20.10.2017

Public consultation on REFIT review of Directive 2009/103/EC on motor insurance

ABI and IFB joint response

About the ABI

The Association of British Insurers is the voice of the UK's world leading insurance and long-term savings industry.

A productive, inclusive and thriving sector, we are an industry that provides peace of mind to households and businesses across the UK and powers the growth of local and regional economies by enabling trade, risk taking, investment and innovation.

About the IFB

Insurance Fraud Bureau (IFB) leads the insurance industry's collective fight against insurance fraud. We act as a central hub for sharing insurance fraud data and intelligence, using their unique position at the heart of the industry and unrivalled access to data to detect and disrupt organised fraud networks.

Introduction

The ABI welcomes the opportunity to respond to this consultation, which raises a number of important issues for consumers.

Since the European Court of Justice's *Vnuk* ruling was handed down in 2014, the UK insurance industry has consistently voiced its concern that the implications of this are unclear, inconsistent and unworkable in practice. We do not believe it was ever the intention of the Commission that the Directive's scope extend to workplaces or entirely private land or that vehicles not deemed roadworthy be covered by compulsory motor insurance.

The Commission has put forward a proportionate response to this, which would clarify that the scope of the Directive only covers vehicles when in traffic. This would ensure the protection of 3rd party victims and maintain the integrity of the system, while also allowing member states to enforce the requirement for compulsory insurance in a manner consistent with local driving conditions.

The ABI sees no clear consumer benefit to extending the scope of the Directive and feels that the time and effort required across all member states to extend the scope to cover situations such as industrial, agricultural and recreational off-road vehicle use would be highly disproportionate.

Addressing these issues with a targeted amendment would allow the Commission to focus on the other important issues raised in this consultation. While the uncertainty created by Vnuk remains, this will significantly limit the opportunity to take forward action to improve the wider operation of motor insurance in the EU.

20.10.2017

B: Questions to Businesses, Business and Consumer Associations

B.1. GENERAL EVALUATION OF THE FUNCTIONING OF THE MID

Q1: Do you consider that the number of uninsured vehicles is problematic in your Member State? What are in your view the reasons for uninsured driving?

1. ABI members work closely in partnership with the Motor Insurers' Bureau (MIB), the UK Government and the police to address the causes and consequences of uninsured driving. The estimated level of uninsured driving on UK roads halved between 2005 and 2015. The number of claims against the guarantee fund involving an uninsured driver also significantly reduced during the same period. This was the result of the effective implementation of Continuous Insurance Enforcement (CIE), which came into effect from 2011 and involves close collaboration with the DVLA and the police. This work is also supported by industry investment in consistent public messaging and media campaigns, which highlight the importance of driving with the correct insurance.

2. However, there are still an estimated one million uninsured vehicles on the road at any one time. The number of uninsured driving claims has also recently increased, which shows the importance of sustained investment in tackling uninsured driving and reducing the number of untraced drivers and 'hit and run accidents'. The MIB is currently conducting detailed research to better understand the factors that cause uninsured and untraced driving. It is clear that a wide range of societal and economic factors combine with inaccurate perceptions among some members of the public about the importance of driving with adequate insurance.

3. Sustained investment in enforcement must be combined with a consistent and clear message about both when and why insurance is needed. The UK insurance industry would be very concerned should the concerns raised in this response about the scope of the Directive (Q 27 – 32) not be addressed. The new enforcement regime required for newly-in-scope vehicles and scenarios risks diverting resources away from this vital work on uninsured driving.

Q2: Do you consider that measures are needed at European level to reduce the levels of uninsured driving? If yes, what could those measures be?

4. Yes – the UK insurance industry would welcome the increased use of electronic data exchange and automatic number plate recognition technology.

B.2. EVALUATION OF SPECIFIC ELEMENTS OF MID, POSSIBLE OPTIONS FOR AMENDMENTS AND THEIR IMPACTS

Q3: Do you consider that the five-year period of the claims history statements is sufficient? If not, what should be the period for such statements: seven, ten, fifteen years?

5. The current requirement for five year claims history statement strikes the right balance between providing information to assist consumers and insurers and proportionate administrative costs.

6. If the Commission were to demonstrate that longer claims history statements would be of value to consumers, it would need to phase the implementation of this requirement. As the insurance market is highly competitive, consumers regularly shop around on an annual basis and therefore a single insurer will not necessarily hold the historic records necessary to extend the existing statements beyond 5 years. It must also carefully consider how to prevent any additional administrative costs related to providing these statements.

Q4: Should the format of claims history statements be standardised in the EU?

7. The ABI would welcome proposals to make it easier for insurers to get accurate information about the recent claims history of a policyholder who has moved from one member state to another. We would welcome the opportunity for further constructive engagement on how this could be achieved.

