehicle, since in the absence of adequate cover under a liability insurance contract s/he has to bear the financial burden of compensating the injured party.⁸ Moreover, notwithstanding the fact that the injured party is not a party to this insurance contract, in the

⁶ D. Krauth, 'E-scooter crashes on the rise in NYC, with bystanders the ones getting injured' (*Eyewitnessnews*, 15 June 2021) <abc7ny.com/7-on-your-side-investigates-e-scooters-electric-scooters-pedestrians-struck/10771051/> accessed 10 December 2021.

See also UK Department of transport, 'National statistics Reported road casualties Great Britain: e-Scooter factsheet year ending June 2021' (*Gov.UK*, 25 November 2021) <www.gov.uk/government/statistics/reported-road-casualties-great-britain-e-scooter-factsheet-year-ending-june-2021/reported-road-casualties-great-britain-e-scooter-factsheet-year-ending-june-2021> accessed 10 December 2021; H. Stigson, I. Malkuti, M. Klingegård, 'Electric scooter accidents: analyses of two Swedish accident data sets' (2021) 163 *Accident Analysis & Prevention* 106466 <www.sciencedirect.com/science/article/pii/S0001457521004978> (accessed 10 December 2021); 'Mensen zien alleen het plezier van steps' *De Morgen* (20 November 2021) 6; D. Mercer, 'Number of e-scooters on UK roads set to soar - why not everyone's pleased about it' (*Sky News*, 25 March 2021) <news.sky.com/story/death-traps-or-the-future-of-transport-why-not-everyones-pleased-with-the-uks-e-scooter-boom-12255287> accessed 10 December 2021; M. Meaker, 'E-Scooters Are Everywhere in Europe. So Are Grisly Accidents' (*Wired*, 12 July 2021) <www.wired.com/story/escooters-accidents-europe/> accessed 10 December 2021; 'Electric scooter accidents: facts and figures' <valientemott.com/blog/electric-scooter-accidents/> accessed 10 December 2021; J.F. Sallis, 'Electric scooters on collision course with pedestrians and lawmakers' (*The Conversation*, 18 July 2018) <theconversation.com/electric-scooters-on-collision-course-with-pedestrians-and-lawmakers-99654> accessed 10 December 2021.

⁷ In the absence of EU harmonised tort law, the national law applicable to traffic accidents is to be determined by the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40, or, in countries which ratified it, the Convention of the Hague of 4 May 1971 on the law applicable to traffic accidents <assets.hcch.net/docs/abcf969d-bac2-4ad5-bf52-f1aabc0939ad.pdf> accessed 4 January 2022.

⁸ The term "injured party" refers to 'any person entitled to compensation in respect of any loss or injury caused by vehicles', EU MID original version, art 1, 2 and as replaced by art 1, (1), (c) adding to the definition the term "party injured".

absence of an adequate liability insurance cover s/he will bear the risk of an insolvent liable person and be left without (full) compensation.

Therefore, we may assume that the person liable for a traffic accident with such a vehicle would want the financial burden of compensating all injured parties to be removed from her/him by adequate liability insurance cover, while the injured party wants to be fully reimbursed and does not wish to bear the risk of an insolvent liable driver.

Since the adoption of the first EU Motor Vehicle Liability Insurance Directive in 1972, the main underlying objectives of this regulation have essentially been the protection of the injured parties and the tortfeasor, as well as the free movement of persons, services and goods.⁹ Not surprisingly, these objectives were explicitly confirmed in the original EU MID, as well as in the review proceedings¹⁰ and in the EU Amending MID.

The second recital of the original EU MID states:

‘Insurance against civil liability in respect of the use of motor vehicles (motor insurance) is of special importance for European citizens, whether they are policyholders or victims of an accident. It is also a major concern for insurance undertakings as it constitutes an important part of non-life insurance business in the Community. Motor insurance also has an impact on the free movement of persons and vehicles. It should therefore be a key objective of Community action in the field of financial services to reinforce and consolidate the internal market in motor insurance.’¹¹

The first recital of the EU Amending MID states:

‘Insurance against civil liability in respect of the use of motor vehicles (‘motor insurance’) is of special importance for European citizens, whether they are policyholders or could become injured parties as a result of an accident. It is also a major concern for insurance undertakings, as it constitutes an important segment of the ‘non-life’ insurance market in the Union. Motor insurance also has a significant impact on the free movement of persons, goods and vehicles, and hence on the internal market. Reinforcing and consolidating the internal market for motor insurance should therefore be a key objective of Union action in the field of financial services.’¹²

To fulfil those objectives, motor vehicle liability insurance is compulsory and the insurance contract must cover the liability related to the use of a motor vehicle. Indeed, Article 3, first paragraph of the EU (Amended) MID

⁹ EU Council Directive 72/166/EEC of 24 April 1972 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 to the enforcement of the obligation to insure against such liability [1972] OJ L103/1. See also e.g. Case C-334/16 *José Luis Núñez Torreiro v AIG Europe Limited e.a.* [2017] ECLI:EU:C:2017:1007, para 25-27; Case C-648/17 *AAS BTA Baltic Insurance Company AS v Baltijas Apdrošināšanas Nams AS* [2018] ECLI:EU:C:2018:917, para 32-33; Case C-383/19 *Powiat Ostrowski v Ubezpieczeniowy Fundusz Gwarancyjny* [2021] ECLI:EU:C:2021:337, para 56.

¹⁰ See e.g. Proposal 2018, 4; EU Commission, *Commission Staff Working Document Impact assessment* (SWD(2018)247 final, Brussels 24 May 2018) 104.

¹¹ [2009] OJ L263/11, 11.

¹² See also [2021] OJ L430/1, 1, recitals 39 and 40.

stipulates: “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.”¹³

To consolidate the case law of the Court of Justice of the European Union (CJEU), a definition of the “use of a vehicle” has been inserted in Article 1, 1a of the EU Amended MID stating:

““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’.¹⁴

Relevant with respect to the underlying aim of protection of the liable person and the injured party is that the EU MID provides certain mandatory insurance conditions, such as minimum amounts of damage compensation and a territorial scope of the cover encompassing accidents occurring on the territory of the European Economic Area, along with the right for the injured party to a direct action against the insurer and the right to claim compensation from the national guarantee fund in case of non-insurance. Some of these mandatory insurance conditions have been strengthened by the EU Amending MID, as well as by the insertion of the very important extensive regulation on compensation in case of insolvency of the motor vehicle liability insurer.

Consequently, the key question of this paper is whether those new types of lighter and lower speed motor-powered vehicles fall under the scope of these harmonised rules.

3. Definition of “vehicle” in the EU MID

To answer this question, a clear distinction has to be made between, on the one hand, the original version of the codified EU MID in 2009 (and the previous EU Directives) and, on the other hand, the EU MID as amended by the EU Amending MID in 2021.

