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Gómez-Acebo & Pombo

Automobile

Automotive Group
Gómez-Acebo & Pombo

2023 No. 19

Contents

Judgments

Spain

Barcelona Provincial Court (Nineteenth Chamber) Judgment no. 10811/2022 of 6 October – Claim for money. Product liability and concurrence of consumer status

This judgment resolves on appeal a claim for a defective product explosion of a Ferrari vehicle while on the road.

Following the European Directive on damages for defective products and European case law on the subject, the Supreme Court, referring to its judgments 34/2020 of 21 January and 448/2020 of 20 July, refers to the fact that the aforementioned European directive does not envisage the liability of the distributor (supplier or provider) of the defective product, when it is possible to identify the manufacturer (among other reasons, because the distributor lacks the possibility of intervening in the product and does not have the knowledge or the opportunity to inspect the goods with which it trades).

The Court of Justice of the European Union has also reiterated that holding distributors liable under the same conditions as producers is an infringement of Article 3 of the Directive (CJEU, Fifth Chamber, 25 April 2000, Case C-52/2000; CJEU, Grand Chamber, 14 March 2006, Case C-177/2004, both of the Commission v. French Republic; CJEU, Grand Chamber, 10 January 2006, Case C-402/2003, Skov v. Bilka; CJEU, First Chamber, 9 February 2006, Case C-127/04, O'Byrne v. Sanofi Pasteur; CJEU, First Chamber, 5 July 2007, Case C-327/2005, Commission v. Kingdom of Denmark).

The Supreme Court emphasises that the European legislator took into account that manufacturers could have their domicile in a State other than that of the aggrieved party, and that EU law has the mechanisms necessary to allow the aggrieved party to sue the manufacturer, and obtain enforcement of the judgment if necessary, in the place where the harm occurred, which will normally coincide with that of the aggrieved party's domicile. In particular, in application of the 1968 Brussels Convention, which for the Member States was replaced by Council Regulation EC No. 44/2001 of 22 December 2000 (Brussels I) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and, from January 2015, by EU Regulation No. 1215/2012 of 12 December 2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I-bis).

Thus, where the manufacturer has its domicile in another Member State, he may be sued, at the choice of the aggrieved party:

1) Before the courts of that State (general jurisdiction, Art. 2 of the Brussels I Regulation, Art. 5 of the Brussels I-bis Regulation);

2) before the courts of the place of manufacture of the product, since that is the place of the "harmful event" (Art. 5(3) of the Brussels I Regulation, Art. 7(2) of the Brussels I-bis Regulation and CJEU, Fourth Chamber, 16 January 2014, Case C-45/13, Kainz v. Pantherwerke; CJEU, First Chamber, 9 July 2020, Case C-343/19, VKI v. Volkswagen);

3) or before the courts of the place where the harm occurred (Art. 5(3) Brussels I Regulation,

Art. 7(2) Brussels I-bis Regulation, provided that it is a foreseeable forum, according to the doctrine of the Court of Justice: CJEU, 11 January 1990, Dumez and CJEU, 19 September 1995, Marinari).

In this case the harm occurred in Spain and the claimant can claim in this forum, but always against the Italian vehicle manufacturer and not against the Spanish distributor.

Pontevedra Judicial Review No. 2 Judgment no. 232/2022 of 18 October - Personal Mobility Vehicles (PMV), technical characteristics and maximum speed

This judgment is particularly interesting as far as mobility is concerned, as it deals with the sanction imposed by the municipal police of Vilagarcía de Arousa on a private individual because the electric scooter ("PMV") he was using did not meet the technical characteristics required by both Regulation (EU) 168/2013 of the European Parliament and of the Council of 15 January 2013[1] ("Regulation 168/2013") and Royal Decree 2822/1998, of 23 December 1998, approving the General Regulation on Vehicles ("RGV").

Specifically, this judgment hears the appeal against the decision of the Vilagarcía de Arousa Town Council's Executive, which ordered the immobilisation of the appellant's PMV, on the grounds that it is a moped which requires a registration certificate, registration number and compulsory insurance certificate. These claims are based on the fact that, according to the technical characteristics of the vehicle, it exceeds the maximum speed of 25 kilometres per hour, which is the maximum speed that determines the classification of an electric scooter as a PMV. Therefore, in its sanctioning file, the Vilagarcía de Arousa police establishes that the vehicle is not a PMV, but a moped.

The sanctioning body produced the report form in which the speed at which the vehicle was travelling, which exceeded the maximum speed of 25 km/h, was established.

The judge, on the basis of the technical characteristics sheet of the vehicle in question, which has the technical capacity to reach 45 km/h (although it is limited to 25 km/h), considers that the vehicle can exceed the maximum speed provided for PMVs and therefore ratifies that the specific category of the vehicle in question is L1e-A (according to Regulation 168/2013) and therefore "requires the corresponding AM class administrative authorisation" and that "it must conclude a civil liability insurance contract in relation to it use".