8. However, there are still potential limitations to the extent to which a claims history statement will inform the approach an individual insurer would take to a new customer, for the following reasons:

    - Firstly, not all insurance markets treat claims information in the same way. In the UK, insurers take account of both 3rd party claims (which fall within the scope of the Motor Insurance Directive) and 1st party claims (such as accidental damage or theft, which do not fall within the scope of the Motor Insurance Directive).
    - Secondly, driving conditions and road safety outcomes vary considerably across the EU. Therefore, while claims history information is one of the factors an insurer may take into account for a new customer, they may also take account of how accurately this information can be used to predict the likelihood of that driver making a claim in future.

9. Detailed thought would need to be given before making any changes to how insurers provide this information to customers, especially as most customers purchase insurance via digital platforms (such as Price Comparison Websites), which will not require paper documents provided by previous insurers are of limited use. There is no need to duplicate information already provided to consumers, for example when invitations to renew policies are sent.

Q5: Should insurers be obliged to take into account a claims history statement from a previous insurer (including from another Member State) for the purposes of premium calculation?

10. No additional obligations should be imposed on insurers.

11. The ABI supports making claims history information available to consumers so that they can make use of this when shopping around for insurance (a process most often conducted online via digital platforms). However, in order to maintain a

competitive insurance market, insurers should be entitled to maintain their own individual criteria for deciding what risk factors should be taken into account when setting a premium and how these different factors are weighted.

12. The Motor Insurance Directive plays an important role in ensuring 3rd party victims of road traffic accidents are treated consistently across the EU. However, there is no justification for extending the scope of the Directive so that it is used to regulate underwriting criteria, which must remain a matter for competition between individual insurers.

Q.6: Do you (if you are an insurer) take into account claims history statements from other insurers and how? If not, please explain why.

N/A

Q7: Would an obligation on insurers to make public their policies regarding no claims bonuses and bonus/malus discounts policies contribute to better treatment of policyholders when switching?

13. The provision of No Claims Discounts in the UK insurance market is already regulated by the Financial Conduct Authority, guaranteeing that consumers are given adequate information when shopping around.

14. For consumers, the process of establishing how many years of No Claims Discount they are entitled to is easy – they will always be told this at the point they need to renew their insurance cover. However, it is important to emphasise that while all insurers will use the same criteria for determining the number of years of No Claims driving a policyholder has, they will then use their own individual criteria to determine the level of bonus they are prepared to offer. This is an important part of a competitive motor insurance market and allows consumers to shop around and find the cover the best meets their individual needs.

15. In addition, following the Competition and Market Authority investigation into the private motor insurance market, the 'Private Motor Insurance Market Investigation Order 2015' was introduced, setting clear requirements for the provision of No Claims Bonus Protection policies.

16. Therefore, there is no justification for additional regulation through the Motor Insurance Directive.

17. The UK insurance industry recognises the importance of ensuring consumers fully understand how claims history statements are used and how any No Claims Discounts are calculated. Since people can be reluctant to read pages of advice about buying insurance, however helpful and plainly written it is, the ABI is currently rolling out a new digital media campaign specifically aimed at getting helpful advice in front of the general public where they are most likely to see it. The campaign, called 'The Insurance Experiments', is based on a series of short and colourful animations which link through to infographics explaining the specific issues further. The ABI is promoting this new content on social media to ensure it

reaches the general public. One of the issues covered in this campaign is how consumers can benefit from the No Claims Discounts offered by insurers.

Q8: Do you have other comments related to the portability of claims history statements?

18. No

B.2.2 PROTECTION OF INJURED PARTIES WHEN A CROSS-BORDER MOTOR INSURER IS INSOLVENT

Q9: In cases where an insurer providing insurance cross-border in another Member State becomes insolvent, what is the most appropriate solution in the case of an accident caused by a policyholder of that insolvent insurer?

a) No legally required intervention by any guarantee fund in any Member State with the consequence that the victim risks not receiving any compensation from an insurer or guarantee fund and may have to seek recourse from the responsible driver in civil courts (current situation if no voluntary agreement for compensation is in place).

b) A fund or compensation scheme in the Member State of the insurer should eventually compensate the victim/reimburse intervention of guarantee scheme of the Member State of residence of the victim.

c) A fund or compensation scheme in the Member State of the insured party (responsible driver) and/or accident should intervene, regardless of whether the insurer contributed to that fund or not.

d) A fund or compensation scheme in the Member State of the insured party (responsible driver) and/or accident should intervene, only if the insurer contributed to that fund.

e) An EU-wide fund with separate contributions.

f) Another treatment (please explain which one).

19. The ABI would favour Option F. In the UK, the Financial Services Compensation Scheme (FSCS) deals with any claims arising as the result of an insolvent insurer. The FSCS applies to insurance providers (and other financial services providers) authorised to conduct business within the UK, including those authorised by their home regulator, for any operations within the UK.