3.1. Original version of the EU MID

The original version of the codified EU MID provides in Article 1, 1:

““vehicle” means 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’.

This definition encompasses the new types of lighter and lower speed motor-powered vehicles in question, which consequently fall under the scope of the original version of the EU MID. This is rightly stated by the EU Commission in its Proposal 2018: ‘Furthermore, the impact assessment explains that new types of motor vehicles, such as electric bicycles, segways, electric scooters already fall within the scope of the Directive’.¹⁵

¹³ The original version of art 3, first paragraph of the EU MID provided: ‘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’. Although EU Amending MID art 1,(2), (a) replaced art 3, first paragraph, the only change was the replacement of the words ‘the use of vehicles’ by ‘the use of a vehicle’.

¹⁴ EU MID, art 1,1a as inserted by EU Amending MID, art 1, (1), (b).

¹⁵ Proposal 2018, 8; EU Commission, *Commission Staff Working Document Impact assessment (SWD(2018)247 final, Brussels 24 May 2018)* 18 and 135. See also Opinion of the Committee on Legal Affairs, cited in Committee on the Internal Market and Consumer protection, *Report 28January 2019 (A8-0035/2019)* 56.

The argument that the so-called “Vnuk law of the CJEU requires a wider range of vehicles than those such as cars and motorbikes to be insured, *including ones previously not requiring insurance*, such as golf buggies, mobility scooters and quad bikes” (emphasis added)¹⁶ is not correct. While the CJEU indeed ruled on the territorial scope of the insurance obligation, also in cases involving vehicles driven on private land or on roads not intended for travel, these preliminary rulings dealt with tractors, military vehicles and cars, and not with the new types of vehicles discussed in this paper.¹⁷

Moreover, the fact that some Member States have applied the option granted in Article 5, 2 EU MID to exempt certain motor vehicles with a low design speed from the compulsory motor vehicle liability insurance obligation confirms this proposition.¹⁸ The EU MID allows Member States to exempt certain types of vehicles from the insurance obligation, but only on the condition that the national guarantee fund of the Member State of the accident compensates the injured party of accidents caused by those exempt vehicles in the same way as the injured party of accidents caused by vehicles for which the insurance obligation had not been satisfied. The compensating guarantee fund has a right to obtain reimbursement from the guarantee fund of the Member State where the vehicle is normally based. Article 5, 2 EU MID provides:

‘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.

¹⁶ See e.g. Public Bill Committee, Clause 1 - Retained EU law relating to compulsory insurance for motor vehicles Motor Vehicles (Compulsory Insurance) Bill, debate 5 January 2022 <www.theyworkforyou.com/psc/2021-22/Motor_Vehicles_%28Compulsory_Insurance%29_Bill/01-0_2022-01-05a.1.4#g9.0> accessed 8 January 2022; Department for Transport, ‘Government announces plan to scrap EU law, ensuring British drivers avoid £50 a year insurance hike. Controversial EU Vnuk motor insurance law may be removed from British law’ (*News Story*, 21 February 2021) <www.gov.uk/government/news/government-announces-plan-to-scrap-eu-law-ensuring-british-drivers-avoid-50-a-year-insurance-hike>; <www.gov.uk/government/speeches/european-motor-insurance-directive-removal-of-vnuk-from-uk-law> accessed 8 January 2022; T. Gangcuangco, ‘Government charges ahead in removing Vnuk from UK legislation’ (*Insurance Business UK*, 30 June 2021) <www.insurancebusinessmag.com/uk/news/breaking-news/government-charges-ahead-in-removing-vnuk-from-uk-legislation-259411.aspx> accessed 10 December 2021.

The debate in the UK Public Bill Committee on 5 January 2022 shows that the question whether electric scooters (if they are authorised for road use) will be deemed to be motor vehicles and need compulsory insurance under UK law, is subject to further examination. See interventions of G. Knight, W. Morton Parliamentary under-secretary and P. Bone, Debate Public Bill Committee on Clause 1 - Retained EU law relating to compulsory insurance for motor vehicles Motor Vehicles (Compulsory Insurance) Bill 5 January 2022 <www.theyworkforyou.com/psc/202122/Motor_Vehicles_%28Compulsory_Insurance%29_Bill/01-0_2022-01-05a.1.4#g9.0> accessed 8 January 2022.

¹⁷ Case C-162/13 *Damijan Vnuk* [2014] ECLI:EU:C:2014:2146; Case C-334/16 *José Luis Núñez Torreiro v AIG Europe Limited e.a.* [2017] ECLI:EU:C:2017:1007; Case C-514/16 *Isabel Maria Pinheiro Vieira Rodrigues de Andrade e.a. v José Manuel Proença Salvador e.a.* [2017] ECLI:EU:C:2017:908; Case C-80/17 *Fundo de Garantia Automóvel* [2018] ECLI:EU:C:2018:661; Case C-648/17 *AAS BTA Baltic Insurance Company AS v Baltijas Apdrošināšanas Nams AS* [2018] ECLI:EU:C:2018:917; Case C-100/18 *Línea Directa Aseguradora* [2019] ECLI:EU:C:2019:517; Case C-383/19 *Powiat Ostrowski v Ubezpieczeniowy Fundusz Gwarancyjny* [2021] ECLI:EU:C:2021:337.

¹⁸ See e.g. Belgium, ‘Proposition de loi portant dispositions diverses en matière d’économie’ Parl. Chamber DOC 54 3570/001, 32-33 <www.dekamer.be/FLWB/PDF/54/3570/54K3570001.pdf> accessed 10 December 2021. See for the List of exempt vehicles according to Article 5, 2 EU MID <ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/motor-insurance-list-exempt-5th-dir_en.pdf> accessed 17 January 2022.

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.’

To conclude, the original EU MID provided an opt-out system as to the insurance obligation, but those exempt motor vehicles nonetheless remained under the scope of this Directive and in particular the protection it granted to the injured party.

There remained however some uncertainty as to the scope of the definition of vehicle regarding electric bicycles that always need pedal assistance to move. For example, in Belgium the legislator and the vast majority of case law and doctrine have always considered that those e-bikes are not motor vehicles falling under the scope of EU MID, because they cannot move without muscle power.¹⁹ In the Netherlands those e-bikes with pedal assistance and a maximum design speed of 25 km/h (called e-bikes) are exempted from the Motor Vehicle Liability Insurance Act, based on the aforementioned Article 5, 2 EU MID.²⁰

3.2. EU Amended MID

The legal situation will change with the new definition of “vehicle”, as amended in 2021.

Article 1, 1 of the EU Amended MD provides:²¹

“vehicle” means:

(a) any motor vehicle propelled exclusively by mechanical power on land but not running on rails with:

- (i) a maximum design speed of more than 25 km/h; or
- (ii) a maximum net weight of more than 25 kg and a maximum design speed of more than 14 km/h;

(b) any trailer to be used with a vehicle referred to in point (a), whether coupled or uncoupled.

