The obligation on vehicle owners to take out compulsory insurance. Comment on the Judgment by the Court of Justice of the European Union of 4 September 2018 (Case C-80/17)

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1. Introduction

The judgment by the Court of Justice of the European Union of 4 September 2018 (Case C-80/17) analyses a situation which raises the question of whether the owner of a motor vehicle is obliged to take out compulsory liability insurance even if they do not use the vehicle.

For these purposes, the CJEU once again interprets Article 3 of Council Directive 72/166/EEC of 24 April 1972, the First Directive on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability, which establishes in section 1 thereof that "Each Member State shall, subject to Article 4, take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance. The extent of the liability covered and the terms and conditions of the cover shall be determined on the basis of these measures".

In this particular case, there is also the attendant circumstance that the vehicle, which the owner did not use due to health problems, had been used by her son without her permission.

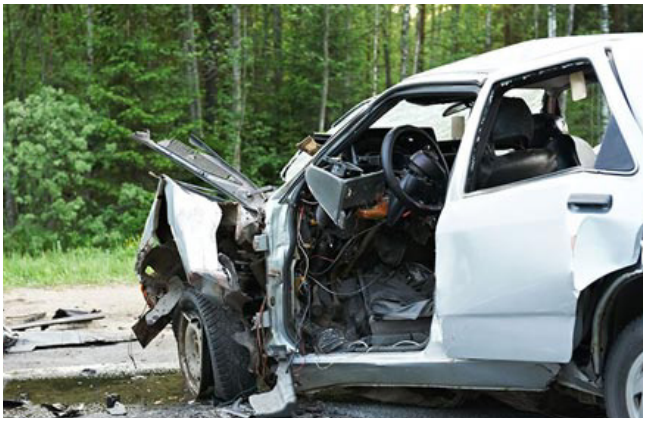
The CJEU reminds us that, on the one hand, any vehicle deemed fit to be used, whether or not it is actually driven for whatever reasons, must be properly insured and, on the other hand, the Guarantee Funds cannot take responsibility for cases where a vehicle is not obliged to be insured for whatever circumstances, such as, for example, being decommissioned. This interpretation, as the judgment says, guarantees that the victims are compensated whatever happens, either by the insurer under a policy taken out for such purpose, or by the organisation envisaged in Article 1, Section 4 of the Second Directive in the case where the obligation to insure the vehicle involved in the accident has not been satisfied or when the vehicle in question has not been identified.

Following on from this decision, the CJEU also delivered judgment on other matters relating to the central issue, such as how vehicles should be considered for the purposes of cover by Guarantee Funds if their owners have not taken out the compulsory insurance, or who the persons are from whom such Funds should seek recovery of pay-outs after they have compensated the victims of road accidents in such cases.

2. Events that have prompted preliminary rulings to be sought from the CJEU

As of that date the owner of the vehicle had not taken out insurance for liability arising from it being driven on the road, which led to the Portuguese Guarantee Fund attending to compensation of the victims of the accident referred to. Nevertheless, after the compensation had been paid out, the Fund filed a claim against the vehicle owner and the

daughter of the deceased driver for reimbursement of the compensation payment made.



In answer to the suit for recovery, the vehicle owner alleged that she was not liable for the accident and that, insofar as she had parked her vehicle on the courtyard of her house and had no intention of it being driven, she was not under any obligation to take out insurance for liability arising from the driving of the vehicle.

The court of first instance found in favour of the claims made by the Portuguese Guarantee Fund, although, following an appeal that was filed by Ms. Juliana, the court of second instance, the *Tribunal da Relação*, understood that there was no obligation on the vehicle owner to take out liability insurance.

As a result, the Guarantee Fund filed an appeal to Portugal's Supreme Court of Justice in which it insisted that any vehicle owner has an obligation to take out liability insurance regardless of whether or not they use the vehicle.