20. All policyholders who have obtained their cover in the UK are covered by the FSCS. This mechanism continues to work well and ensures policyholders (and any 3rd party victims) are protected in the event of an insolvency.

21. As the ABI indicated in its response to the 2016 Green Paper on Retail Financial Services, we are supportive of a minimum harmonisation directive on Insurance Guarantee Schemes (IGS). The ABI does not believe this should only be introduced for the motor insurance market, as adequate protection against the

consequences of insolvency is equally necessary for other forms of insurance. However, we believe this would address the issues raised in this consultation paper regarding the compensation of any 3rd party victims of road traffic accidents and would ensure these injured parties were not disadvantaged if there were disputes between member states and/or regulatory bodies about where responsibility for the insolvency lies.

22. The low incidence of insurance insolvencies in the UK and the long timeframe over which claims are paid means there is no need for pre-funding of an IGS. Establishing a directive on a minimum harmonisation basis would also ensure that differences within individual markets can be accounted for.

Q10: Should injured parties seek compensation from the competent body in the Member State of:

a) their residence, in which case this body would have a recourse towards the body of the Member State where the insurers has its head office of the insurer

b) where the insurers has its head office.

23. The ABI believes that in the overwhelming majority of cases claimants would prefer to present their claim in the country where they are resident. When an insurer becomes insolvent, it should be the responsibility of regulators and the insolvency guarantee scheme (as proposed in response to Q9) to ensure any prospective claimants are given adequate information about where they should present their claims.

Q11: Should EU law provide that in the case of insolvency of the insurer, compensation to the victim must be provided in full?

24. Victims of road traffic accidents should never be disadvantaged by an insolvency. This could be addressed as part of a wider consideration of the operation of an Insurance Guarantee Scheme, as proposed in our answer to Q9 above.

Q12: Do you have other comments related to protection of victims where a cross-border motor insurer is insolvent?

25. In the UK, there is a clear distinction between the role of the Motor Insurers' Bureau (MIB), which acts as the guarantee fund for claims involving uninsured or untraced drivers and the Financial Services Compensation Scheme (FSCS), which acts as the guarantee fund in the event of an insolvency.

26. As explained in the ABI's answer to Q1 & Q2 above, the MIB plays an important role not just in settling claims but also in pro-actively addressing the causes of uninsured driving and 'hit and run' incidents. The UK already has an effective and well-understood process for dealing with insolvency and there is no need for the MIB's role to be altered in this respect. Member states should be obliged to ensure there are clear and consistent routes to compensation (as is the case in the UK), but the Directive does not need to mandate that the responsible body with regards to insolvency is the same as that responsible for claims involving uninsured or untraced drivers.

B.2.3 MINIMUM AMOUNTS OF COVER

Q13: Should the minimum amounts of cover continue to be the same in all EU Member States?

27. Yes – the minimum amounts of cover should be consistent across all member states. Individual countries can then determine if additional cover is appropriate. In the UK, no minimum level is set for personal injury liability – compensation awards are unlimited and reflect the nature of injury and the ongoing needs of the individual.

Q14: Should the minimum amounts of cover be lower, higher or remain the same compared to what they currently are under MID?

28. The current minimum level of cover as set in the Directive is adequate and does not need to be increased.

Q15: Should MID differentiate between types of vehicles (such as electric bicycles, lorries, tractors, etc.) for the determination of the minimum amounts of cover?

29. Differentiating between different types of vehicle would create unnecessary complexity. There is no need to introduce such differentiation between classes of vehicle.

30. Compensation awards should reflect the level of damage incurred, regardless of what vehicle caused the accident. Within a competitive market, insurers can use underwriting models to ensure that premiums for different categories of vehicles accurately reflect the risk posed.

Q16: If so, what should be the minimum amounts of cover for those different types of vehicles? Please specify.

N/A

Q17: Do you have other comments related to minimum amounts of cover?

31. No

B.2.4 DEEMED INSURANCE COVER AND INSURANCE CHECKS

Q18: Should MID permit systematic checks on insurance by electronic means without physically stopping the vehicle?

Q19: Should the cross-border exchange of information on number plates and linked insurance policies be improved and/or streamlined between Member States?

Q20: Does the current system of determining the Member State where the vehicle is based capture adequately all conceivable situations? If not, please state why.

Q21: Do you have other comments related to insurance checks?

32. As stated in response to Q1-2, the ABI works closely with the Motor Insurers' Bureau on questions related to the enforcement of compulsory insurance and uninsured driving. We therefore endorse the MIB's response to this question. In particular, we emphasise that electronic checks on vehicles play a vital role in enforcing the requirement for uninsured driving and therefore additional cross-border co-operation on this work would be valuable. Additional exchange of information on a cross-border basis would not inhibit the ability of drivers to travel cross-border as such checks do not require the vehicle to stop.

