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# Automobile Newsletter

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# Contents




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# Judgments and decisions

## Spain

### Judgment no. 292/2019 of the Barcelona Provincial Court of 21 June 2019

In the first instance, the claim filed by Innocast España, S.L., a company specialising in prototype tooling and production, against a company to which it outsourced prototype tooling, failed. Innocast sought restitution of the quantities delivered due to a **repudiatory breach of contract by the subcontractor**, invoking **the aliud *pro alio* doctrine**. In turn, Innocast had seen its order cancelled by the company in the automotive components sector to which it was supplying, as the prototype had not passed the car manufacturer quality verification process.

However, on appeal, the Provincial Court accepts the argument based on the *aliud pro alio* doctrine and concludes that there are grounds for contractual termination, having been proven that neither the material nor the molds complied with the specifications requested by Innocast and in turn specified by the relevant company of the components manufacturing chain of of the automotive industry that had made the order.

The defendant is ordered to repay the sums paid to him, at statutory interest from the date on which the application was lodged.

This type of tooling procurement chain is very common in the automotive industry.

### Orders of the Supreme Court (Civil Division) of 18 June 2019 and 9 July 2019 (inter alia)

These orders confirm previous decisions by the same Court Division on this type of issue.

In view of the **conflict of territorial jurisdiction** arising in relation to the action for damages brought by aggrieved for **infringement of competition law** by the so-called **"truck cartel"**, the Supreme Court concludes that the criteria for determining the court of competent jurisdiction are the following, in accordance with the Order of the Supreme Court of 26 February 2019, conflict proceedings no. 262/2018, on the same issue of territorial jurisdiction:

— A person domiciled in one Member State may be sued in another Member State before the court of the place where the harmful event occurred or is likely to occur.

— The transposition in Spain of the Damages Directive[1], carried out through RDL 9/2017, which determined the amendment of the Competition Act and the Civil Procedure Act (LEC), did not introduce express rules on territorial jurisdiction for such actions.

— The application of Article 51 LEC, which provides that it will be the domicile of the defendant or alternatively the place where he has an establishment open to the public. However, since the dealer cannot be considered to be an establishment open to the public or an authorised representative acting on behalf of the maker of the vehicle (because they are independent companies), the defendant's domicile or establishment open to the public cannot match that of the dealer and a problem therefore arises when the manufacturer has its registered office in another Member State.

— Thus, the SC concludes that the venue closest to the regulation of private competition law actions is that set out for cases of unfair competition, as provided in Article 52(1)(12) LEC, which **assigns jurisdiction to the court of the place where the defendant has his establishment, and, in the absence of this, to the court of the domicile or place of residence**. **As a last alternative venue, when the defendant is not domiciled in Spain, the venue shall be that of the place where the act was performed or where its effects are produced**. The place of performance of the harmful act, which is the cartelised agreement, may lead to confusion, but the same is not true of the place of production of effects, which is where the claimant sees the extra charge passed on, which is the place of purchase of the vehicle. And, in the event that the action may lie with judges from more than one location, the claimant may choose any of them.

## List of Judgments of the Madrid High Court of Justice (Employment Division) of 1 July, 9 July and 18 July 2019. Judgments nos. 645/2019, 570/2019, 617/2019 and 711/2019

The Madrid High Court of Justice rejects the appeals lodged by **Peugeot Citroen Automóviles España, S.A.** against the judgment of the Employment Court, upholding the contested decision that deems the dismissal at issue unfair, with the appellant having to choose between the reinstatement of the worker or the payment of severance equivalent to thirty-three days' salary per year of service, as a consequence of said worker's employment being considered permanent.

Although the contracts signed by the workers with the company were **temporary casual contracts** (coinciding with the launch of new models of the brand), cover contracts (in some cases), which were succeeded by retiree replacement contracts, the Court confirms that the first of the temporary contracts - the one relating to casual employment due to the launch of a new model - became permanent due to essential defects, with no practical solution of continuity. To this effect, it is

[1] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

consistent doctrine of the Supreme Court that, for this type of temporary casual contracts to be valid, the objective data justifying temporariness must be clearly and precisely expressed therein, **the expression "launching of the model** ..."**being insufficient**, since this prevents an adequate control of the legitimacy of the temporary contract.