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

According to this new definition of vehicle, certain lighter and lower speed motor-powered vehicles are not just exempted from the insurance obligation but also excluded from the scope of the EU Amended MID. Indeed, based on an *a contrario* reading of the above definition, we can conclude that the following vehicles are excluded from the scope of the EU Reviewed MID:

¹⁹ J. Muyltermans, ‘Noot onder Corr. Turnhout 5 april 2011’ [2001] TAVW 269; G. Jocqué, ‘Verkeersongevallen en de gezins aansprakelijkheidsverzekering’ [2016] T.Pol. 215; I. Verbaeys, ‘Noot onder Pol. Brugge 29 mei 2007’ [2007] De Verz. 447; C. Van Schoubroeck, ‘Recente ontwikkelingen in het verzekeringsrecht’, in M. Kruithof (ed) *Inzichten in actueel aansprakelijkheidsrecht en verzekeringsrecht ICAV II* (Intersentia 2018) 85-88; L. Schoonbaert and S. Vereecken, ‘De elektrische fiets in het recht op kruissnelheid?’ [2019] T. Pol. 7-10.

²⁰ Besluit 28 August 2006 vrijstelling voor fietsen met trapondersteuning van aansprakelijkheidsverzekering motorrijtuigen, art 1 and Wegenverkeerswet 1994, art 1, 1, ea; <ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/motor-insurance-list-exempt-5th-dir_en.pdf>.

²¹ EU MID, art 1, 1, as replaced by EU Amending MID, art 1, (1), (a).

- ‘(a) those motor vehicles propelled not exclusively by a mechanical power on land but not running on rails;
- (b) those motor vehicles propelled exclusively by a mechanical power on land but not running on rails with:
 - (i) a maximum design speed of not more than 25 km/h; or
 - (ii) a maximum net weigh of not more than 25 kg, and a maximum design speed of not more than 14 km/h;
- (c) wheelchair vehicles exclusively intended for use by persons with physical disabilities, irrespective of their weight or speed’.

4. Overview of the proceedings and arguments justifying the new definition of “vehicle” in the EU MID

4.1. Overview

The EU Commission’s Proposal 2018 did not modify, or replace the definition of “vehicle” in Article 1, 1 EU MID. However, in the course of the review proceedings, strong lobbying, in particular from the eBike industry,²² argued that those new types of motor-powered vehicles should not be exempted, but totally excluded from the definition of vehicle and consequently from the scope of the harmonised regulation of the EU MID.

The main arguments were picked up by the European Parliament (EP), which adopted amendments on 13 February 2019, including the insertion of two new recitals and a new paragraph in Article 2:

‘(3a) Some motor vehicles such as electric bicycles and segways are smaller and are therefore less likely to cause significant damage to persons or property than others. It would be disproportionate and not future proof to include them in the scope of Directive 2009/103/EC, as it would impose an obligation to have an expensive and excessive insurance cover for these vehicles. Such situation would also undermine the uptake of these vehicles and discourage innovation, although there is insufficient evidence that these vehicles could cause accidents resulting in injured parties at the same scale as other vehicles, such as cars or trucks. In line with the principles of subsidiarity and proportionality, requirements at Union level should cover those vehicles that have the potential to cause significant damage in a cross border situation. It is therefore necessary to limit the scope of Directive 2009/103/EC to those vehicles for which the Union considers that there need to be safety and security requirements before those vehicles are placed on the market, i.e. the vehicles subject to an EU type-approval.’

‘(3b) However, it is important to allow Member States to decide at national level the appropriate level of protection of parties potentially injured by vehicles other than those subject to EU type-approval. Therefore, it is important that Member States are allowed to maintain or introduce new mandatory provisions covering the protection of users of these other types of vehicles in order to protect potential injured parties from a traffic accident. Where a Member State chooses to require such insurance coverage in the form of compulsory insurance, it should take into account the likelihood that a vehicle might be used in a cross

²² See e.g. on the lobbying of the eBike industry, EU Commission, *Commission Staff Working Document Impact assessment* (SWD(2018)247 final, Brussels 24 May 2018) 63, 69 and 135.

border situation and the need for protection of potential injured parties in another Member State.’

‘(1a) In Article 2, the following paragraphs are added: This Directive shall only apply to vehicles covered by Regulation (EU) 2018/858²³, Regulation (EU) n° 167/2013²⁴, or Regulation (EU) n° 168/2013.²⁵ This Directive shall not apply to vehicles that are intended exclusively for use in the context of participation in a competitive sport activity, or in related sport activities, within a closed area.’²⁶

These EP amendments were based on the Report of its Committee on the Internal Market and Consumer Protection²⁷, which modified the proposals made by the Committee on Legal Affairs.²⁸ This Report phrases the justification as follows:

‘While the inclusion of non-type approved vehicles might increase insurance coverage, it will also dissuade the uptake of alternative vehicles, like e-bikes, which are better for the environment. Moreover, most non-type vehicles are small in size and therefore the chance of significant damage to persons or property is limited. Other forms of liability insurance than motor insurance should cover these non-type approved vehicles’²⁹;

‘As regards the scope of the Directive, which could be considered the most disputed part of the proposal, the rapporteur notes that following the rulings of the Court of Justice (cases Vnuk C-162/13, Rodrigues de Andrade C-514/16 and Torreiro C-334/16), there has been some confusion among Member States on which vehicles fall within the scope of the Directive. This concerns, in particular, vehicles like eBikes, segways or electric scooters, but also vehicles for instance used in motor sports. The rapporteur believes that in principle the Directive should not cover such vehicles, as the requirement of motor insurance could hinder the uptake, for instance, of eBikes or may unnecessarily increase the insurance premium for all vehicles. The rapporteur has therefore proposed that only vehicles, which are subject to type-approval requirements, should fall within the scope of the Directive. However, Member States should have the option of requiring also other vehicles to have compulsory insurance cover, if they deem it necessary.’³⁰

Since this distinction between type-approved and non-type approved vehicles was not workable, on 13 December 2019 the Council of the EU proposed a new definition of vehicle implying that the scope of the directive should

²³ Concerning motor vehicles and their trailers.

²⁴ Concerning agricultural and forestry vehicles.

²⁵ Concerning two- or three-wheel vehicles and quadricycles.

²⁶ Amendments adopted by the European Parliament on 13 February 2019 (EP 2014-2019, P8_TA(2019)0110) 3-4, 14 <www.europarl.europa.eu/doceo/document/TA-8-2019-0110_EN.pdf> accessed 7 December 2021.

²⁷ Committee on the Internal Market and Consumer protection, *Report 28 January 2019* (A8-0035/2019) 7-8, 60 <www.europarl.europa.eu/doceo/document/A-8-2019-0035_EN.pdf> accessed 10 December 2021.

²⁸ See Opinion of the Committee on legal Affairs, cited in Committee on the Internal Market and Consumer protection, *Report 28 January 2019* (A8-0035/2019) 56.

