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Legislation

Spain

Order EIC/1337/2017 of 18 December 2017[1]. This Order updates Schedules I and II to Royal Decree 2028/1986 of 6 June 1986 (RCL 1986\3056) on rules for the application of certain EU directives concerning the type approval system for motor vehicles, trailers, semi-trailers, motorcycles, mopeds and agricultural vehicles, as well as for parts and components of such vehicles. Official Journal of Spain (BOE), 12 January 2018, No. 11.

The publication, subsequent to Order IET/904/2016 of 2 June 1996, of several EU regulations, implementing regulations, delegated regulations and a corrigendum has made it necessary to adopt this Order amending Schedules I and II to Royal Decree 2028/1986 of 6 June 1986 in order to bring these into line with those regulations. Specifically, by way of this Order, the contents of the above-mentioned schedules are consistent with the EU regulations listed below, as well as with revised regulation derived from the Agreement concerning the adoption of uniform technical prescriptions for wheeled vehicles, equipment and parts which can be fitted and/or be used on wheeled vehicles and the conditions for reciprocal recognition of approvals granted on the basis of these prescriptions done at Geneva on 20 March 1958:

(a) Commission Regulation (EU) 2016/427 of 10 March 2016 amending Regulation (EC) No 692/2008 as regards emissions from light passenger and commercial vehicles (Euro 6).

(b) Commission Implementing Regulation (EU) 2016/799 of 18 March 2016 implementing Regulation (EU) No 165/2014 of the European Parliament and of the Council laying down the requirements for the construction, testing, installation, operation and repair of tachographs and their components.

(c) Corrigendum to Commission Implementing Regulation (EU) 2016/799 of 18 March 2016 implementing Regulation (EU) No 165/2014 of the European Parliament and of the Council laying down the requirements for the construction, testing, installation, operation and repair of tachographs and their components (OJ L 139,26.5.2016).

(d) Commission Regulation (EU) 2016/646 of 20 April 2016 amending Regulation (EC) No 692/2008 as regards emissions from light passenger and commercial vehicles (Euro 6).

[1] *Orden EIC/1337/2017, de 18 de diciembre, por la que se actualizan los anexos I y II del Real Decreto 2028/1986, de 6 de junio, sobre las normas para la aplicación de determinadas directivas de la CEE, relativas a la homologación de tipo de vehículos automóviles, remolques, semirremolques, motocicletas, ciclomotores y vehículos agrícolas, así como de partes y piezas de dichos vehículos.*

(e) Commission Regulation (EU) 2016/1004 of 22 June 2016 amending Regulation (EC) No 661/2009 of the European Parliament and of the Council.

(f) Commission Delegated Regulation (EU) 2016/1788 of 14 July 2016 amending Regulation (EU) No 167/2013 of the European Parliament and of the Council as regards the list of requirements for vehicle EU type-approval, and amending and correcting Commission Delegated Regulations (EU) No 1322/2014, (EU) 2015/96, (EU) 2015/68 and (EU) 2015/208 with regard to vehicle construction and general requirements, to environmental and propulsion unit performance requirements, to vehicle braking requirements and to vehicle functional safety requirements.

(g) Commission Delegated Regulation (EU) 2016/1824 of 14 July 2016 amending Delegated Regulation (EU) No 3/2014, Delegated Regulation (EU) No 44/2014 and Delegated Regulation (EU) No 134/2014 with regard, respectively, to vehicle functional safety requirements, to vehicle construction and general requirements and to environmental and propulsion unit performance requirements.

(h) Commission Implementing Regulation (EU) 2016/1825 of 6 September 2016 amending Implementing Regulation (EU) No 901/2014 with regard to the administrative requirements for the approval and market surveillance of two- or three-wheel vehicles and quadricycles.

(i) Commission Implementing Regulation (EU) 2016/1789 of 7 September 2016 amending Implementing Regulation (EU) 2015/504 with regard to the administrative requirements for the approval and market surveillance of agricultural and forestry vehicles.

(j) Regulation (EU) 2016/1628 of the European Parliament and of the Council of 14 September 2016 on requirements relating to gaseous and particulate pollutant emission limits and type-approval for internal combustion engines for non-road mobile machinery, amending Regulations (EU) No 1024/2012 and (EU) No 167/2013, and amending and repealing Directive 97/68/EC.

(k) Commission Regulation (EU) 2016/1718 of 20 September 2016 amending Regulation (EU) No 582/2011 with respect to emissions from heavy-duty vehicles as regards the provisions on testing by means of portable emission measurement systems (PEMS) and the procedure for the testing of the durability of replacement pollution control devices.

(l) Commission Implementing Regulation (EU) 2017/78 of 15 July 2016 establishing administrative provisions for the EC type-approval of motor vehicles with respect to their 112-based eCall in-vehicle systems and uniform conditions for the implementation of Regulation (EU) 2015/758 of the European Parliament and of the Council with regard to the privacy and data protection of users of such systems.

(m) Commission Delegated Regulation (EU) 2017/79 of 12 September 2016 establishing detailed technical requirements and test procedures for the EC type-approval of motor vehicles with

respect to their 112-based eCall in-vehicles systems, of 112-based eCall in-vehicle separate technical units and components and supplementing and amending Regulation (EU) 2015/758 of the European Parliament and of the Council with regard to the exemptions and applicable standards.

Royal Decree 1076/2017 of 29 December 2017[2]. This piece of secondary executive legislation lays down rules supplementary to the Land Transport Planning Regulations, approved by Royal Decree 1211/1990, of 28 September, concerning the commercial use of private hire vehicle licences. BOE, 30 December 2017, No. 317.