B.2.5 PROTECTION OF VISITORS

Q22: Is the protection of visiting victims provided under MID sufficient? Is there a level playing field with the Green Card protection?

33. The current level of protection of visiting victims is sufficient and the ABI is not aware of any examples that suggest there is not a level playing field within the Green Card system. At the point where the UK leaves the European Union, we believe it would be beneficial for both the UK and all EU member states to maintain the UK's current involvement in the Green Card and visiting victims processes, in order that any EU citizens involved in cross border travel to the UK continue to benefit from this system. As indicated in our answer to Q9, the ABI believes that the implementation of a minimum harmonisation directive on Insurance Guarantee Schemes would address any challenges relating to different approaches taken to insolvency in certain member states.

Q23: Does the functioning of the claims representatives, information centres and compensation bodies need to be improved? If so, how?

34. The ABI is not aware of any significant concerns with the operation of these systems. The UK insurance industry is committed to continuing to work to improve the day-to-day operation and functionality of this process to ensure claims are settled efficiently and would welcome the opportunity to be part of further consultation on specific proposals in this area.

Q24: Do you have other comments related to claims concerning visiting victims?

35. No

B.2.6 TERMINOLOGY AND DEFINITIONS

Q25: Are there any terminology or definition issues in MID that undermine its effective functioning?

36. Yes

Q26: If the answer to the previous question is in the affirmative, please state the issues and explain their effect on the protection of victims of traffic accidents.

37. The lack of clarity created by differing interpretations of the scope of the Directive following the ECJ *Vnuk* judgment and subsequently highlighted by a number of further referrals to the ECJ (most notably, *Pinheiro Vieira Rodrigues* - C-514/16) for further clarity on issues raised by *Vnuk* urgently needs to be addressed by amending the scope of the Directive to confirm that it is intended to cover traffic situations only. The ABI's views on this issue are set out in more detail in response to Q27 – 32 below.

1.7. B.2.7 SCOPE

Q27: Should the protection provided under MID include liability for accidents irrespective where they occur, thus both on public roads and private property?

38. No – the provisions of the Motor Insurance Directive can only be effectively applied and enforced in clearly defined traffic scenarios. To be absolutely clear, the insurance industry does not dispute that there are accidents that occur on private land (sometimes caused by vehicles and mobile devices) and that those victims should be entitled to redress. However, this is not the issue under consideration in this consultation. This consultation considers where compulsory motor insurance should be required and where other arrangements need to apply.

39. Motor insurance plays a vital role in protecting all users of the road network and has a crucial role in ensuring that road traffic accidents do not have a disproportionate impact on the wider economy. The protection provided to road traffic accident victims by the provisions of the Motor Insurance Directive is dependent on a competitive insurance market.

40. It is right that motor insurance is compulsory and that robust enforcement measures are in place to ensure that all drivers contribute to the shared cost of the system (especially as all road users are also potential beneficiaries if they themselves are the victims of an accident).

41. However, the implication of extending this requirement to vehicles used on private land would be that road users, whose premiums ultimately fund the motor insurance guarantee fund required by the Directive, are also expected to fund a regime that would also apply to a wide range of industrial, agricultural and recreational activities. These activities have no link to the activities motorists purchase insurance to cover and should not be part of the same system.

42. A compulsory motor insurance regime can only operate effectively where there is an unambiguous definition of both the kind of driving activities it covers and where it applies. Since it was first introduced in the UK in 1930, compulsory motor insurance has operated alongside the wider obligations placed on drivers by the Road Traffic Act, and would not be viewed by insurers as an appropriate form of

cover for non-traffic scenarios (as drivers do not need to be trained, licensed or comply with speed limits and driving regulations and vehicles are not required to go through type approval, be licensed or registered and are not subject to MOT and roadworthiness requirements.)

43. The insurance industry is not aware of any evidence that calls into question the current process for resolving off-road accidents (whereby those injured in off-road settings can seek compensation from those responsible, with compensation often funded in the UK by either Public Liability insurance or compulsory Employer's Liability insurance or, in some instances, via an optional add-on to a policy to cover off-road use). Attempting to make settling off-road claims part of the Motor Insurance Directive regime would inevitably require a total overhaul of these well-established processes. There is no evidence to justify a reform of this scale.

44. Furthermore, it could potentially create significant inconsistencies and uncertainty for claimants - when accidents occur in workplaces or during recreational events, the process for resolving such incidents should be consistent. When accidents in workplaces occur, all claimants should be entitled to consistent treatment. The implication of extending the scope of the Motor Insurance Directive into off-road workplaces is that there could then be a separate legal process for claiming compensation for any accidents involving something with wheels, which would be both confusing and potentially unfair on accidents victims.