²⁹ Committee on the Internal Market and Consumer protection, *Report 28 January 2019* (A8-0035/2019) 20-21.

³⁰ Committee on the Internal Market and Consumer protection, *Report 28 January 2019* (A8-0035/2019) 49 and 51 “In conclusion the rapporteur believes that the elements listed above address the most pertinent point where the Commission proposal and the Motor Insurance Directive need to be improved, in order to ensure a high level of protection of victims of motor vehicle accidents and facilitate the free movement of motor vehicles between the Member States.”

be limited to vehicles that are heavier than 25 kg, or move faster than 25 km/h.³¹ It is this approach that ended up in the final text of the definition of vehicle in the EU Amended MID.

The EU Amending MID basically reiterates the arguments previously invoked by the EP and the Council to justify the exclusion of certain vehicles from the scope of the harmonised regulation on motor vehicle liability insurance.³² Indeed, recitals 3, 4 and 6 of the EU Amending MID stipulate:

‘(3) Since the entry into force of Directive 2009/103/EC, many new types of motor-powered vehicles have come onto the market. Some of them are powered by a purely electrical motor, some of them by auxiliary equipment. Such vehicles should be taken into account in defining the meaning of “vehicle”. That definition should be based on the general characteristics of such vehicles, in particular their maximum design speeds and net weights, and should provide that only vehicles propelled exclusively by mechanical power are covered. The definition should apply independently of the number of wheels that the vehicle has. Wheelchairs intended for use by persons with physical disabilities should not be included in the definition.’”

‘(4) Light electric vehicles that do not fall within the definition of “vehicle” should be excluded from the scope of Directive 2009/103/EC. However, nothing in that Directive should hinder Member States from requiring, under their national law, motor insurance, subject to conditions to be set by them, in respect of any motor equipment used on land that does not fall within that Directive’s definition of “vehicle”, and for which consequently that Directive does not require such insurance. Nor should that Directive hinder Member States from providing, in their national laws, for the victims of accidents caused by any other motor equipment to have access to the Member State’s compensation body as determined in Chapter 4. Member States should also be able to decide that, where residents of their territory are parties injured in an accident caused by such other motor equipment in another Member State in which motor insurance is not required for that motor equipment, those residents are to have access to the compensation body as determined in Chapter 4 in the Member State where they are residing. Compensation bodies of Member States should have the possibility of entering into a mutual agreement about the ways in which they will cooperate in that kind of situation.’

‘(6) Some motor vehicles are smaller and are therefore less likely to cause significant personal injury or damage to property than others. It would be disproportionate and not future proof to

³¹ Council of the EU, *Mandate for negotiations with the European Parliament* (2018/0168 (COD)) <data.consilium.europa.eu/doc/document/ST-14645-2019-INIT/en/pdf> accessed 10 December 2021. The Member States’ ambassadors (Coreper) endorsed this position for inter-institutional negotiations on 18 December 2019 <www.europarl.europa.eu/legislative-train/theme-an-economy-that-works-for-people/file-revision-of-the-motor-insurance-directive> accessed 10 December 2021; Council of the EU, *Motor insurance: Council agrees position on better protection of victims of motor vehicles accidents* (Press release 18 December 2019) <www.consilium.europa.eu/en/press/press-releases/2019/12/18/motor-insurance-council-agrees-position-on-better-protection-of-victims-of-motor-vehicles-accidents/> accessed 10 December 2021.

³² Recitals 3 and 4 are similar to recitals 2a and 2b of the Council of EU, *Mandate for negotiations with the European Parliament* (2018/0168 (COD)) <data.consilium.europa.eu/doc/document/ST-14645-2019-INIT/en/pdf> accessed 10 December 2021; <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_14645_2019_COR_1&from=EN>; Recital 6 is similar to recital 3a of the *Amendments adopted by the European Parliament on 13 February 2019* (EP 2014-2019, P8_TA(2019)0110) 3-4, 14 <www.europarl.europa.eu/doceo/document/TA-8-2019-0110_EN.pdf> accessed 10 December 2021.

include them in the scope of Directive 2009/103/EC. Including them would also undermine the uptake of newer vehicles, such as electric bicycles that are not exclusively propelled by mechanical power, and discourage innovation. Furthermore, there is insufficient evidence that such smaller vehicles could cause accidents resulting in injured parties at the same scale as other vehicles, such as cars or trucks. In line with the principles of subsidiarity and proportionality, requirements at Union level should, therefore, cover only those vehicles that are defined as such in Directive 2009/103/EC.’

4.2. Unconvincing arguments

This overview of the review proceedings clarifies that the three main arguments justifying the exclusion of certain (new) types of lower speed motor vehicles from the scope of the EU MID are that:

- those motor vehicles are smaller and therefore less likely to cause significant damage to persons or property at the same scale as other vehicles, such as cars or trucks;
- inclusion in the scope of the EU MID would impose an obligation to have expensive and excessive insurance cover for these vehicles; and
- inclusion in the scope of the EU MID would undermine the uptake of these vehicles and discourage innovation.

Those arguments are not particularly convincing, especially as regards the motor vehicles propelled exclusively by mechanical power. Firstly, the EU Commission has already dismissed those arguments in its Explanatory Memorandum to the Proposal 2018. It has emphasised that the power of the Member States to exempt certain vehicles could resolve the issues raised by the eBike industry without the protection of the injured parties being negatively affected:

“The use of these new types of electric motor vehicles in traffic has the potential to cause accidents whose victims need to be protected and reimbursed swiftly. However, the current Directive also provides Member States with the power to exempt such vehicles from motor third party liability insurance if they would consider this necessary. During the public consultation a number of associations representing the electric bicycles industry called for an exclusion of such vehicles in the Directive itself, arguing that requiring third party liability insurance could undermine the uptake of electric bicycles. This is not considered necessary in light of the power of Member States to exempt electric bicycles or any other new electric motor vehicles. In that case, the national guarantee funds would bear the costs of reimbursing victims of accidents caused by these new types of vehicles. This provides the highest level of protection of victims without the need for any additional EU action.”³³

Secondly, it goes without saying that, regardless of whether buyers have taken out motor vehicle liability insurance, the increased presence of eBikes and other electric vehicles, such as e-scooters or kick-scooters, on the road all over the world has proven the industry wrong.

³³ Proposal 2018, 8. See also EU Commission, *Commission Staff Working Document Impact assessment* (SWD(2018)247 final, Brussels 24 May 2018) 18 and 135.