The Portuguese Supreme Court of Justice stated that the appeal to quash the decision by the court of second instance (petition for cassation) raised a first matter requiring a preliminary ruling by the CJEU which concerns the obligation on a vehicle owner to take out insurance for liability on the road arising from the mere fact of owning the vehicle, and whether such an obligation does not exist when, at the owner's decision, the vehicle is kept immobilised and away from a public thoroughfare, as in the case which we are dealing with here.

It therefore appears, as far as one can tell from the CJEU decision, that the referring court entertains doubts as to whether the owner should take out liability insurance given that she did not use the vehicle and kept it immobilised. Moreover, such doubt is further sustained by the fact that the vehicle was used without her consent.

Even so, the court wonders whether, if this were the case, if there were no obligation on the vehicle owner to take out the compulsory insurance, this would mean that the Fund does not have to intervene in circumstances such as those disputed in the main litigation.

On the other hand, the court also seeks a second preliminary ruling over whether the Fund can file an appeal with the intention of obtaining reimbursement of the compensation paid out to the victims against the vehicle owner who failed to meet her obligation of taking out liability insurance regardless of whether the owner is liable as a result of the accident in question, or whether it can only do so when the requirements are satisfied for declaring such liability, specifically the obligation to have effective control over the vehicle in the sense of Srticle 503, Section 1 of the Portuguese Civil Code.

2.1. First preliminary ruling sought

As has just been set out, in the case of the first preliminary ruling sought, the referring court essentially wishes to know if Article 3, Section 1 of the First Directive should be interpreted in the sense that it is compulsory to take out liability insurance when the vehicle in question is parked on private land merely at the decision of its owner, who no longer intends to drive it.

In the CJEU's opinion, Section 1 of Article 3 of the First Directive obliges member states to establish a general obligation to insure vehicles in their legal systems. This obligation is irrespective of the use made of the vehicle, as the European Court itself set out in its judgment of 4 September 2014 (the Vnuk case).

Matters being thus, the CJEU considers that "a vehicle that has been registered, and therefore has not been legally taken out of use, and which is suitable for driving, fits the concept of a «vehicle» as such in the sense of Article 1, Point 1 of the First Directive and therefore does not cease to be subject to the obligation to insurance that is envisaged in Article 3, Section 1 of said Directive merely because its owner no longer intends to drive it and immobilises it on private land".

It could be held, as do the German, Irish, Italian and British governments in their written pleadings, that such a broad interpretation of this obligation to insure is unwarranted, given that the Guarantee Funds of the various member states are there to cover such cases. Nonetheless, and we believe rightly so, the CJEU holds that the compulsory involvement of such bodies in such a situation cannot extend to cases where the vehicle involved in an accident is not subject to the obligation to be insured.

In short, the CJEU reminds us that, on the one hand, any vehicle deemed fit to be used, whether or not it is actually driven for whatever reasons, must be properly insured and, on the other hand, the Guarantee Funds cannot take responsibility for cases where a vehicle is not obliged to be insured for whatever circumstances, such as, for example, being decommissioned. This interpretation, as the judgment says, guarantees that the victims are compensated whatever happens, either by the insurer under a policy taken out for such purpose, or by the organisation envisaged in Article 1, Section 4 of the Second Directive in the case where the obligation to insure the vehicle involved in the accident has not been satisfied or when the vehicle in question has not been identified.

2.2. Second preliminary ruling sought

The second ruling sought relates to whether the Guarantee Fund can recover payment from the vehicle owner when the latter has not been responsible for the accident and moreover neither consented to nor authorised the use of her vehicle.

In this case the CJEU says that European legislation is not harmonised as regards persons whom the Guarantee Fund can approach in cases such as the one we are dealing with here, where it takes charge of attending to injured persons because the vehicle is not properly insured. Thus, member states can decide whether these organisations can only approach the driver responsible or, if the person is different, also the owner of the vehicle who has failed to meet their obligation to insure, such as occurred in the case studied in this decision.