Q28: In light of the Vnuk ruling, should it be left to the discretion of individual Member States to exempt certain natural or legal persons, certain public or private vehicles, certain types of vehicles or vehicles bearing special number plates that normally fall under MID, provided that the victims are otherwise compensated? If not, why not and what action should be taken?

45. The challenges created by the unintended consequences of the ECJ *Vnuk* judgment cannot be resolved by member states extending or altering their use of derogations. There are certain classes of vehicle that, when used as road traffic, need to be covered by compulsory motor insurance. Therefore, these vehicles cannot be derogated. However, if that same vehicle is used on private land in an industrial, agricultural or recreational setting, it would not be possible to continue to enforce a requirement for compulsory insurance.

46. Therefore, no change to the existing criteria for allowing derogations is needed. Instead, the Directive must be amended to clarify that it applies only to vehicles when used in traffic.

47. Member states need discretion to make appropriate derogations from the compulsory motor insurance requirement, to accommodate local driving conditions and national legal systems.

48. It has long been established that member states can, where appropriate, make derogations from the compulsory motor insurance regime where they believe insurance is not the best mechanism to compensate victims of accidents involving these persons or vehicles. Some member states have made more use of the option

to derogate than others. This flexible approach has worked well, is in the interests of both vehicle users and victims and therefore should be maintained.

49. Any derogation must be on the basis that the designated guarantee fund for uninsured or untraced drivers would still provide compensation. Therefore, as it is other road users who ultimately fund these guarantee funds through their premiums, the ABI believes derogations should only be used in very limited circumstances and only after a comprehensive risk assessment has demonstrated that the likelihood of claims being brought against the guarantee fund is low.

50. The ECJ *Vnuk* judgment, as the ABI understands it, did not question the concept of derogations. Instead, the suggestion of some interpretations of the judgment is that the compulsory motor insurance requirement should be seen to apply to any use of any vehicle or potentially-mobile device or transportation equipment (within the broad definition of a 'normal function') regardless of whether or not the use is within the context of road traffic. Interpreting the requirements of the Directive in this way would be unworkable, unenforceable and unfair.

51. The approach taken since the Motor Insurance Directive was first introduced in 1972 remains the correct one. There must be a clear distinction between road traffic scenarios where a licensed driver of a vehicle assumes legal liability for any injuries or damage inflicted on a third party and non-road traffic scenarios, where drivers will not necessarily be licensed and where legal liability may instead fall on employers or event organisers.

Q29: What types of vehicles, if any, should be excluded from the scope of MID at EU level?

52. The UK insurance industry would not recommend that the Commission seeks to define which individual categories of vehicles are considered to be either in scope or out of scope. Instead, the scope of the MID should apply to any vehicle intended to adapted for use in traffic. Member states should then determine which vehicles are appropriate for use in local traffic situations, having considered safety implications and local transport needs.

53. Public roads are a shared space where each driver must be appropriately licensed and where each is entirely responsible for their own actions. Every driver on the road has the right to expect that their fellow road users have the same legal obligations as they do. For that reason, it is vital not only that the Motor Insurance Directive applies to every vehicle on the roads, but that adequate resources are devoted to enforcement and to preventing uninsured driving.

54. In very limited circumstances, member states may allow certain vehicles to be exempted or derogated from being covered directly from insurance (see answer to Q28 above). However, when used in traffic, these vehicles must remain within the scope of the Motor Insurance Directive in order that the designated guarantee fund is able to compensate third parties for injury or damage.

55. Attempting to exclude certain classes of vehicle from this provision risks confusion and would create ongoing challenges whenever new forms of vehicle come to market. The Motor Insurance Directive should continue to operate on the basis that any vehicle is considered within scope, provided that it is being used in traffic and provided that, where appropriate, member states retain a degree of flexibility to accommodate local transport requirements through derogations.

Q30: Should compulsory MTPL insurance cover accidents resulting from agricultural, construction, industrial, motor sports or fairground activities?

56. The ABI would be extremely concerned were the scope of the Motor Insurance Directive to extend to any of the activities listed above. Attempting to do so risks creating confusion and uncertainty for participants in any of these activities. This is the reason why the UK insurance industry has consistently voiced concern about the unintended consequences of the ECJ *Vnuk* judgment.

57. The UK insurance industry's view is that this would be wrong in principle. There should be no attempt to artificially stretch the definition of motor insurance, a regime developed to protect users of public roads, into situations where employers, event organisers or local authorities must have primary responsibility providing the level of safety and certainty the public need (rather than the individual drivers or operators of vehicles/devices). In the UK, there are already a range of well-established mechanisms in place to protect the safety of employees and participants in the activities listed above, including but not limited to a requirement that businesses have employer's liability insurance.