Thirdly, and more importantly: can one seriously argue that smaller or lower speed motor-powered vehicles propelled exclusively by mechanical power are less likely to cause significant personal injury or damage to property than others? Does the frequency of accidents outweigh the actual losses caused? If so, should this argument not lead to the opposite conclusion that there is no need to exclude them from the EU MID protection? Moreover, can one question that an accident affecting a coach with many passengers can also be caused by a smaller vehicle?³⁴ Can one dispute that e.g. paraplegia can also be caused by a collision with an e-scooter or monowheel? Would the expectations regarding protection as a liable person or injured party be different depending on whether the accident was caused by an e-scooter, or by a car? Moreover, the seriousness and severity of the damage is determined by kinetic energy. This is calculated on the basis of not only the speed of the object but also its mass (how much matter is present in an object), meaning that the weight of the rider, any passengers, and the cargo also has to be taken into account. These last elements of course depend on the specific circumstances of each accident. It seems clear that the exclusion of certain means of transport from the definition of vehicle is based on criteria that appear neutral but are in fact totally factitious.

Moreover, what will happen when the maximum design speed of the vehicle is manipulated? This is not a theoretical question, given reports of a kick-scooter reaching a speed of 104 km/h.³⁵ This can be considered as a modification of the speed as designed by the manufacturer. This criterium of “maximum design speed” only makes sense if it refers to the speed actually achieved by the construction. In principle this speed is determined by the constructor, unless it has been manipulated by anyone in which case this is the maximum design speed. Moreover, manipulation of design speed is generally considered as an aggravation of the risk, allowing modification of the insurance conditions.

Fourthly, it is revealing that the EU Amending MID did not reiterate the argument invoked by the EP regarding the risk of expensive and excessive insurance cover for these vehicles. A Belgian study pointed out that the premium for motor vehicle liability insurance for a speedpedelec (L1e-B) was 118 euro, compared to 230 euro for a motorbike (L1-A).³⁶ Also, prior to the adoption under Belgian law of an exemption of certain types of motor vehicles, personal liability insurance contracts available on the Belgian market provided cover for electric bicycles propelled exclusively by mechanical power according to the Motor Vehicle Liability Act at no additional premium.³⁷ If understood correctly, the Vnuk Impact Analysis of the UK Government Actuary’s Department mentions that the insurance cost for each mobility scooter and electric bike under one of the options to adopt to UK law is expected to be £16.93 per annum.³⁸

³⁴ Cfr. Proposal 2018, 6.

³⁵ D. Coman, ‘Wankeler dan een fiets, maar hoe gevaarlijk zijn e-steps?’ *De Standaard* (14 January 2022) 14.

³⁶ G. Stevens, B. Rotthier, e.a., ‘Het potentieel van lichte elektrische voertuigen in Vlaanderen’ (2017) Report KU Leuven, Vrije Universiteit Brussel and ASBE, 53 <iiw.kuleuven.be/apps/lev/eindrapport.pdf> accessed 10 December 2021.

³⁷ Commission des assurances, ‘Avis sur l’avant-projet d’arrêté royal précisant la définition de la notion de véhicules automoteurs dans la loi du 21 novembre 1989 relative à l’assurance obligatoire de la responsabilité en matière de véhicules automoteurs’ (DOC C/2018/4, 9 March 2018) 16, <www.fsma.be/sites/default/files/legacy/content/advorg/2018/advice_c_2018_4.pdf> accessed 10 December 2021.

³⁸ M. Kirkpatrick, ‘Vnuk Impact Analysis Combined Report’, (2019) Government Actuary’s Department, 67 <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/965_738/vnuk-impact-analysis-combined-report.pdf.pdf> accessed 8 January 2022. The UK Government refers to an estimated

Moreover, this argument does not take into account the potential cost of covering these vehicles in a general (personal or commercial) liability insurance contract which in general provides less protection under national law. Also, taking into account the increase in accidents, the use of those lighter and slower motor vehicles might be considered an element material to the pricing of a general liability insurance contract and lead to higher premiums. However, since the risk of liability for traffic accidents continues to exist an insurance covering this risk remains necessary, even if it is not mandatory. Besides, cautious persons could be more tempted to conclude first party insurance contracts to cover the risk of costs incurred in traffic accidents. This would lead to at least a partial shift of the burden of the premium to compensate traffic accidents to the injured party.

Although this is not made explicit in the final texts, the issue of overregulation of non-type approved vehicles has been mentioned to clarify the exclusion of certain vehicles from the definition of motor vehicle. For example, a Press communication of the EP of June 2021 motivates the exclusion of e-bikes, motorsports and non-road vehicles:

“To avoid overregulation, the amended rules allow non-road vehicles (such as garden tractors, mobility scooters, toy cars) to be excluded as well as excluding electric bicycles from insurance obligations.”³⁹

It seems therefore more likely that this exclusion could be in essence related to the fact that the EU Amended MID, by consolidating the case-law of the CJEU, now explicitly imposes an insurance obligation on private terrain (art. 1, 1a and art. 3). As a result, certain lighter and lower speed motor-powered vehicles that are not allowed on public roads in some Member States (according to diverse national rules) will fall under the insurance obligation if they are used as a means of transport on private terrain. If this is the real reason, the exclusion of motor vehicles based on the definition of vehicle in the EU Amended MID seems to be too broad. Moreover, this does not seem to be a convincing argument, knowing that some of these non-road vehicles propelled exclusively by mechanical power are already being driven on public roads and causing traffic accidents. Moreover, this issue could have been dealt with under the newly inserted exemption of the insurance obligation of Article 5, 5 in conjunction with Article 5, 6 of the EU Amended MID providing:

‘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

£50 annual increase in motor vehicle insurance premiums. It is however not very clear whether or not this is primarily because of the extension of the territorial scope of the insurance obligation to vehicles on private land which under UK law would also include some of the new types of vehicles currently not permitted on roads, and vehicles for motorsports, see debate Public Bill Committee on Clause 1 - Retained EU law relating to compulsory insurance for motor vehicles Motor Vehicles (Compulsory Insurance) Bill, 5 January 2022 <www.theyworkforyou.com/ptbc/2021-22/Motor_Vehicles_%28Compulsory_Insurance%29_Bill/01-0_2022-01-05a.1.4#g9.0> accessed 8 January 2022; T. Gangcuangco, ‘Government charges ahead in removing Vnuk from UK legislation’ (*Insurance Business UK*, 30 June 2021) <www.insurancebusinessmag.com/uk/news/breaking-news/government-charges-ahead-in-removing-vnuk-from-uk-legislation-259411.aspx> accessed 8 January 2022; Department for Transport, ‘Government announces plan to scrap EU law, ensuring British drivers avoid £50 a year insurance hike Controversial EU Vnuk motor insurance law may be removed from British law’ (*Gov.UK*, 21 February 2021) <www.gov.uk/government/news/government-announces-plan-to-scrap-eu-law-ensuring-british-drivers-avoid-50-a-year-insurance-hike> accessed 8 January 2022.

³⁹ EP, *Deal reached on new rules to better protect road accident victims* (Press Releases, 22 June 2021) <www.europarl.europa.eu/news/en/press-room/20210617IPR06467/deal-reached-on-new-rules-to-better-protect-road-accident-victims> accessed 10 January 2022.