It provides that licences authorising the hiring of private vehicles (provided with the services of a driver for the purpose of carrying passengers) may not be transferred until two years after their original issue by the competent body responsible for land transport, except in cases of transfer to heirs in the event of death, mandatory retirement, physical disability or legal incapacity of the holder.

For control purposes, the holders of private hire vehicle licences must communicate to the Public Administration, by electronic means, the particulars set out in art. 24 of Order FOM/36/2008, of 9 January, implementing the second section of Chapter IV of Title V of the Land Transport Planning Regulations, approved by Royal Decree 1211/1990, of 28 September[3], before the beginning of each service performed under said licences.

To this end, the Directorate-General for Land Transport shall set up a record of communications of private hire vehicle services, to which the licence holders must send their communications.

Public consultations

In process:

— **Private Members' Bill amending the Criminal Code Act 10/1995, of 23 November[4], concerning the reckless driving of motor vehicles or mopeds and penalties for leaving the scene of**

[2] *Real Decreto 1076/2017, de 29 de diciembre, por el que se establecen normas complementarias al Reglamento de la Ley de Ordenación de los Transportes Terrestres, aprobado por Real Decreto 1211/1990, de 28 de septiembre, en relación con la explotación de las autorizaciones de arrendamiento de vehículos con conductor.*

[3] *Orden FOM/36/2008, de 9 de enero, por la que se desarrolla la sección segunda del capítulo IV del título V, en materia de arrendamiento de vehículos con conductor, del Reglamento de la Ley de Ordenación de los Transportes Terrestres, aprobado por Real Decreto 1211/1990, de 28 de septiembre.*

[4] *Proposición de Ley Orgánica de modificación de la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal.*

an accident. Leaving the scene of an accident is classed as an offence and three new cases of gross negligence are criminalized, increasing the sentences.

As of the date of this newsletter, the deadline for amendments to the articles thereof was extended until 6 March 2018.

— **Draft Royal Decree amending Royal Decree 647/2011, of 9 May, regulating the activity of charging suppliers in the provision of electric recharge services**[5].

The period for submitting responses ended on 19 December 2017. The Ministry of Energy, Tourism and Digital Agenda has referred to the Spanish Competition and Markets Authority (CNMC) the Royal Decree that simplifies charging supplier regulation. As of the date of this newsletter, the CNMC Report is pending.

This Draft Royal Decree expressly includes among the rights of charging suppliers the right to hire the services of a representative for the management of the obligations required as a charging supplier. In this way, whoever wants to provide recharge services, once a charging supplier, will be able to hire the services of a specialized company for its management.

Second, the requirement (formerly contained in art. 4(1)(a)) that the corporate purpose of companies intending to act as charging suppliers should expressly mention their capacity to sell and buy electricity, without any limitations or qualifications to the exercise of that business activity, has been removed. This amendment is particularly useful in the case of large undertakings or companies for which an alteration of the articles of association such as that previously required would be complex, and will enable those companies whose main activity is not the provision of electric recharge services to register as charging suppliers by means of a simple communication. However, it must be borne in mind that, in accordance with art. 12 of the Electricity Sector Act 24/2013 of 26 December[6], the provision of electric recharge services is incompatible with the carrying out of regulated activities in the electricity sector and, therefore, due account must be taken, where appropriate, of the appropriate requirements on the separation of activities provided for in that article.

With this amendment, by making it easier for any commercial company that consumes electricity to register as a charging supplier and, at the same time, hire the services of a specialist company for the management of the obligations incumbent on such a supplier, it will no longer be necessary for the charging points to have an independent connection to the said consumer who carries out another main activity, since it will be able to register as a charging supplier and outsource the management of the electric recharge services to a specialist company.

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[5] *Proyecto de Real Decreto por el que se modifica el Real Decreto 647/2011, de 9 de mayo, por el que se regula la actividad de gestor de cargas del sistema para la realización de servicios de recarga energética.*

[6] *Ley 24/2013, de 26 de diciembre, del Sector Eléctrico.*

Third, in line with the simplification mentioned above, the measurement configuration is made as easy as possible by abolishing the requirement for a specific measurement of the electricity sold through the recharging points, while maintaining only the measurement of electricity at the grid-bound point, as for other consumers.

Fourth, the annual reporting obligations to the Public Administration are abolished, simplifying as far as possible the formal costs involved in carrying out the activity.

Fifth, the information to be sent by the charging suppliers is updated at the beginning of the activity or whenever there is any modification of the particulars initially communicated, providing at the same time that the information related to the type of charging point and location will be published on a geo-portal, collected in the electronic gateway of the Ministry of Energy, Tourism and Digital Agenda, so that it is accessible to all users and it can be used as a source of data for future developments and computer applications.

Finally, the administrative procedures for implementation are updated so that (i) the statement of compliance for carrying out the activity is valid in any part of the territory and (ii) they are completed by electronic means, in accordance with the provisions of the Market Unity Act 20/2013 of 9 December[7] and the Public Administrations (Common Administrative Procedure) Act 39/2015 of 1 October[8].

The amendment will contribute to the deployment of charging points associated with various activities, in particular in the service and hospitality sector, where the main activity is not the provision of recharge services, and where there is great potential.

This draft Royal Decree includes the automotive industry's demands for simplification of charging supplier regulation so as to facilitate the take-off of the electric vehicle.

European Union

Commission Regulation (EU) 2017/2400 of 12 December 2017 implementing Regulation (EC) No 595/2009 of the European Parliament and of the Council as regards the determination of the CO2 emissions and fuel consumption of heavy-duty vehicles and amending Directive 2007/46/EC of the European Parliament and of the Council and Commission Regulation (EU) No 582/2011.