For this reason, the **irregularity of the first of the successive temporary contracts** - which became permanent due to essential defects - **makes the employment permanent**, even if the last of the temporary contracts - the retiree replacement contract - may be considered in accordance with the law.

## Judgment no. 286/2019 of the Valladolid Provincial Court of 9 July 2019

The Valladolid Provincial Court affirms the first instance judgment that deems unfit to be used for its own purpose - ***aliud pro alio*** - a lorry engine purchased by the claimant company from the defendant that had a crack in the cylinder head, resulting in the expansion tank being impregnated with antifreeze and a breakdown at 50,000 km.

Both instances consider it completely likely that the causes of the defect in the engine, which make it unfit to be used for its own purpose, are a consequence of a **defect in the product or the manufacturing process**, and not of misuse or improper use by the claimant. Therefore, they conclude that this is a case of *aliud pro alio* or delivery of the wrong good in that it does not meet the characteristics required for the purpose for which it was acquired, comparable to non-delivery - and not a case of latent defect - and thus **subject to a limitation period of fifteen years,** as is the characteristic of personal obligations.

The defendant, the dealer, is therefore ordered to pay for the repair of the part, without prejudice to the defendant's right to make a claim against the manufacturer of the component that supplied the product.

## Judgment no. 474/2019 of the Madrid High Court of Justice (Judicial Review Division) of 11 July 2019

The Judicial Review Division of the Madrid High Court of Justice **upholds the decision of the Directorate-General for Traffic** rejecting the request by the association "**Asociación Club Nacional Seat**" for **information on the registration numbers and frame numbers of certain Seat-make vehicles** (Seat 124, 124 Sport and 1430) **for statistical purposes**, in the context of a study of social behaviour in the 60's and 70's. The Directorate-General for Traffic did provide other types of data mentioned in the same application, such as the date of registration, the province of registration and permanent or temporary registration or deregistration status. The Directorate-General for Traffic claims that the date of manufacture is known only to the manufacturer and this particular is therefore not subject to dispute.

The refusal first of the Directorate-General for Traffic and later of the Madrid High Court of Justice relies on the **Transparency, Access to Public Information and Good Governance Act (Article 14(1)(e) and (l))**[2], which allows **the right of access to information to be limited** where such access may jeopardise the prevention, investigation and punishment of criminal, administrative or disciplinary wrongs. In this sense, it is considered thEB0001673229at "access to such data would uniquely identify vehicles and their administrative records, which **would facilitate the falsification or manipulation** of both the vehicles themselves and their documentation, facilitating the rehabilitation and putting into service of fraudulent vehicles that can also threaten road safety and the environment. The information requested refers to vehicles which, due to their age, can be catalogued as antiques and therefore have a considerable monetary value, so it is **not a matter of innocuous data** (...), but rather with such data vehicles of high monetary value could be cloned and unduly trafficked and rehabilitated".

Although "Asociación Club Nacional Seat" provided a report from the Spanish Data Protection Agency stating that access to such data would be permitted provided that such data was used for statistical purposes (Article 7(f) of Directive 95/46/EC), the Court considers that this is not an issue that should be resolved on the basis of personal data protection legislation, but rather on the basis of the Transparency, Access to Public Information and Good Governance Act.

## Judgment no. 508/2019 of the Girona Provincial Court of 12 July 2019

The Provincial Court allowed the appeal against the first instance judgment - which only found the private individual owner (seller of the vehicle) liable – and extended liability, joint and severally, to the dealer who intermediated in the sale of the aforementioned second-hand vehicle with a tampered mileage meter, in view of the trust that the intervention of the dealer in the sale generated for the buyer.

The Court acknowledges that, **although the dealer was not a party to the second-hand vehicle sale and purchase agreement** - since the formal owner of the vehicle was the natural person - he exhibited the vehicle on its premises, managing the sale in such a way that the seller and the buyer did not get to know each other. It is concluded that the dealer "**is liable for the harm** suffered by the claimant because, although the vehicle was purchased without warranty, the claimant did not purchase it directly from a private individual, but **went to the dealership facilities, which means greater confidence both in the condition of the vehicle and in the trustworthiness of the seller**.