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.”⁴⁰

Another argument sometimes invoked by riders is that it is not workable to carry the insurance certificate when riding e.g. an e-scooter. In our increasingly digital age, this has or will become a non-issue. Reference can also be made to the 2019 decision of the Council of Bureaux that the international insurance certificate known as the “green card”, can be issued in black and white to be sent electronically and printed on paper.⁴¹ Consequently, the policyholder can forward it to any person operating the vehicle. Although this “green card” is primarily a certificate issued in the framework of the international traffic compensation system of Bureaux (“green card system”⁴²), it is in some jurisdictions also used as a certificate of compliance with the insurance obligation according to the National Motor Vehicle Liability Insurance Act.⁴³

5. Application of the new definition of “vehicle” in the EU MID

Serious practical problems arise in the application of the new definition of vehicle in Article 1, 1 EU MID.

The design speed as well as the net weight of each and every specific motor-powered vehicle has to be assessed. Not only the owners and persons operating those vehicles, who are often consumers, but also authorities competent to control and to sanction, criminally or otherwise, the non-fulfilment of the insurance obligation, often lack this necessary information. A quick search on the internet shows that this information is not always readily available. Moreover, within one and the same type, the maximum design speed and net weight can significantly differ. For instance, a study shows that an e-kickscooter (e-step) can weigh between 10 and 28 kg and has a speed between 22 and 30 km/h, an e-skateboard’s weight can range between 7 and 34 kg and its speed between 20 and 40 km/h., while the net weight of a segway can vary between 13 and 55 kg.⁴⁴ It seems that a hoverboard (12-18 km/h and 10-14 kg) would meet the criteria of speed and weight to be excluded from the definition of vehicle, but uncertainty remains as to the monowheel.⁴⁵ What about the speed of a bulldozer, tractor or golf buggy, the maximum net weight of which can be assumed to exceed 25 kg? It is not clear whether or not the battery has to be included to assess the net weight of the vehicle.

⁴⁰ EU Amended MID, art 5, 5 and 5, 6, as inserted by EU Amending MID, art 1(4).

⁴¹ <www.cobx.org/sites/default/files/cob_file_folder/FAQ-Website-Consumers-colour-of-the-IMIC.pdf> accessed 10 December 2021.

⁴² <www.cobx.org/index.php/article/3/green-card-system> accessed 10 December 2021.

⁴³ See e.g. Belgian Act of 21 November 1989 on compulsory motor vehicle liability insurance, art 7.

⁴⁴ G. Stevens, B. Rotthier, e.a., ‘Het potentieel van lichte elektrische voertuigen in Vlaanderen (2017) Report KU Leuven, Vrije Universiteit Brussel and ASBE, 27, 31-32 <iw.kuleuven.be/apps/lev/eindrapport.pdf> accessed 10 December 2021.

⁴⁵ Ibidem, 29-30 (hoverboard), 28 (monowheel).

The outcome of the assessment is crucial because those motor-powered vehicles propelled exclusively by mechanical power excluded from the EU MID definition of vehicle no longer fall under the scope of the EU harmonised rules on motor vehicle liability insurance. Consequently, they are considered “ordinary bicycles” or “non-motor-powered vehicles” and will be excluded from any protection of the liable person and the injured party provided for in the EU MID Directive as of 23 December 2023 (Article 2, 1 EU Amending MID).

The liability resulting from accidents caused by “ordinary bicycles” and other non-motor-powered vehicles can be covered by general liability insurance contracts (for private persons or businesses) governed by national insurance contract law. The applicable national law has to be determined by Article 7 of the Regulation EU No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I).⁴⁶ Commonly, those liability insurance contracts are not compulsory, nor regulated by specific mandatory rules, and the injured party has no right to claim compensation from a guarantee fund in case of non-insurance or insolvency of the insurer. Some national jurisdictions provide a right of direct action in cases involving non-compulsory liability insurance, but even then the protection of the injured third party is less than in cases involving compulsory general or motor vehicle liability insurance.⁴⁷ For instance, Belgian law provides that while in case of compulsory liability insurance contracts the insurer has no right to plead defences pursuant to law or under the insurance contract against the injured third party, he can do so under certain conditions in case of non-compulsory liability insurance contracts, and consequently the injured party will not receive damage compensation from the insurer.⁴⁸

Moreover, when falling within the scope of the EU MID, the motor vehicle liability insurance contract must cover ‘the civil liability in respect of the use of the vehicle’ (Art. 3, first para EU (Amended) MID). This implies that no matter who drives the vehicle, his/her financial burden of compensating the injured party is covered. On the other hand, a general liability insurance contract covers only those who have the capacity of insured in that contract. For instance, when the insured owner of an e-scooter lends it to a friend, the owner’s general liability insurance contract will not cover traffic accidents caused while the insured’s friend is riding. In addition, the territorial scope of the cover requires specific attention when travelling cross-border.

Could one still sustain that the general objectives of ensuring a high level of protection for injured parties of road traffic accidents and of facilitating the free movement of persons and vehicles throughout the EEA are pursued if those new types of motor-vehicles propelled exclusively by mechanical power, are excluded from the scope of the EU MID and the liable person and the injured party are consequently deprived of the protection they have enjoyed until now? It seems to be a missed opportunity, especially given that the press release of 28 June 2021 states that

⁴⁶ [2008] OJ L177/6 and Directive 2009/138/EC of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast) [2009] OJ L335/1, art 178.

See e.g. C. Van Schoubroeck, ‘The New European conflict-of-law rules from an Insurance perspective’ (2009) *European Journal of Consumer Law* 729-775.

⁴⁷ See regarding the application of the EU MID: Case C-287/16 *Fidelidade-Companhia de Seguros SA* [2017] ECLI:EU:C:2017:575: the national law cannot make it possible to invoke against third-party victims the nullity of the contract for motor vehicle insurance against civil liability arising as a result of the policyholder initially making false statements concerning the identity of the owner and of the usual driver of the vehicle concerned or from the fact that the person for whom or on whose behalf that insurance contract was concluded had no economic interest in the conclusion of the contract.

⁴⁸ See e.g. Belgian Insurance Act of 4 April 2014, art 150 and 151, §2.

the amendments “will strengthen the protection of injured parties in motor vehicles accidents and improve the rights of policyholders.”⁴⁹

6. Exemption of the insurance obligation or exclusion from the definition of vehicle

If a choice had to be made for certain types of motor-powered vehicles propelled exclusively by mechanical power between on the one hand a system of exemption from the insurance obligation under the EU MID, and on the other hand a system of exclusion under the definition of vehicle in the EU MID, the first option would have been preferable in view of the aim of the EU harmonisation efforts since 1972.