Consequently, the judgment concludes that "Article 1, Section 4 of the Second Directive should be interpreted in the sense that it does not oppose a national rule which establishes that the organisation envisaged in this provision is entitled to file an appeal, besides against the person or persons responsible for the accident, against the person who was subject to the obligation to take out insurance against the liability arising from the driving of the vehicle that has caused the losses compensated by the organisation, yet had failed to take out any policy for such purposes, even if this person is not liable under civil law for the accident that causes these losses".

3. Regulation in the Spanish legal system

3.1. The obligation on vehicle owners to take out compulsory motor insurance

Under the Spanish legal system the regulation of this matter is similar to that laid down in the Portuguese Civil Code which we have just looked at. Thus paragraph 1 of Article 2.1 of the LRCSCVM (Law on civil liability and insurance regarding the driving of motor vehicles) establishes an obligation on all motor vehicle owners to take out liability insurance covering losses to third parties caused by using the vehicle in question. This provision was added to the rule through Law 21/2007 of 11 July amending the revised text of the LRCSCVM and the revised text of the LOSSP (law on the regulation and supervision of private insurance). In the wording of previous drafts this eventuality had not actually been considered, although such a duty incumbent upon the driver of the motor vehicle was taken for granted.

It could be said that this is not an obligation in the technical sense, but instead a legal duty that falls to a person who finds themselves in a certain situation (in this case deriving from ownership of a motor vehicle). The insurance policy can of course be taken out by someone else, in which case the duty to insure has been satisfied. This is confirmed in the second paragraph of Article 2.1 of the LRCSCVM when it states that "the owner shall be relived of such an obligation when the insurance policy is arranged by some other person with an interest in the insurance, who shall have to assert the capacity in which they are taking out the policy". Normally persons having an interest in arranging the insurance are those such as a custodian, lessee or a usufructuary of the vehicle, or an acquirer under an agreement of retention of title to it, or generally, any other person who, while not falling under any of these stated categories, uses or operates it; in other words usually anybody whose liability can be declared as a result of an accident in which the vehicle is involved.

At the same time, the owner of the vehicle must be considered as such under civil law, irrespective of who appears as such in the relevant registers or files. The provisions of Art. 4 of the compulsory motor insurance regulations, as they indicate, can only be credited as having presumptive scope of meaning where the article states "For the purposes of the obligation to insure against liability in using motor vehicles, it is assumed that the person considered to be owner of the vehicle is the natural or legal person whose name appears on the relevant public register".

3.2. Vehicles which have to be insured

With respect to those vehicles which have to be insured and which represent the object of the insurance contract, Article 1.6 LRSCVM refers to statutory regulation, which is provided for under Royal Decree 1507/2008 of 12 September endorsing the regulations on compulsory liability insurance with regard to the use of motor vehicles, article 1 of which defines the concept of a motor vehicle.

This article establishes that "For the purposes of liability in using motor vehicles and the obligation to insure them, motor vehicles are held to mean any vehicles that are suited to being drive overland and are powered by an engine, including mopeds, special vehicles, trailers and semi-trailers, the use of which on the roads requires administrative permission pursuant to the legislation on traffic, driving motor vehicles and road safety. Exceptions to the obligation to insure are trailers, semi-trailers and special towed machines the maximum weight of which is no more than 750 kilograms, as well as any vehicles that have been temporarily or permanently removed from the Directorate General for Traffic's Vehicle Register".

As can be seen, under the current compulsory motor insurance regulations the criterion of authorisation to be driven on the road is observed by adding to the 2001 regulations the wording "the use of which on the roads requires administrative permission pursuant to the legislation on traffic, driving motor vehicles and road safety". Administrative authorisation is covered in Article 66 of Royal Decree Law 6/2015 of 30 October endorsing the revised text of the Law on traffic, using motor vehicles on the roads and road safety, which is implemented by Arts. 25 et seq. of Royal Decree 2822/1998 of 23 December endorsing the General vehicle regulations.

What is useful to point out is that those vehicles which are not held to be "motor vehicles" according to the definition given will not fall within the coverage in the LRCSCVM and, as a result, if they do not have compulsory liability insurance, neither shall they be covered by the CCS, given the absence of one of the material pre-requisites under the aforementioned Law, the scope of application of which is defined as events on roads that have been caused by "motor vehicles".