[7] *Ley 20/2013, de 9 de diciembre, de garantía de la unidad de mercado.*

[8] *Ley 39/2015, de 1 de octubre, del Procedimiento Administrativo Común de las Administraciones Públicas.*

(OJ L 349, 29.12.2017). Regulation No 125 of the Economic Commission for Europe of the United Nations (UN/ECE) — Uniform provisions concerning the approval of motor vehicles with regard to the forward field of vision of the motor vehicle driver [2018/116].

(OJ L 20, 25.1.2018). Council Decision (EU) 2018/176 of 29 January 2018 on the position to be adopted, on behalf of the European Union, within the EEA Joint Committee concerning an amendment to Annex XIII (Transport) to the EEA Agreement.

(OJ L 32, 6.2.2018). Regulation No 94 of the Economic Commission for Europe of the United Nations (UNECE) — Uniform provisions concerning the approval of vehicles with regard to the protection of the occupants in the event of a frontal collision [2018/178].

Judgments and decisions

Judgment of the Court (Fifth Chamber) of 19 October 2017 - Europamur Alimentación SA v Dirección General de Comercio y Protección del Consumidor de la Comunidad Autónoma de la Región de Murcia (Case C-295/16).

Sales at a loss.

The Court of Justice of the European Union ('CJEU') has passed an important judgment examining whether the Spanish legal system is in conformity with EU law in respect of sales at a loss. Specifically, that of 19 October 2017 in Case C-295/16, in response to a request for a preliminary ruling from the Murcia Judicial Review Court No. 4 in proceedings between Europamur Alimentación SA ('Europamur') and the Directorate-General for Trade and Consumer Protection (Region of Murcia), concerning the legality of an administrative penalty imposed on Europamur due to an infringement of the prohibition on selling at a loss laid down by Spanish legislation relating to retail commerce.

The Spanish Retail Trading Act[9] ('LOCM') contains an article expressly devoted to sales at a loss. Specifically, article 17, which, after providing as a general rule that prices may be freely set and, consequently, that selling at a loss is lawful ("in the absence of legal or regulatory provisions to the

[9] *Ley 7/1996, de 15 de enero, de Ordenación del Comercio Minorista,*

contrary, prices may be freely set"), goes on to set out three circumstances where a sale at below cost or purchase price shall be deemed unfair: (a) where it is liable to mislead consumers about the pricing of other goods or services in the same establishment; (b) where it has the effect of discrediting the image of another product or establishment; and (c) where it is part of a strategy aimed at removing a competitor or a group of competitors from the market.

In essence, the CJEU was asked whether or not the prohibition on selling at a loss laid down by the LOCM complied with Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC and Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'). And the CJEU (after pointing out that the regulation of sales at a loss by the LOCM must be judged in the light of the Directive, since it pursues objectives relating to consumer protection), responded that the directive "must be interpreted as precluding a national provision, such as that at issue in the main proceedings, which contains a general prohibition on offering for sale or selling goods at a loss and which lays down grounds of derogation from that prohibition that are based on criteria not appearing in that directive".

The first consequence of the CJEU's ruling is that Spain will have to amend the regulation of the sale at a loss contained in the LOCM. And it must do so in order to remove the general prohibition on sales at a loss and introduce, if it is to continue to regulate such sales in that statute, legislation under which sales at a loss can only be prohibited after a case-by-case examination as to whether there is an unfair commercial practice (because it is contrary to the requirements of professional diligence and because it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers, particularly if misleading or aggressive within the meaning of the Directive). Moreover, it should be made clear in the new regulation that anyone who claims that a sale at a loss is an unfair commercial practice must prove it, without being able to shift the burden of proof and require that it be the trader making the sale who proves its lawfulness, as this is a more restrictive measure than that imposed by the Directive (which, as the CJEU points out, is prohibited).

This amendment to the LOCM will remove the current difficulties and divergences of interpretation in determining the existence of exceptions to the prohibition on sales at a loss, for example, where a trader intends to 'match the prices of one or more competitors with the ability materially to affect that person's sales'.

Currently, the regulation of the LOCM applies to both retail and wholesale sales. There is nothing to prevent the introduction of a differentiated body of rules for retail sales and another for wholesale sales from now on. If this is done, the regulation of retail sales should be in line with the legal doctrine of the CJEU. On the other hand, however, the rules governing wholesales

could be different (because they are not subject to the Unfair Commercial Practices Directive, as the CJEU itself points out in paragraph 30 of the judgment when it states that '[i]n the present case, it is clear from the order for reference that the provisions of the Unfair Commercial Practices Directive were rendered applicable by national law to situations, such as that at issue in the main proceedings, which do not fall within the scope of that directive'). Although it probably makes no sense to continue prohibiting wholesales at a loss when retail sales will, as a general rule, be allowed at a loss.

The ruling of the CJEU is limited to an analysis of the LOCM, without any consideration being given to the Spanish regulation of sales at a loss as contained in the Unfair Competition Act[10] ('LCD'). From our point of view, art. 17 LCD respects the criteria laid down in the judgment of the CJEU in question because it does not lay down a general prohibition on sales at a loss, but only does so in three specific cases in which elements of unfairness (deceit, denigration or predation) are involved, elements which also match, at least in part, those laid down in the Unfair Commercial Practices Directive.

Judgment no. 1711/2017 of the Supreme Court (Judicial Review Division) of 13 November 2017 (Cassation appeal 3542/2015). The Jojucar case.

Limitations and restrictions on licences for land transport, private hire vehicles.