Both were **jointly and severally ordered** to refund the price paid and pay damages, considering that the tampering of the mileage meter produced a repudiatory breach of contract (*aliud pro alio*).

[2] Transparency, Access to Public Information and Good Governance Act 19/2013 of 9 December.

## Set of judgments of the *Audiencia Nacional* against the Decision of 5 March 2015 of the Spanish Markets and Competition Authority (CNMC). Sanction proceedings S/0489/13, Opel dealers, S/0488/13, Hyundai dealers; TOYOTA dealers; and S/0487/13, Land Rover dealers, various dates (May - July 2019).

### Sanction proceedings S/0489/13, Opel dealers:

In most of the judgments, the *Audiencia Nacional* has allowed in part the appeals lodged by the dealers, reducing the penalties imposed on them, their participation in the cartel for all the years on which such penalty was calculated not having been established and/or the penalty having been calculated on the basis of an erroneous turnover.

In the case of certain dealers, the appeal has been allowed in its entirety by the *Audiencia Nacional*, considering in these cases that there was insufficient evidence to establish their involvement in a cartel.

In the case of certain dealers, the appeal has been completely rejected, confirming the penalty for anticompetitive practices prohibited by Article 1 of the Competition Act 15/2007 of 3 July (LDC) and leaving the penalty as it was.

### Sanction proceedings S/0488/13, Hyundai dealers:

The Judicial Review Division of the *Audiencia Nacional* has allowed all the appeals lodged by the dealers, considering that in these cases there was not sufficient evidence to establish their association with a cartel.

### Sanction proceedings, Toyota dealers:

The Judicial Review Division of the *Audiencia Nacional* rejected all the appeals lodged by the dealers, considering that Article 1 LDC was actually violated, and that there was no lack of justification in the decision of the CNMC, that Articles 63 and 64 LDC were not ignored when quantifying the fine, and that there was no violation of the principles of grading and proportionality.

### Sanction proceedings S/0487/13, Land Rover dealers:

The Judicial Review Division of the Audiencia Nacional allows in part the majority of the appeals lodged by the dealers, reducing the penalties imposed on them, their participation in the cartel for all the years on which such penalty was calculated not having been established and the penalty being disproportionate in terms of the temporal attachment.

In other cases, the fewest, the appeal of certain dealers has been fully allowed as the Court considered that there was insufficient evidence to establish their involvement in a cartel.

## Europe

### Summary of Commission Decision of 5 March 2019 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.40481 — Occupants Safety Systems (II) supplied to the Volkswagen Group and the BMW Group). OJ C199, 14.6.2019, p. 4-7

Following the termination of the procedure initiated by the European Commission, it decided to fine the automotive component manufacturers TRW, TAKATA and AUTOLIV for the exchange of commercially sensitive information and coordination in responses to requests for quotations from companies belonging to the Volkswagen and BMW groups, coordinating pricing information. The joint fine is set at EUR 368 million. The companies of the TAKATA group were imposed a fine of EUR 0 as a result of the immunity from fines granted for cooperation with the investigation.

### Regulation No 11 of the Economic Commission for Europe of the United Nations (UN/ECE) — Uniform provisions concerning the approval of vehicles with regard to door latches and door retention components. OJ L 218, 21.8.2019, p. 1-27

This Regulation applies to vehicles of categories M1 and N1 with respect to latches and door retention which can present the risk of occupants being thrown from a vehicle as a result of impact.

The application procedure for approval is described in the Regulation itself.

Its date of entry into force is 28 May 2019. The Regulation includes transitional provisions in relation to ongoing approval processes and previously issued type approvals.

### Directive (EU) 2019/1161 of the European Parliament and of the Council of 20 June 2019 amending Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles. OJ L 188/116, 12.7.2019, p. 116-130

Directive 2009/33 on the promotion of clean and energy-efficient road transport vehicles is amended, setting **minimum procurement targets** for this type of vehicle to be met in two reference periods and differentiating between light-duty and heavy duty vehicles. The first period runs from **2 August 2021 to 31 December 2025** and the second period from **1 January 2026 to 31 December 2030**.