58. The ABI has worked closely with other industry bodies to understand and analyse the unintended consequences of the ECJ *Vnuk* judgment. In particular, we have worked closely with the Motor Insurers' Bureau (MIB) and share the concerns about challenges associated with particular devices outlined in detail in the MIB's response to this consultation.

<u>Motorsports</u>

59. Attempting to extend this requirement to motorsports could mean the scope of the Directive extending to collisions between two willing participants in a motorsport event. Motorsport events vary significantly in terms of speed and risk, but it is commonly accepted by participants that a motorsport event is inherently more dangerous than driving in road traffic – as it involves driving at high speed and undertaking risky overtaking manoeuvres. There are considerably more accidents and collisions in motorsport events than on normal roads.

60. Insurance works on the principle of pooling risk. When a very high volume of claims is pooled amongst a comparably small number of participants, as will be the case with motorsports, this will directly impact the premiums charged. Therefore, motorsport event organisers could face either very high insurance costs or might be unable to obtain appropriate cover. This might also mean an increase in unlicensed and unregulated events.

61. It was never the intention to have the same insurance regime for motorsports as is used on public roads. Given that motorsports events currently operate in a well-regulated environment across the EU (with adequate insurance already in place to protect spectators, employees and the general public), the ABI believes there is simply no evidence to justify bringing these events into the scope of motor insurance. The Commission must act to address what would be an undesirable unintended consequence.

Impact on Businesses

62. While motorsports is perhaps the most stark example of the unworkable and unenforceable nature of the ECJ *Vnuk* judgment, it is vital that the Commission takes account of the wide number of sectors that would be negatively affected by being forced to either significantly amend their existing insurance cover or take out insurance cover they have never previously needed.

63. The ABI has already provided a detailed submission to the UK Department for Transport outlining the many costly administrative challenges associated with the wide range of vehicle types potentially brought into scope as a result of the ECJ *Vnuk* judgment and we would be happy to provide further detail to the Commission on the specific challenges presented for individual businesses.

64. It is worth re-emphasising at this point that had an accident in similar circumstances to the original *Vnuk* case occurred in the UK, the claim should be settled through employer's liability (and covered by compulsory insurance). Given that there is no evidence that the issues raised by the Vnuk case are a problem in other member states and given the European Commission's commitment to using the REFIT process to "remove red tape and lower costs" and "make EU laws simpler and easier to understand", there can be no justification for imposing a considerable administrative and cost burden on the a wide range of SMEs who use these newly-in-scope vehicles only in off-road scenarios (we have been informed by the UK Department of Transport that this could affect an estimated 1-2m vehicles).

Distortion of existing liability frameworks

65. In some of the scenarios potentially brought into scope, the ECJ *Vnuk* judgment's interpretation would create a potential safety risk. The organisers of any recreational event would normally have legal responsibility for ensuring the safety of everyone who takes part. However, were individual participants required to make their own insurance provisions, this would take responsibility away from event organisers. This is not appropriate as, in off-road settings, drivers are not required to be licensed or trained. In effect, treating such events in the same way as normal road use could mean the event organisers no longer having any direct legal responsibility for accidents and this would risk allowing unscrupulous event organisers to neglect vital safety requirements.

66. There is currently no harmonised EU-wide regime for civil liability for industrial, agricultural or recreational accidents. Therefore, were the Commission to demand an extension of compulsory motor insurance, it would create an unworkable

scenario where member states would have to adapt their own local liability regimes to incorporate new rules for use of vehicles within these activities. Within this, the range of potential applications of vehicles and devices now potentially brought in to scope of the Directive is extremely broad and potentially complex. In particular, considerably further consultation would be needed to cover industrial and agricultural devices potentially capable of being used as vehicles, but not enabled to do so at the time of use. Therefore, it would be very difficult for member states to implement these new requirements in a consistent or harmonised fashion.

Q31: Should compulsory MTPL insurance cover accidents that occur on areas that the public are not allowed (legally) to access?

67. No. This issue – even more so than the concerns raised in the answer to Q30 above – is the insurance industry's biggest concern in relation to the unintended consequences of the ECJ *Vnuk* judgment.

68. Compulsory motor insurance can only operate effectively in areas where its application can be consistently enforced. As there is no requirement for those using vehicles on private land to be licensed or registered, there is no way to enforce these requirements. Any attempt to do so will divert resources away from the vital task of preventing uninsured driving on roads and therefore could have a negative impact on the issues referred to in Q1 and Q2. We also refer the Commission to the detailed response of the Motor Insurers' Bureau (MIB) on this point and the extensive evidence they provide with regards to the problems this proposal would be expected to create.