Here an appeal on the grounds of a breach of the rules governing the determination of disputes ('cassation') was lodged by the Region of Madrid against the judgment of the Madrid High Court (Judicial Review Division) of 8 October 2015 on an application for judicial review - by Jojucar, S.L. - of the Order of 30 May 2014 of the Regional Ministry of Transport and Infrastructure (Region of Madrid), which rejected the application for administrative review of the decision of 1 April 2014 of the Directorate-General for Transport refusing to grant sixty new private hire vehicle licences (Case 47975/14).

The Supreme Court concludes that the Madrid High Court should have examined whether the application for licences could have been rejected by direct application of the limitations provided in the new wording of art. 48 of the Land Transport Planning Act ('LOTT') given by Act 9/2013 of 4 July, understanding that this legal provision was supplemented by previous regulatory provisions, or whether, on the contrary, it could not have been rejected under the aforementioned article as the regulatory implementations of the limitations and restrictions provided for therein took place after with Royal Decree 1057/2015 of 21 November. This is precisely the central issue in the dispute and since the court a quo left it unaddressed, its judgement must be quashed and set aside.

[10] *Ley 3/1991, de 10 de enero, de Competencia Desleal*.

For these purposes, the Supreme Court holds the following:

The licence applications submitted before the entry into force of art. 48 LOTT, as worded by Act 9/2013 of 4 July, are fully subject to the considerations set out in various rulings of the Supreme Court. These include the judgments of 27 January 2014 (two judgments of that date handed down in appeals 5892/2011 and 962/2012), 29 January 2014 (four judgments of that date handed down in appeals 527/2013, 105/2012, 384/2012 and 2169/2012) and 30 January 2014 (two judgments handed down in appeals 4163/2012 and 110/2012). That is to say, this business can be carried out freely and the only remaining requirements are those deriving from the regulation of Act 16/1987 itself on the discretionary transport of passengers, regulation to which art. 134(2) LOTT refers in its new wording.

From this perspective, no legislation with the force and effect of an act of parliament allowed, as of the entry into force of Act 25/2009, that the number of private hire vehicle licence applications to be quantitatively conditioned on the terms provided in article 181(2) of the Land Transport Planning Regulations (in the version prior to that included in the one approved by Royal Decree 1211/1990, not amended by such) and art. 14(1) of Order FOM/36/2008. Both are therefore to be considered as repealed since the entry into force of Act 25/2009.

With regard to licence applications submitted when the new wording of art. 48 LOTT, as given by Act 9/2013 of 4 July, had already entered into force and before its regulatory implementations, which took place after with Royal Decree 1057/2015 of 21 November, it should be noted that art. 48(2) LOTT, as worded by Act 9/2013 of 4 July, does not authorise any type of limitations or restrictions by regulation, since the referral of the legal provision contains certain cautions and qualifications: on the one hand, the imposition of limitations by regulation must be "in accordance with EU rules and any other applicable provisions"; on the other hand, the possible imposition of limitations by regulation is not considered in a broad but limited manner, i.e. "when the supply of public passenger transport in passenger cars is subject to quantitative limitations at a regional or local level".

On the other hand, art. 99(4) LOTT, also as worded by Act 9/2013, sets out that "[p]rivate hire vehicles constitute a type of passenger transport and shall be subject to the obtaining of the appropriate licence, in accordance with the provisions of arts. 42 and 43(1) and what is specifically provided by regulation with regards to this type of transport".

This means that the possibility of imposing restrictions by regulatory means is limited by the LOTT as worded by Act 9/2013. In addition, and in close connection with the foregoing, the impact of the Market Unity Act 20/2013 of 9 December on this area should also be highlighted.

Therefore, the Supreme Court decided to vacate the contested administrative decisions, stating that the company was entitled to the sixty new private hire vehicle licences it applied for.

Judgment no. 1713/2017 of the Supreme Court (Judicial Review Division) of 13 November 2017 (Cassation appeal). The Gran Vía Rent a Car case.

The dispute leads to the determination of whether, under the provision contained in art. 48(2) LOTT, the limitations provided in art. 181(2) of the Land Transport Planning Regulations ('ROTT'), approved by Royal Decree 1211/1990, and art. 14 of Order FOM/36/2008 of 9 January 2008, can be deemed maintained or reborn (view supported by the contested decision and defended by the Regional Government of Madrid in the course of proceedings), or if, on the contrary, the elimination of arts. 49 and 50 of the previous LOTT 16/1987 of 30 July by LOTT 25/2009 of 22 December (Omnibus Act), deprived those regulations of all support and coverage, so that the provision contained in the new article 48(2) LOTT, as worded by Act 9/2013 of 4 July, is not effective until the regulatory implementation announced therein and which finally occurred with Royal Decree 1057/2015 of 21 November.

The judgment comes to the same conclusion as the previously reviewed Supreme Court judgment no. 1711/2017.

Judgment of the Court (First Chamber) of 6 December 2017 in Case C-230/16. Coty Germany GmbH v Parfümerie Akzente GmbH.

Selective distribution to preserve the luxury image of goods.

The CJEU considers two main questions: first, whether the establishment of a selective distribution system to preserve the luxury and prestige image of goods constitutes concerted practices contrary to competition law, and second, whether contractual clauses imposing a comprehensive prohibition on the online sale of the goods on their distributors, in the context of a selective distribution system, are lawful.

Contention was prompted by the assertions contained in para. 46 of the Judgment of the Court (Third Chamber) of 13 October 2011 in Case C-439/09, according to which the 'aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU'.

The Coty judgment clarifies that the traditional requirement of the legal doctrine in the Metro case, according to which the establishment of a selective distribution system is possible if the properties of the good in question necessitate such a system in order to preserve the good's quality and ensure its proper use, must be understood to be fulfilled regardless of whether those properties are material characteristics (for example, high-tech goods) or its prestigious luxury image. In such

cases, selective distribution can also be considered legitimate in view of the favourable effects for competition it generates.