This point has been analysed in the CJEU judgment which we have mentioned. Thus, in their pleadings, the governments of Germany, Ireland, the UK and Italy suggested that, in the case being examined, where the owner of the vehicle did not use it, a broad interpretation of the scope of the general obligation to insure would not be necessary insofar as the losses that occur in circumstances such as those in the main litigation can be compensated by the organisation envisaged in Article 1, Section 4 of the Second Directive. In short, the states referred to proposed that in such cases the Guarantee Fund should assume the losses and not sue for recovery from the owner of the vehicle, who did not use it and therefore, in a broad interpretation, would not be under an obligation to take out motor vehicle liability insurance.

Nonetheless, and we believe rightly so, in this decision the CJEU understands that the compulsory involvement of the Guarantee Fund in such a situation cannot extend to cases where the vehicle involved in an accident was not subject to the obligation to take out motor vehicle liability insurance. We must therefore be of the opinion that, in cases of identified vehicles, the Guarantee Fund will only bear losses to third parties when, in the absence of insurance, the vehicle is held to be a "motor vehicle" according to the legislation of each member state and which is suited to being driven, regardless of how it is ultimately used.

In the case being studied, the decision tells us that Ms. Juliana's vehicle was usually parked in a member state (Portugal), and, at the time the events took place, was registered and in working order, as is demonstrated by the fact that Ms. Juliana's son was driving it at the time of the accident. Therefore (the judgment goes on to say), "in these circumstances it was subject to the obligation to insurance that is envisaged in Article 3, Section 1 of the First Directive".

3.3. Vehicles no longer entered on the Register of the Directorate General for Traffic

We have seen that the final paragraph of Article 1 of the compulsory motor insurance regulations exempts vehicles from the obligation to be insured which have been temporarily or permanently removed from the Directorate General for Traffic's Vehicle Register, which raises certain practical problems. This provision in the regulations appears reasonable and thus, if a vehicle has been temporarily or permanently removed from the traffic register, there should be no requirement to keep it validly insured. Let us consider those persons who only use a moped which is on a property where they go on holiday once a year. It seems logical that they should be able to de-register it for the rest of the year and not have to keep the insurance for it effective, given that they don't use it for those 11 months, and this appears even truer if the vehicle is permanently withdrawn from use.

The problem that arises in practice with respect to de-registered vehicles, even those that have been permanently removed from the DGT (Directorate General for traffic) register, is that it is by no means rare for such vehicles to be used on the roads and cause traffic accidents. It is not uncommon for a vehicle that has been permanently de-registered to appear on the roads because it has not been taken to the breaker's yard or, having been left there, it has been sold. In such circumstances it is typical for them to be driven or ridden without the relevant compulsory motor insurance and the question is whether the Consorcio de Compensación de Seguros should have to take care of the losses caused by these vehicles pursuant to Article 11 of the LRCSCVM. What we should in fact be asking ourselves is whether or not such vehicles are actually "motor vehicles" for the purposes of the LRCSCVM and the regulations thereof. If the answer is no, they would not have cover from the CCS, while, on the other hand, if it is yes, they would have cover.

To answer this question, it should be pointed out that the vehicles mentioned in the cases that we have mentioned lack the documentation that makes them suitable for use on the road, such as a vehicle registration certificate and the vehicle technical inspection card or the certificate of characteristics in the case of mopeds. In the case of temporary de-registrations, this is because, pursuant to Article 37.2 of Royal Decree 2822/1998 of 23 December endorsing the General vehicle regulations, the vehicle registration certificates specific to cars or mopeds and the vehicle technical inspection card or certificate of characteristics will be ordered to be withheld until application is made for these documents to be returned after the temporary withdrawal from use has concluded, whereas in cases of permanent de-registration, this is because, pursuant to the article cited, the traffic authorities will cancel the vehicle registration certificates specific to cars or mopeds.