69. An extension of compulsory motor insurance into private areas, where there will be no CCTV or police ANPR technology and often no witnesses, will make both checking a vehicle's insurance status and investigating the circumstances of a claim very difficult.

70. Some respondents to this consultation may suggest that a private estate is no different in this regard to a comparatively remote country road. However, the difference is that even remote roads are public spaces that an insurer can easily access. An insurer that, for example, receives a suspicious claim where someone has allegedly crashed their vehicle into a road sign or a tree is able to attend the scene and validate whether the information provided is accurate. The same would not necessarily be true on private land, as the insurer would not necessarily have the right to access this space to conduct an investigation without the consent of the landowner.

71. Extending the scope of motor insurance onto private land could also provide a new opportunity to bring fraudulent or exaggerated claims. Motor insurance fraud remains the most common fraud and the highest value – the most recent statistics from the ABI show that in 2016 there were 125,123 fraudulent claims with a value of £1,276m. This represented a fall on earlier years and demonstrates the successful approach taken by the industry, including through the work of the Insurance Fraud Bureau (IFB) and the City of London police's Insurance Fraud Enforcement Department (IFED).

72. However, while the industry has proven increasingly effective at tackling organised fraud, there is still a significant challenge with opportunistic fraud – which now makes up around 90% of claims fraud by volume. Individuals are often caught in the spur of the moment, in the mistaken belief that insurance fraud is a victimless crime. Fraud is not just a problem in the private motor insurance market, but is also prominent for commercial vehicles, where the total volume of fraud was an estimated £124m in 2016, with the average fraudulent claim valued at £8,690.

73. Experience from other forms of personal injury claims demonstrates starkly the challenges that could arise as a result of the extension of scope of motor insurance. Recent examples include a 500% increase in the number of claims by holidaymakers for sickness between 2013 and 2016 and before that a 250% increase in the number of claims for Noise Induced Hearing Loss between 2010 and 2013. This trend of sudden spikes in particular claims shows the entrepreneurial and adaptive nature of the claims management sector and a willingness to bring claims where it would be difficult for compensators to prove that the claims are false.

74. The example of holiday sickness claims also demonstrates the capacity for organised and opportunistic fraudsters to use the legal system of one member state to significantly disrupt the operation of markets in another member state (in this case, Spanish holiday resorts). In the context of the scope of the Directive, it is possible that these organised fraudsters will target those member states known to have less robust enforcement mechanisms for any new requirement to insure off-road vehicles.

Q32: Do you have other comments related to the scope of MID?

75. As the ABI has already indicated in previous submissions to the Commission, the UK insurance industry is extremely concerned about the unintended consequences of the ECJ *Vnuk* judgment. It is unfortunate that the REFIT consultation document does not contain enough analysis of the practical implications of the Commission's 'baseline option', which would impose highly costly for member state governments, industry and individuals. The ongoing legal uncertainty in this area means that action to address the unintended consequences of the ECJ *Vnuk* judgement must be treated as a priority. We have set out our views on these issues in more detail below:

<u>Risks of extending the scope of the Directive</u>

76. The Motor Insurance Directive has been in effect since 1972, and throughout that time has only been understood to apply to traffic scenarios. The ECJ *Vnuk* judgment has raised questions over whether that interpretation was consistent with how the Directive is worded, in theory. However, before that judgment, there had never been any suggestion from the Commission that compulsory motor insurance should extend onto private land or into industrial, agricultural, recreational or sporting activities. We are not aware of any member state that has fully or consistently adopted this interpretation of the ECJ *Vnuk* judgment.

77. It is vital that the Commission does not disregard or underestimate the fact that, in an environment of considerable uncertainty, it is at risk of creating an entirely unenforceable law – both because it will be impossible to check whether these vehicles actually have insurance and because that insurance may not always be commercially available. Making insurance compulsory for vehicle users and operators does not compel insurers to actually provide that cover. Insurers will take individual decisions about how and when to provide cover, having considered whether doing so would be viable commercially, if appropriate reinsurance is available and only if they can do so in a way that meets the regulatory obligations of Solvency II.

78. The ABI has worked closely with the Department for Transport and the Motor Insurers' Bureau to analyse the potential cost implications of extending the scope of the Directive (and we endorse the estimates provided in their respective responses to this consultation). We believe this demonstrates conclusively that, without action to clarify the scope of the Directive, this could expose a wide range of business across the EU to considerable uncertainty and financial risk, entirely unnecessarily.

79. Making a small and targeted amendment to the Directive in order to minimise this unnecessary disruption and allow member states to continue with existing motor insurance regimes would not preclude the Commission from conducting a more detailed analysis of off-road activities, if it was felt there was evidence to justify this.