As regards the possibility of prohibiting sales via the internet on third-party platforms, it should be noted that, according to the CJEU, the prohibition imposed on authorised distributors of engaging third-party undertakings discernible to the public to handle internet sales constitutes a limitation which is coherent in the light of the specific characteristics of the selective distribution system, since it serves to preserve the quality and image of those goods. This is because the "internet sale of luxury goods via platforms which do not belong to the selective distribution system for those goods, in the context of which the supplier is unable to check the conditions in which those goods are sold, involves a risk of deterioration of the online presentation of those goods which is liable to harm their luxury image and thus their very character (para. 49)". Moreover, "given that those platforms constitute a sales channel for goods of all kinds, the fact that luxury goods are not sold via such platforms and that their sale online is carried out solely in the online shops of authorised distributors contributes to that luxury image among consumers and thus to the preservation of one of the main characteristics of the goods sought by consumers" (para. 50).

The prohibition is proportionate in the light of the objective pursued because the prohibition applies solely to the internet sale of the contract goods via third-party platforms which operate in a discernible manner towards consumers, so that authorised distributors are permitted to sell the contract goods online both via their own websites (as long as they have an electronic shop window for the authorised store and the luxury character of the goods is preserved) and via unauthorised third-party platforms (when the use of such platforms is not discernible to the consumer).

In the event that, despite the interpretative criteria provided by the CJEU in that judgment, a national court considers that the prohibition satisfies the conditions necessary for it to be regarded as a concerted practice, the CJEU concludes that a prohibition to sell via the internet on third-party platforms such as that at issue in the present case does not constitute a hard-core restriction that cannot benefit from the exemption; the exemption under Regulation No 330/2010 would therefore apply. In that regard, the CJEU finds that it is neither a restriction of the distributor's customers, within the meaning of art. 4(b) of that regulation, or a restriction of passive sales to end users, within the meaning of art. 4(c) of that regulation; inter alia, because customers are able to find the online offer of authorised distributors by using online search engines.

The Coty judgment is important because it goes beyond the debate on the protection of the luxury image or aura of goods as a determining element of selective distribution. And the importance of the judgment increases when one considers that very recently the General Court held the opposite of what the Court of Justice now concludes (see judgment of 23 October 2017, Case T-712/14).

Moreover, the Coty judgment is important because it recognises the possibility of limiting the marketing of luxury goods on electronic platforms. However, it should be borne in mind that

the judgment does not provide for a general legality of such prohibitions. On the contrary, the CJEU rules on a very specific type of prohibition (that which restricts the marketing of luxury goods on third party platforms recognisable as such). Therefore, the legal doctrine of the CJEU does not simply apply to clauses which totally prohibit the marketing of luxury goods on the Internet. Nor is it applicable to restrictions on the marketing on third-party electronic platforms of goods which are subject to a selective distribution system but which are not luxury goods.

Finally, the CJEU partly bases its interpretation on the current structure of the e-marketplace, where only 10% of Internet distributors use third-party electronic platforms (as recalled in the 'Final Report on the e-commerce sector inquiry' of 10 May 2017). Attention must be paid to subsequent developments to see whether any change in this reality has consequences for the case law now set.

Judgment of the Court (Second Chamber) of 20 December 2017 in Joined Cases C-397/16 and C-435/16.

This judgment, in response to a request for a preliminary ruling in the proceedings Acacia Srl v Pneusgarda Srl, in insolvency, and Audi AG (C-397/16) and Acacia Srl and Rolando D'Amato v Dr. Ing. h.c. F. Porsche AG (C-435/16), has interpreted art. 110(1) of Regulation 6/2002 ('repair' clause). The ruling is important because it makes it clear that said clause applies to car wheel rims, which has been a long-time subject of controversy.

Car wheel rims as a "component part of a complex product": car manufacturers have been arguing that the 'repair' clause does not apply to car wheel rims because the public would not perceive them as a component part of the complex product (car), as the purchaser of a car is aware that there are many models of car wheel rims on the market and many of them are, given that their technical characteristics match, interchangeable. This is the interpretation followed, for example, by the Alicante Provincial Court in its Judgment no. 278/2010 of 18 June, which held that "it is well known that the manufacturer offers the possibility of mounting different models of rims on the same car and that the users themselves do so by virtue of their aesthetic interests".

However, the CJEU refuses to allow the clause to apply solely to component parts of a complex product whose shape is in principle immutably determined by the appearance of the complex product. As a result, it also applies to component parts that can be chosen by customers and are freely interchangeable. A car wheel rim must therefore be classified as a 'component part of a complex product', such a wheel rim being a component of a complex product which a car constitutes, without which that product could not be subject to normal use.

The repair purposes: the CJEU recalls that the possibility of relying on the 'repair' clause requires that the use of the component part be necessary for the repair of a complex product that has become defective, inter alia due to the lack of the original part or damage caused to it. Any use

of a component part for reasons of preference or purely of convenience, such as, inter alia, the replacement of a part for aesthetic purposes or customisation of the complex product is therefore excluded from the 'repair' clause. However, the CJEU does not rule out the possibility that wheel rims may comply with these conditions, which is relevant because some national courts have argued that "the primary purpose of the manufacture of a certain wheel rim model is not to repair it, but to satisfy the aesthetic interest of consumers who know that, by purchasing them, they can incorporate them into various models of cars" (Judgment of the Alicante Provincial Court no. 278/2010 of 18 June).