In both scenarios it is difficult to determine whether or not a concrete motor-powered vehicle would fall under the scope of a national exemption granted under Article 5, 2 EU MID, or under the new definition of vehicle of Article 1, 1 EU MID. In both scenarios the insurance requirement for a concrete vehicle has to be checked each time the vehicle crosses a border between countries. These checks are crucial to avoid criminal convictions for non-insured driving. However, once this is determined an exemption is still preferable to an exclusion guaranteeing a higher level of legal certainty.

The option of the exemption implies a decision of each Member State to opt out of the obligation to insure the use of a specific type of motor-powered vehicle according to the minimum requirements provided by the EU MID. As the EU Commission already pointed out, in case of a vehicle exempt based on Article 5, 2 of the EU MID, the injured party is still protected under the harmonised rule providing, as mentioned, compensation by the national guarantee fund of the country of the accident in the same way as for vehicles for which the insurance obligation of Article 3 has not been satisfied. This protection is guaranteed even in case of cross-border accidents since the guarantee fund of the Member State in which the accident has occurred can obtain reimbursement from the guarantee fund in the Member State where the vehicle is normally based. This system, which is already operational for a long time, is based on agreements between the national guarantee funds. Moreover, if a Member State did not opt out, the compulsory motor liability insurance contract must conform to the minimum requirement imposed by the EU MID, and the rules on compensation in case of non-insurance or insolvency of the insurer or the claims representative remain applicable. In case of travelling with e.g. an electric scooter exempt in one Member State to another country requiring compulsory insurance on its territory, the frontier insurance will bring that vehicle under the scope of the EU MID again. On the other hand, when travelling from a Member State not exempting this e-scooter, the motor vehicle insurance contract shall cover accidents caused in another Member State notwithstanding the exemption of that vehicle from the insurance obligation on the territory of the Member State of the accident.⁵⁰

A drawback of this opt-out system of exemption is that the guarantee funds are funded by insurers operating in motor vehicle liability insurance in that Member State, but their financial resources come from the premiums paid for non-exempt motor vehicles. The guarantee fund has the right to lodge a claim against the liable person to

⁴⁹ Council of the EU, *Motor insurance directive: Coreper endorses provisional agreement* (Press release 28 June 2021) <www.consilium.europa.eu/en/press/press-releases/2021/06/28/motor-insurance-directive-the-council-and-the-european-parliament-reach-a-provisional-agreement/> accessed 10 January 2022.

⁵⁰ EU MID, art 14, b) provides: ‘Member States shall take the necessary steps to ensure that all compulsory policies of insurance against civil liability arising out of the use of vehicles: (...) (b) guarantee, on the basis of that single premium, in each Member State, the cover required by its law or the cover required by the law of the Member State where the vehicle is normally based when that cover is higher.’

obtain reimbursement amounting to, at most, the damage compensation paid to the injured party (which could be insured by other types of (commonly non-compulsory) liability insurance).

At first sight, the system of exclusion from the definition of vehicle of the EU MID seems to have the benefit of simplicity, as it seems to avoid the disparate landscape of different opt-out decisions of various Member States in a system of exemptions under Article 5, 2 EU MID. It was argued that “[t]his would mean a clear clarification of the current situation to the advantage of the victims”.⁵¹ Indeed, if it is decided that the concrete vehicle does not fall under the definition of vehicle of the EU MID, it is excluded from the scope of the EU MID in all Member States.

Although no actual accurate overview is available, there is no uniformity in types and criteria of exempt lighter and slower motor-powered vehicles. On the other hand, apparently only a minority of Member States has used this option for those vehicles.⁵²

However, this is a false perception because the landscape will be more disparate and there is also a risk of legal uncertainty increasing. Indeed, in the absence of any uniform harmonised EU regulation, the compensation of traffic accidents caused by those excluded lighter and slow moving motor-powered vehicles will be governed by national law. It is rather ironic that the EU Amending MID explicitly reminds the Member States of their competence to regulate the compensation of traffic accidents caused by those vehicles in their own way, while also pointing out the importance of protecting the injured party.⁵³

Assuming that some Member States will provide a specific compensation system one way or another, hopefully taking into account cross-border accidents, this diversity of national rules will undoubtedly lead to disputes and delays in claims handling, or uncertainty as to who to address now that the rule on the claims handling in the Member State of residence of the injured party does not apply.⁵⁴ The compensation of accidents caused by the same e-scooter, for example, will be different when travelling through various countries as it depends on the applicable national law. Uncertainty about the conflict of law rule to determine the applicable national law is not excluded.⁵⁵ It will depend on the conditions of the specific general or motor vehicle liability insurance contract, or national compensation system whether cross-border accidents will be compensated. If a Member State were to impose a right of the injured party to obtain compensation from a guarantee fund, who would finance this fund when those vehicles are no longer considered motor vehicles? Consequently, not only the protection of the injured

⁵¹ Council of the EU, *Press release of 18 December 2019* <www.consilium.europa.eu/en/press/press-releases/2019/12/18/motor-insurance-council-agrees-position-on-better-protection-of-victims-of-motor-vehicles-accidents/> accessed 10 December 2021.

⁵² See for the List of exempt vehicles according to Article 5, 2 EU MID <ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/motor-insurance-list-exempt-5th-dir_en.pdf> accessed 17 January 2022. Also: France exempts the electric bicycle (vélo avec assistance électrique) with power not exceeding 250 w and assistance activated above 25 km/h, while insurance is compulsory for the electric bicycle the power of which exceeds 250 w or the speed of which exceeds 25 km/h, because it is assimilated to a motorcycle; Belgium exempts all motor-powered vehicles with mechanical force (design speed) not exceeding 25 km/h, with the exception of motor vehicles not exclusively intended for road transportation as well as mopeds (Motor vehicle liability insurance Act of 21 November 1989, art 2bis).

⁵³ EU Amending MID, recital 4 and EU Amended MID, art 28, as amended by EU Amending MID, art 1, (21).

⁵⁴ EU Amended MID, art 20-21, 24-26.

⁵⁵ In case it is based on an insurance contract, Regulation No 593/2008 Rome I, art 7 will apply. It will depend on the applicable national conflict of laws rules whether Regulation (EU) No 864/2007 Rome II or the Convention of the Hague of 4 May 1971 on the law applicable to traffic accidents will apply to determine the liability and the compensation award.

party and the liable person are jeopardised, but the free movement of persons and hence the internal market are impacted as well.

From the point of view of clear information, it also seems easier to draw up a list of vehicles exempt from the motor vehicle insurance obligation per Member State⁵⁶ than to make an comprehensive and accessible overview of the national rules applicable in each Member State to compensate cross-border and other traffic accidents caused by vehicles excluded from the scope of the EU MID.