Ongoing legal uncertainty

80. The ECJ *Vnuk* judgment was handed down in 2014. Since that point, the European Commission has already launched one consultation exercise on the issue (seeking views on its 2016 Inception Impact Assessment), without reaching any conclusion about its proposed course of action. The UK Government has also conducted its own consultation exercise. There have also subsequently been further referrals to the ECJ relating to issues raised in that initial judgment. Clearly, this shows that the ECJ *Vnuk* judgment has not provided the legal clarity that motor insurance consumers and claimants need.

81. Furthermore, as the Commission itself acknowledged in its 2016 Inception Impact Assessment, even before the additional uncertainty created by *Vnuk*, there was a lack of consistency in how the Directive was understood in different member states - "*These differing interpretations, prior to the ruling, were possible due to varying wording in different language versions of the Directive. While the French (and several other) versions of the Directive imposed the obligation to insure the vehicles "in traffic", the English (and several other) version required that "the use" of vehicles was subject to that obligation*."

82. In this context, the ABI believes the Commission should immediately rule out its 'baseline option'. Given the vital role that motor insurance plays in compensating victims of serious road traffic accidents, the ongoing legal uncertainty cannot be allowed to continue. The Commission must act to ensure that all member states

are working from the same Directive and clearly, without an amendment to the original text, the various alternative translations used in certain member states must be changed so that they align directly.

Lack of detail on the practical implications of the ECJ *Vnuk* judgment

83. The ABI strongly supports the proposal to amend the Directive to clarify that it applies only to vehicles used in traffic. In practice, this would simply clarify that existing practices can continue and therefore a represents the most proportionate response to the issue of those outlined in the consultation.

84. The option that the Commission describes as its "baseline" option is only a baseline option in the sense that it would mean the Commission taking no immediate action. For member states, this option would require significant change to established practice and, in most cases, amendments to domestic legislation.

85. It is not clear from the consultation document whether the practicalities of what is described as the 'baseline option' have been analysed in any detail. The REFIT consultation document does not provide any information on what timescales member states would be expected to work to in implementing the proposed change and does not provide any guidance on what transitional measures would be made available, especially for those activities for which no insurance cover is currently commercially available.

86. Though presented as the 'do nothing' option, in reality aligning the practical implementation of the Motor Insurance Directive with the interpretation in the ECJ *Vnuk* judgment will be an expensive and resource-intensive piece of work. It will require close and detailed co-operation between officials in the Commission and counterparts in each member state over several years.

1.8. B.2.8 TECHNOLOGICAL EVOLUTION –AUTONOMOUS VEHICLES

Q33: Should autonomous vehicles continue to be insured for liability to victims of accidents the same way as vehicles with drivers?

87. The ABI does not believe any amendments to the Motor Insurance Directive are necessary to accommodate any anticipated developments with automated driving technology in the next 5-10 years. Any victim of a road traffic accident – whether caused by a manually operated or automated vehicle – should be entitled to the same levels of compensation.

Q34: Should MID be clarified in any way to reflect the development of autonomous vehicles? If so, please substantiate your answer and explain how.

88. No – the Directive does not need any further clarification or amendment at this stage. However, we recommend that the Commission take an active interest in the ongoing UNECE-level discussions about how to regulate and provide type approval to various forms of automated driving and ensure that vehicles are only approved for commercial sale and use when there is clarity about whether

adequate processes are in place to determine liability in the event of a crash occurring while the vehicle is in automated mode.

Q35: Do you have other comments related to technological evolution?

89. The UK insurance industry is fully supportive of the development of automated driving technology. The ABI has been closely engaged with the development of the UK Government's forthcoming Automated and Electric Vehicles Bill, which is intended to clarify the insurance requirements for the first tranche of fully automated vehicles up to at least 2025. It is our view that this legislation is entirely consistent with the aims and principles of the Motor Insurance Directive. We would be happy to continue to provide expert advice and analysis to the Commission as the technology develops and comes to market.

90. The ABI has worked with Thatcham Research to develop a detailed set of proposals for the technical, safety and data accessibility standards that would be needed to underpin a competitive insurance market for automated driving (available in full here). We would welcome the opportunity for further engagement with the Commission on these issues as, whatever the final outcome of the Brexit negotiations, we believe it would be in the interests of both the UK and the EU to adopt common approaches to these issues.

1.9. B.2.9 TRANSFER OF VEHICLES

Q36: Should the current legal framework applicable for dispatched vehicles be modified in any manner? Please specify how.

91. The ABI is not aware of any concerns relating to the legal framework for dispatched vehicles within the UK insurance market.

Q37: Do you have other comments related to the transfer of vehicles?

92. No.

B.2.10. ANY OTHER ISSUES

Q38: Are there any other issues not falling within the remit of the above questions that might require action at EU level you wish to raise? What would be your preferred solution to the identified issue?

93. No