Aside, the clause only applies to the repair of original wheel rims, i.e. so as to restore the complex product to its 'original' appearance. That means, according to the CJEU, that the appearance the complex product had when it was placed on the market must be taken into account. The 'repair' clause therefore applies only to component parts of a complex product that are visually identical to original parts. It is, accordingly, excluded if, inter alia, the replacement part does not correspond, in terms of its colour or its dimensions, to the original part, or if the appearance of a complex product was changed since it was placed on the market. Consequently, the wheel rim manufacturers' claim that the 'repair' clause applies to all 'standard variants' of original wheel rims is rejected.

Manufacturers or sellers of replica parts must limit the distribution of their products to repair shops: car manufacturers have been arguing (and it was submitted in the proceedings) that the application of the 'repair' clause is irreconcilable with the direct sale of replica parts to end consumers, so that manufacturers of replica parts must limit the distribution of their products to repair shops.

However, the CJEU does allow direct sales to end customers, albeit imposing a number of obligations on manufacturers and sellers of spare parts in order to ensure that end users comply with the conditions laid down by the 'repair' clause. In particular, the CJEU refers to the following obligations:

(a) inform the downstream user, through a clear and visible indication on the product, on its packaging, in the catalogues or in the sales documents, on the one hand, that the component part concerned incorporates a design of which they are not the holder and, on the other, that the part is intended exclusively to be used for the purpose of the repair of the complex product so as to restore its original appearance.

(b) through appropriate means, in particular contractual means, ensure that downstream users do not intend to use the component parts at issue in a way that does not comply with the 'repair' clause.

(c) refrain from selling such a component part where the manufacturer or seller knows or, in the light of all the relevant circumstances, ought reasonably to know that the part in question will not be used in accordance with the conditions laid down in the repair clause.

Judgment of the Court of 20 December 2017 in Case C-434/15. Asociación Profesional Elite Taxi v Uber Systems Spain, S.L.

Here the CJEU was referred, on 7 August 2015, a series of questions for a preliminary ruling by the Barcelona Companies Court no. 3 in proceedings where a professional taxi drivers' association sued Uber, claiming unfair competition in violation of laws (including the Taxi Act (Catalonia) 19/2003 of 4 July[11]).

The question referred for a preliminary ruling is "must the activity carried out for profit by [Uber Systems Spain], consisting of acting as an intermediary between the owner of a vehicle and a person who needs to make a journey within a city, by managing the IT resources — in the words of [Uber Systems Spain], "smartphone and technological platform" interface and software application — which enable them to connect with one another, be considered to be merely a transport service or must it be considered to be an electronic intermediary service or an information society service".

As the CJEU points out (para. 39 of the judgment), "the intermediation service provided by Uber is based on the selection of non-professional drivers using their own vehicle, to whom the company provides an application without which (i) those drivers would not be led to provide transport services and (ii) persons who wish to make an urban journey would not use the services provided by those drivers. In addition, Uber exercises decisive influence over the conditions under which that service is provided by those drivers. On the latter point, it appears, inter alia, that Uber determines at least the maximum fare by means of the eponymous application, that the company receives that amount from the client before paying part of it to the non-professional driver of the vehicle, and that it exercises a certain control over the quality of the vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion".

Consequently, the CJEU considers that Uber's service at issue is an intermediary service which forms an integral part of an overall service whose main component is a transport service. We are not, therefore, dealing with an information society service, subject to the e-commerce directive.

The fact that the CJEU determines that we are dealing with a transport service subject to the relevant national legislation and not merely with an intermediary service means that, in so far as that national legislation requires the appropriate administrative licence, acting without it may involve the commission of an act of unfair competition in violation of laws.

This judgment of the CJEU refers to the operation of the Uber platform known as 'Uber Pop', which is in dispute before the Barcelona Companies Court no. 3, as well as the one before the Madrid Companies Court no. 2, which was an application for intermediation between users and drivers who did not have the corresponding licence.

[11] *Ley 19/2003, de 4 de julio, del Taxi. Comunidad Autónoma de Cataluña.*

However, as a result of the litigation, Uber changed its business model to offer the service by way of drivers holding a private hire vehicle licence. On the other hand, the taxi industry has stated that the judgment will imply the need for Uber itself, as such, to have the appropriate administrative licence and to be subject to the appropriate inspections, controls and supervision provided in the Land Transport Planning Regulations.

Judgment no. 125/2017 of the Vitoria (Alava) Companies Court of 20 December 2017 (JUR 2017\313044). *'Asociación para el Fomento y Promoción de Actividades Industriales y Deportivas de Automoción'* (AFYPAIDA) subject to at-fault insolvency proceedings.

Aggravation of the insolvent debtor's insolvency.

The judgment finds that the insolvency proceedings are at-fault due to the purchase of a vehicle for a price of 535,000 euros plus VAT, carried out when the association was financially drained, with no expectation of being able to continue with the project it was engaged in, as it was a seriously imprudent decision that aggravated the final state of insolvency: liability is attached to the four members of the Board of Directors of the insolvent company who were such two years prior to the opening of insolvency proceedings; the liability is identical for all four since the decision that led to the at-fault characterisation is equally attachable to all of them since it was passed within the Board of Directors by unanimous agreement. Order to pay damages to the insolvent debtor for the decision that has determined at-fault insolvency proceedings.

Ruling of complicity of a company, which is jointly and severally liable to pay damages with those others liable for the characterisation.

Judgment no. 180/2017 of the Manacor Court of First Instance No. 4 of 5 January 2018.

Dieselgate case. Voidance of a contract for the sale and purchase of a vehicle.