For **light-duty vehicles,** the percentage assigned to **Spain** as a minimum procurement target is **36.3%,** slightly lower than that established for other surrounding countries such as France, Germany or Italy. For heavy-duty vehicles, a distinction is made between **trucks** (N2 and N3) and buses (M3), the share threshold for trucks being **10% for the first period and 14% for the second**. For **buses, the threshold is 45% for the first period and 65% for the second**. As for the minimum target for the share of clean **buses, half has to be fulfilled by procuring zero-emission buses** as defined in the Directive itself.

For the purpose of calculating the minimum procurement targets, the date of the public procurement to be taken into account is the date of completion of the public procurement procedure.

For the purposes of calculating thresholds, procurement shall include purchase, lease, rent or hire-purchase contracts, as well as public service contracts having as their subject matter the provision of passenger road transport services, refuse collection services, and parcel and mail delivery services.

The Directive also defines emission thresholds by category for clean vehicles (which vary according to the two reference periods).

The Directive entered into force on 1 August 2019 and must be transposed into national law by Member States **by 2 August 2021**.

## Decision (EU) 2019/984 of the European Parliament and of the Council of 5 June 2019 amending Council Directive 96/53/EC as regards the time limit for the implementation of the special rules regarding maximum length for cabs delivering improved aerodynamic performance, energy efficiency and safety performance. OJ L 164, 20.6.2019, p. 30–31

With the aim of improving energy efficiency through improvements in the aerodynamic performance of cabs, the European Union amends Article 9a of Directive 96/53/EC, establishing that the European Commission must take the necessary measures before 1 November 2019 so that **cabs that improve aerodynamic performance are approved even if they exceed the maximum lengths** provided for in Annex 1[3], provided that said improvement does not involve an increase in load capacity.

The **approval** of this type of cabs must **apply from 1 September 2020**.

[3] The maximum authorised lengths are set out in para. 1.1 of Annex I to Directive 96/53/EC: (i) motor vehicle, 12.00 m; (ii) trailer, 12.00 m; (iii) articulated vehicle, 16.50 m; (iv) road train, 18.75 m; (v) articulated bus, 18.00 m. Para. 1.5 of the same Annex also provides that motor vehicles or vehicle combinations in motion must be able to turn within a swept circle having an outer radius of 12,50 m and an inner radius of 5,30 m.

# News

## Barcelona will extend its low emission zone to a total area of 95 km$^2$

According to July 2019 statements by the regional government of Catalonia, the administrations involved, which comprise forty municipalities in the urban area of Barcelona, are finalising an initiative to improve air quality. According to the information provided, **the low emission zone of the city of Barcelona will be extended to 95 km$^2$ (twenty times greater than the low emission zone of the city of Madrid**), covering practically the entire city of Barcelona and including some adjacent areas. Restrictions will be effective **weekdays** between **7.00 AM and 20.00 PM.** Only vehicles with the DGT label with the environmental label may enter the low-emission zone. Appropriate municipal bylaws are expected to be passed by the end of the year so that the measure applies from 1 January 2020.

## Adjudication of the Spanish Advertising Standards Association's Jury of 5 September 2019: sending advertising emails indicating in the subject "important communication" breaches the E-Commerce Act

The Jury of the Spanish Advertising Standards Association (*Autocontrol*), in its adjudication of 5 September 2019, has declared that this type of mail with the indication "important communication" is advertising contrary to Article 20(1) of the Information Society Services and Electronic Commerce Act 34/2002 of 11 July (and, by reference, contrary to Article 3 of *Confianza Online's* Code of Ethics). These provisions require that commercial communications made by electronic means are clearly identifiable as advertising.

This case, which could be extrapolated to marketing campaigns in the automotive sector, it consisted of two e-mails that sent a food ordering platform to a private individual, which included a subject "important communication" and a warning sign. In the email text it was stated that the next day he would receive a discount to place an order for food on the platform.

Autocontrol's Jury concluded that the subject line of these two emails make the recipient think that it is not advertising and is therefore contrary to the obligation for commercial communications of an advertising nature made by electronic means to be clearly identifiable as advertising.

For any questions please contact:

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