Further to the above, as regards the case of the re-authorisation of vehicles that have been definitively de-registered, Article 38 of the General vehicle regulations states that "Any owner or third person who submits sufficient accreditation to ownership of a vehicle that has been permanently withdrawn from the Register may obtain the vehicle registration certificate specific to cars or mopeds again when they apply for this from the traffic authority, either in the province where they have their address for legal purposes or else that where the vehicle was registered, and accompany those documents stated in appendix XV whenever the vehicle is declared roadworthy by the competent industry-recognised body subject to prior checking thereof for the sake of verifying that it satisfies the technical conditions set out in these

regulations. The traffic authority that issues the vehicle registration certificate specific to cars or mopeds shall give notification of this to the council of the catchment area that includes the legal address of the owner of the vehicle".

Therefore, within a strict interpretation of, and according to, paragraph 1 of Article 1 of the compulsory motor insurance regulations, it is highly doubtful whether these vehicles can be held to be "motor vehicles" to the extent that they are not "subject to obtaining administrative authorisation to take to the road", because, at least those vehicles that have been permanently de-registered as regards the traffic authorities do not have a vehicle technical inspection card or a certificate of characteristics (as may be the case) and, according to the previous paragraph, have to be declared roadworthy by the competent industry body subject to prior checking of this aimed at verifying that they meet the technical conditions envisaged in these regulations. If this is so, any losses caused by such de-registered vehicles will not fall within the scope of the LRSCVM and shall not be covered by the CCS if they are driven or ridden without the appropriate insurance.

Notwithstanding this, we take the view that in this case it would be necessary to adopt a more flexible interpretation and, for the purposes to which we are referring, to consider that such vehicles that are temporarily or permanently de-registered as regards the traffic register are "motor vehicles" and therefore that the losses caused without the appropriate insurance being attendant, should be covered by the CCS. It cannot be denied that, although at the time they lack the vehicle technical inspection card or the certificate of characteristics on account of the reasons cited, they have had these beforehand and "are in a position to recover them".

3.4. Cover from the Consorcio de Compensación de Seguros and its associated right of recovery

As could surely not be otherwise, Spanish legislation is similar to the Portuguese legislation which we have just outlined in the preceding paragraphs, given that both are the outcome of the transposition of EU directives on the matter.

Thus in Section b, Article 11.1 provides that, within territorial scope and up to the limit for compulsory insurance, it falls to the CCS: "to compensate for personal injury and property loss that is caused by a vehicle that is usually parked in Spain, as well as any caused on Spanish soil to persons who normally reside in Spain, or property which they own that is located in Spain, by a vehicle that is usually parked in a third country that is not a signatory to the accord between the national insurance bureaux of the member states of the European Economic Area and other associated states, in both cases where said vehicle is not insured".

Consequently, were an event such as that analysed in the CJEU judgment which we are commenting on to happen in Spain, the CCS would have to pay for the losses caused to third parties (passengers) on the same terms as the Portuguese Guarantee Fund did. Similarly, despite not being used by its owner, the vehicle in question had not been de-registered or taken off the roads and would be considered a "motor vehicle" according to Spanish legislation.

With regard to the right to sue for recovery, we have already stated that in this ruling the CJEU says that European legislation is not harmonised as regards persons whom the Guarantee Fund can approach in cases such as the one we are dealing with here, for which reason member states can decide whom the Guarantee Fund can apply to after attending to the victims.

In the case of Spain, as occurs in Portuguese law, pursuant to Article 11.3 of the LRCSCVM, having paid out compensation to victims who have suffered damage or injury that has been caused by an uninsured vehicle, the CCS can sue for recovery from the driver of the vehicle responsible and also the owner thereof. In this respect, paragraph two of Article 1.3 of said law says that "Any owner who is not driving a vehicle that does not have compulsory insurance shall have civil liability in connection with the driver thereof for personal injury and property damage caused by the latter, except where they prove that the vehicle has been stolen from them".