The claimant brings an action to void a contract for the sale and purchase of a Skoda Yeti Greenline vehicle (date of registration 12 December 2012) for vitiated consent and, in the alternative (i.e., failing the foregoing), an action to rescind said contract for failure of consideration, against the seller (Motor Insular, S.L.) and the manufacturer (Volkswagen Audi España). As ancillary relief, the claimant seeks in both cases compensation for the depreciation of the vehicle valued at 7,834.11 euros. In addition to bringing the aforementioned actions and regardless of whether they succeed or not, 5,933.47 euros are claimed for pain and suffering (i.e., non-material damage), plus another 1,494.17 euros for interest and expenses paid as a result of the financing contract for the purchase of the vehicle.

The claimant submits that the purchased vehicle has an EA189 diesel engine where the engine software fraudulently configured it in such a way that NOx emissions on the test benches would

comply with the limits laid down in Regulation (EC) No 715/2007 – "Euro 5 and Euro 6 Regulation", although after, under actual driving conditions, these limits would be exceeded to the detriment of the environment. These facts were judicially noticed.

The action to void for mistake is based on art. 1266 of the Civil Code (CC), which provides that "[i]n order for a mistake to invalidate consent, it must go to the substance of that which was the subject matter of the contract or to those conditions thereof that would have mainly given cause to conclude the contract".

The sale and purchase contract did not include any information on the vehicle's level of NOx emissions. The list of technical characteristics of the various Skoda Yeti models included the data on C02 emissions but not NOx. However, the vehicle model purchased was part of the 'Greenline' range, which was expressly advertised as a response to the "great concern for the environment" (advertising leaflet submitted as documentary evidence). The repair shop manager, as a witness, stated that the model had specific wheel rims and tyres aimed at low consumption, and that few units were sold. This shortage of sales leads the Judge to conclude that Skoda Yeti Greenline's low level of pollutant emissions was the main reason for the acquisition of the vehicle by a large majority of users; and that the remaining vehicle characteristics (price, performance, equipment) were not sufficiently attractive to other potential buyers who were not driven by ecological criteria.

This circumstance of special environmental "concern", "awareness", of the buyer meant for the Judge in this particular case, unlike others that were previously not upheld, that either the action to void or the action to rescind the contract should succeed, identifying both as suitable for consideration. In connection with the action to void, because of the presence of an excusable mistake on the part of the buyer concerning one of the conditions which mainly gave rise to the choice of the Skoda Yeti Greenline vehicle; in connection with the action to rescind, because the vehicle's non-conformity to the conditions of respect for the environment taken into singular account in the acquisition of the vehicle determines objective buyer dissatisfaction, and with such the application of the *aliud pro alio* ('delivery of the wrong good') doctrine (Judgments of the Supreme Court of 25-2-2010, 17-2-2010, 9-7-2007, 27-2-2004 and 31-7-2002).

The Judge was of the opinion that the possibility of correcting the incident by reconfiguring the software at approved repair shops had no relevance for the purposes of the actions to void and to rescind.

The action to rescind presupposes the validity and completion of the contract notwithstanding the failure of consideration. Upholding the action to rescind entails the duty of the parties to mutually return what has been received and the injured party's entitlement to damages and payment of interest (arts. 1123 and 1124 CC).

The action to void, on the other hand, implies here a contract voidable for vitiated consent, consent that constitutes an essential element of the contract (art. 1261 CC). Art. 1303 CC provides that "[s]ubject to determination of voidability of an obligation, the contracting parties must reciprocally return to each other that which was the subject matter of the contract, along with any proceeds therefrom, and the price plus interest, except as provided in the following articles". The wording of the article seems to exclude the possibility that the claimant may claim additional compensation. However, the Judge holds that article 1306 CC, specifically sub-article (2), does recognize a substantial legal effect: "Where the turpitude does not constitute a minor or serious offence, the following rules will be observed: [...] (2) Where it attaches to a single contracting party, such party may not recover what he has given under the contract, nor request performance of what he was promised. The other party, to whom the turpitude does not attach, may claim back what he has given, without any obligation to perform what he has promised."

For that reason, and considering the best outcome for the claimant's interests subject to the *non ultra petita* rule under art. 218 of the Civil Procedure Act (LEC), the judge finally determined that the contract be voided rather than rescinded, ordering the seller and the manufacturer to refund the price paid (19,378.11 euros) plus statutory interest from the date of conclusion of the contract (five years back) and ordering the buyer to return the vehicle.

Judgment of the Supreme Court no. 33/2018 of 12 January. Cassation appeal.

Private hire vehicle licences: applications submitted after the entry into force of art. 48 LOTT as worded by Act 9/2013 of 4 July. Application of the quantitative limits and restrictions laid down in the 1990 Regulations.

This Supreme Court judgment follows the arguments referred to in the aforementioned Supreme Court judgment of 13 November 2017, cassation appeal 3542/2015, and rejects the appeal filed by the Region of Madrid against judgments that upheld applications for judicial review and the applicants' entitlement to private hire vehicle licences.

Judgment of the Supreme Court no. 87/2018 of 25 January. Cassation appeal 313/2016. On the same lines, Judgment of the Supreme Court no. 81/2018 (Judicial Review Division) of 24 January 2018.

Cassation appeal 313/2017 is lodged by the Region of Catalonia against the Judgment of the Barcelona Judicial Review Court no. 15 of 6 October 2016 given in the summary proceedings no. 434/2015. The Court finds for the judicial review applicants and sets aside the decision imposing a fine on Uber, B.V., a fine of EUR 4,001.00, for the commission of a very serious infringement under art. 140(2) in connection with art. 42, both of the Land Transport Planning Act 16/87 of 30 July 1987 ('LOTT').