7. Impact on the international traffic compensation system of Bureaux (“green card system”)

It is rather surprising that apparently no attention has been paid to the impact of an exclusion from the definition of vehicle on the international traffic compensation system of Bureaux, known as the green card system. This issue is not without relevance. The website of the Council of Bureaux mentions that in Europe every year more than 400.000 accidents occur between motorists originating from different countries using the green card system.⁵⁷

Founded in 1949, this international compensation system protects injured parties of cross-border road traffic accidents in 47 member countries, among which are not only the EEA Member States but also e.g. the UK, Switzerland, Russia, Israel and Morocco, through the compensation organised by 46 National Insurers’ Bureaux. The aim is twofold:

- (i) facilitating the crossing of borders by avoiding the need for motorists to obtain insurance cover at each of the frontiers of the 47 member countries. The motorist is released from the obligation of taking out a national insurance contract at the border if in possession of an international certificate of insurance of the motor vehicle concerned, the so-called green card;
- (ii) facilitating claims settlement by ensuring that injured parties of road traffic accidents caused by those foreign motor vehicles are not prejudiced by the fact that injuries or damage sustained by them were caused by a visiting motorist rather than a motorist resident in the same country. The National Insurance Bureau of the country where the accident occurred shall handle the claims in conformity with legal and regulatory provisions applicable in the country of accident relating to liability, compensation of injured parties and compulsory insurance. It can obtain reimbursement from the National Bureau which issued the green card or the insurance company.⁵⁸

This green card system is the foundation on which the EU MID is built. Because checks of the green card at the border hinder the free movement of persons and goods, the EU replaced the green card by the notion of ‘territory in which a vehicle is normally based’ in 1972.⁵⁹ Therefore, a motor vehicle which is normally based in the territory of an EEA Member State, and currently also of Andorra, Bosnia and Herzegovina, Montenegro, Serbia, Switzerland and the United Kingdom, will be presumed to be insured in this country and the National Insurers’

⁵⁶ See already the obligation imposed in EU MID, art 5, 2.

⁵⁷ < www.cobx.org/article/3/green-card-system > accessed 10 December 2021.

⁵⁸ < www.cobx.org/article/3/green-card-system > accessed 10 December 2021. See e.g. L. de Baere and F. Blees, *Insurance Aspects of Cross-Border Road Traffic Accidents* (Eleven International Publishing, 2019) 410 pages.

⁵⁹ EU MID, art 1, 4 and art 8.

Bureau will guarantee the compensation of damages of an injured party in one of the other countries, even without the presence of the green card.⁶⁰

The Internal Regulations⁶¹ governing the relations between the National Insurers' Bureaux, define in Article 2, 5 that:

“‘ vehicle’’: means any motor vehicle intended for travel on land and propelled by mechanical power but not running on rails as well as any trailer whether or not coupled but only where the motor vehicle or trailer is made subject to compulsory insurance in the country in which it is being used’.

This definition is the same as the one in the original version of the EU MID, but with the important additional words ‘only where the motor vehicle is made subject to compulsory insurance in the country in which it is being used’. The term “compulsory insurance” has to be interpreted as meaning compulsory motor vehicle liability insurance.⁶²

Consequently, the victim of a traffic accident caused by a motor vehicle normally based in another member country of the green card system will be refused compensation by the National Bureau of the country of the accident which does not make that vehicle subject to compulsory motor vehicle liability insurance, even in case this liable vehicle is covered by a motor vehicle liability insurance contract.

With the general exclusion of certain types of motor-powered vehicles propelled exclusively by mechanical power from the definition of vehicle in Article 1, 1 EU MID, the risk of not being compensated by the National Bureau of an EEA Member State where the accident occurred will of course be much greater than in the case of some Member States exempting those vehicles from the insurance obligation. It seems that with regard to the compensation of cross-border traffic accidents caused by those lighter and slower moving motor-powered vehicles, we are being catapulted back to the situation in Europe prior to 1949.

8. Conclusion

The new definition of vehicle in Article 1, 1 of the EU MID, as amended in 2021, has a major impact on the main objectives underlying the EU regulation on motor vehicles liability insurance. This impact is significant in particular for new types of lighter and lower speed motor-powered vehicles propelled exclusively by mechanical power which, without any doubt, have fallen under the scope of the EU regulation since 1972, as well as of the “green card” system since its foundation in 1949.

⁶⁰ *Agreement between the National Insurers' Bureaux of the Member States of the EEA and other Associate States (Multilateral Agreement)* <www.cobx.org/article/39/green-card> and <www.cobx.org/article/44/about-cob> accessed 10 January 2022.

⁶¹ Internal Regulations adopted by the General Assembly in Crete on 30 May 2002, revised in Lisbon on 29 May 2008, Istanbul on 23 May 2013, Tallinn on 2 June 2016, Helsinki on 8 June 2017, Marrakesh on 14 June 2019 and Brussels on 24 September 2020 <www.cobx.org/sites/default/files/cob_file_folder/Internal-regulations-Brussels-1-January-2021-clean-version.pdf> accessed 15 January 2022.

⁶² Internal Regulation, art 2, 9 provides: “‘policy of insurance’’: means a contract of compulsory insurance issued by a Bureau member covering civil liability in respect of the use of a vehicle’, COB, *Explanatory Memorandum to the Internal Regulations*, 9 <http://www.bbbaa-bbav.be/documents/REG_GEN/IR-Exp-Mem-final-eng.pdf> accessed 10 January 2022.

The exclusion of certain types of motor vehicles propelled exclusively by mechanical power from the scope of the EU regulation, to be assessed on the basis of their concrete maximum design speed and net weight, deprives not only the person liable for the accident caused with such a vehicle, but also the injured party, from the protection this EU MID has been guaranteeing them throughout the EEA Member States. As briefly discussed, the main arguments invoked to justify this exclusion are not convincing, especially if one takes into account the major legal uncertainty this entails for the compensation of an increasing number of (cross border) traffic accidents involving such vehicles. The impact is much greater than under the current right of EU Member States to exempt certain types of motor-powered vehicles from the compulsory motor vehicle liability insurance obligation. Since those excluded motor vehicles propelled exclusively by mechanical power are now considered as “non-motor-powered vehicles”, liability for traffic accidents can be covered by general liability insurance contracts (for private persons or businesses) governed by national insurance contract law. However, these are commonly non-compulsory, and without a guarantee fund backing at least the injured party.

It can be expected that some Member States will exercise their right to impose a specific compensation scheme, if only to maintain the protection that injured parties currently enjoy from the guarantee fund under the current exemption. Some might opt for a compulsory liability insurance for the rider. Others will not provide any specific regulation. The expected disparity of national rules will lead to an opaque and complex set of national compensation schemes, which will also impede the free movement of persons, services and goods.

Under the EU Amended MID the only way to avoid anarchy in the compensation of domestic and cross-border traffic accidents caused by those lighter and slower motor-powered vehicles propelled exclusively by mechanical power excluded from the definition of vehicle, is through cooperation and a common vision between the EU Member States, as well as the participating countries of the green card system. Was this not precisely what the founders of the green card system intended back in 1949 and what the former EU harmonisation efforts regarding compulsory motor vehicle liability insurance for those vehicles were all about?