In view of the legal doctrine of the Judgment of the CJEU of 20 December 2017 (Case C-434/15) referred to above, the Supreme Court concludes that, in contrast to what is stated in the judgment under appeal, the business carried on by Uber, B.V. must be classified as a 'transport service' within the meaning of art. 58(1) TFEU and that such a service is therefore excluded from the scope of art. 56 TFEU, of Directive 2006/123 and of Directive 2000/31 and the judgment under appeal must therefore be set aside.

However, as the CJEU itself points out in paragraphs 46 and 47 of its conclusions of law, it is the case that non-collective urban transport services and services inextricably linked to them, such as the intermediation service at issue here, have not led to the adoption by the European Parliament and the Council of the European Union of common rules or other measures on the basis of art. 91(1) TFEU. Therefore, under the current state of EU law, it is incumbent on the Member States to regulate the conditions for the provision of intermediation services such as those at issue, provided that the general rules of the TFEU are respected.

At this point, it is necessary to determine which provision of national law is applicable here, since the sanctioning decision directly applies the State legislation (LOTT), while the appellant maintains that the regional regulations on transport is of preferential and exclusive application (Taxi Act (Catalonia) 19/2003 of 4 July).

Among the various grounds for challenge raised in the appeal proceedings, the representation of Uber, B.V. claimed that there is no room for the supplementary application of the LOTT, given that the Region of Catalonia has exclusive jurisdiction in the field of urban transport, which would mean that the regional legislation on the subject, and in particular the Taxi Act (Catalonia) 19/2003 of 4 July, would apply to the case. The Supreme Court concludes that this approach cannot be accepted since, though being true that the Taxi Act (Catalonia) 19/2003 of 4 July includes in its arts. 37 et seq. a sanctioning regime, its mere reading allows us to state that its content, like that of all the regulation contained in the said statute, is specifically referred to the taxi service, an area in which the requirement for licensing of taxi drivers has never been questioned.

The Supreme Court explains that it is precisely the uniqueness of the business carried on by Uber, B.V., which, although considered a "service in the field of transport", cannot be identified with the traditional taxi service, which prevents it from applying to the latter the regulation and sanctioning regime established specifically for the latter - the taxi service - in the Taxi Act (Catalonia) 19/2003 of 4 July.

For this reason, in the absence of regional regulations referring to an organisational and intermediation business activity in the field of transport such as that carried out by Uber, B.V., the Court determines that the state regulation contained in the LOTT, including the sanctioning regime established therein, must be considered applicable to the case.

The Supreme Court states that the business engaged in by Uber, B.V. is not a mere intermediary service but constitutes a substantial part of the provision of passenger transport services and is therefore subject to the licence required by art. 42(1) LOTT, and decides to set aside the judgment and take the proceedings back to the time immediately prior to the date of the judgment, so that the Barcelona Judicial Review Court no. 15 may resolve the matter as appropriate, it being understood that the new judgment given by the Court may not deny that the business carried on by Uber, B.V. is subject to the authorisation required by art. 42(1) LOTT, nor is the sanctioning regime provided for in said statute applicable to it.

Judgment of the Supreme Court no. 98/2018 (Civil Division) of 26 February 2018.

Tis judgment interprets the current remuneration rules for directors of unlisted companies limited by shares. It is relevant because it sets aside the judgment of the Barcelona Provincial Court (Fifteenth Chamber) of 30 June 2017 and contradicts the doctrine laid down by the Directorate-General for Registers and Notaries in recent decisions, which held that the rules set out in arts. 217 to 219 of the Companies Act ('LSC'), which require the rules on directors' remuneration to be set out in the articles of association and the approval by the general meeting of the maximum amount of the annual remuneration to be received by all the directors, does not affect directors performing executive duties, whose remuneration (without the need to respect the maximum amount approved by the general meeting) could only be regulated in the relevant director's service contract in accordance with arts. 249(3) and 294(4) LSC.

Contrary to this interpretation, the Supreme Court in the aforementioned judgment provides that:

(1) The articles of association must provide the non-remunerated or remunerated nature of the position of director and establish the remuneration system or, in other words, the remuneration to be received by all directors, regardless of whether they are directors performing purely supervisory functions or directors performing executive functions.

(2) It is the responsibility of the general meeting to set the maximum amount of annual remuneration that all directors (including those who perform executive duties) may receive.

(3) The remuneration of directors performing executive duties must be stated in the director's service contracts (in the terms of arts. 249(3) and 249(4) LSC) and in any case be in accordance with the remuneration system established in the articles of association (art. 217(2) LSC) and be included in the maximum amount of the annual remuneration to be received by all the directors approved by the General Meeting (art. 217(3) LSC).

(4) The powers of the Board of Directors with regard to the remuneration of its members consist of: (i) distributing the remuneration set for the whole of the Board among the different directors

according to their functions and responsibilities, unless it is already distributed by the General Meeting (art. 217(3) LSC) and (ii) approve and sign contracts with executive directors under the terms of arts. 249(3) and 249(4) LSC within the framework of the provisions of the articles of association and within the maximum remuneration established by the General Meeting (art. 217(3) LSC).

This ruling may have practical consequences if the remuneration received by executive directors of many unlisted companies, included in their respective contracts with the company, does not respect the remuneration system provided in the articles of association or the maximum remuneration parameters approved by the General Meeting for all directors, whether executive or not.

Accordingly, it is advisable to review the articles of association to ensure that they reflect the remuneration items that make up the actual remuneration of all directors (including those performing executive duties) and, where appropriate, to make the appropriate amendments to the current contracts to ensure their consistency with the articles of association. In principle, it will also be necessary to ensure that the General Meeting approves the maximum amount of the annual remuneration to be received by all the directors and to verify whether the remuneration provided for in the director's service contracts is within the limits authorised by the General Meeting.

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