Europe

Judgment of the Court of Justice of the European Union ('CJEU') of 8 November 2022 in Case C-873/19 - 'Reference for a preliminary ruling - Environment - Aarhus Convention - Access to justice - Article 9(3) - Charter of Fundamental Rights of the European Union - Article 47, first paragraph – Right to effective judicial protection – Environmental association – Standing of such an association to bring an action before a national court against EC type-approval granted to certain vehicles – Regulation (EC) No 715/2007 – Article 5(2)(a) – Motor vehicles – Diesel engine – Pollutant emissions – Valve for exhaust gas recirculation (EGR valve) – Reduction of nitrogen oxide (NOx) emissions limit-

[1] The full regulatory reference is Regulation (EU) No 168/2013 of the European Parliament and of the Council of 15 January 2013 on the approval and market surveillance of two- or three-wheel vehicles and quadricycles.

ed by a 'temperature window' – Defeat device – Authorisation of such a device where the need is justified in terms of protecting the engine against damage or accident and for safe operation of the vehicle – State of the art)

This judgment resolves questions referred for a preliminary ruling by the Schleswig-Holstein Administrative Court (Germany) concerning the use by a vehicle manufacturer (and in relation to a particular type of engine) of a computer program equipped with software with two modes: on the one hand *a*) a mode 1 which was activated at the time of emission tests, which operated by recirculating exhaust gases to the engine, thereby reducing emissions; and *b*) a mode 0 which was activated in cases of normal vehicle operation, resulting in low gas recirculation.

The manufacturer did not declare to the German approval authority that its engines were equipped with such software and in its decision of 15 October 2015 the German approval authority stated that such a system consists of a "defeat device" within the meaning of Article 3(10) of Regulation 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information ("Regulation No 715/2007")[2], not in conformity with the German type-approval decree for these components.

To this end, the manufacturer updated this software and designed it in such a way as to allow the recirculation of pollutant gases depending on the outside temperature, establishing a temperature window with an exhaust gas recirculation rate of 0% when the outside temperature is below -9 °C; 85% when it is between -9 °C and 11 °C; and increases to 100% when the temperature exceeds 15 °C.

Following this modification, the German approval authority issued a new decision declaring the new systems to be permissible.

In the light of the foregoing, the environmental association 'Deutsche Umwelthilfe' appealed against that decision to the Schleswig-Holstein Regional Administrative Court, claiming that, despite the software update, the new software was a deactivation device prohibited under Regulation No 715/2007. In that action, the Federal Republic of Germany was named as a defendant, which, in its response, argued that the appellant association did not have locus standi.

On the basis of this dispute, the German court referred to the CJEU the questions which give rise tothe present decision, and the CJEU ans-wered:

First, that the Aarhus Convention, in conjunction with the Charter of Fundamental Rights of the European Union, must be interpreted as precluding a situation where an environmental association, authorised to bring legal proceedings in accordance with national law, is unable to challenge before a national court an administrative decision granting or amending EC type approval which may be contrary to the prohibition on the use of defeat devices that reduce the effectiveness of emission control systems.

[2] Article 3(10) of Regulation 715/2007: 'defeat device' means any element of design which senses temperature, vehicle speed, engine speed (RPM), transmission gear, manifold vacuum or any other parameter for the purpose of activating, modulating, delaying or deactivating the operation of any part of the emission control system, that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use.

It thus prohibits depriving such associations of any possibility of seeking review of compliance with certain rules of EU environmental law.

Second, as regards the temperature window at issue, the Court points out that Regulation No 715/2007 must be interpreted as meaning that a device which ensures compliance with the emission limit values laid down by that regulation only where the outside temperature is between 15 and 33 degrees Celsius and the driving altitude is below 1 000 metres constitutes a 'defeat device' and that Regulation No 715/2007 prohibits the use of defeat devices which reduce the effectiveness of emission control systems. However, this prohibition is mitigated by three exceptions, including that contained in Article 5(2)(a) of that Regulation, which refers to the case where 'the need for the device is justified in terms of protecting the engine against damage or accident and for the safe operation of the vehicle'.

In any event, the CJEU recalls that, even if the need described above exists, the defeat device will be prohibited if it has to operate, in real driving conditions, for most of the year. To allow such a defeat device could lead to the derogation being applied more frequently than the prohibition and would therefore disproportionately undermine the very principle of limiting emissions of nitrogen oxides.

Legislation

Spain

Order TED/1009/2022, of 24 October, which establishes the list of fuel supply facilities obliged to install electric recharging infrastructures and the exceptions and technical impossibilities for compliance

This Order is issued in implementation of the provisions set out in paragraphs 2 to 5, 7 and 8 of Article 15 of the Climate Change and Energy Transition Act 7/2021 of 20 May ("Act 7/2021"), which establishes that the owners of fuel supply facilities that meet a certain sales criterion by geographic area are obliged to install at least one electric charging infrastructure at the facility itself, of different powers, in the different time periods established in the aforementioned act, all depending on the aggregate annual sales volume of petrol and diesel A of these facilities in 2019.

Article 4 of this order establishes the exceptions and impossibilities for compliance with the obligations of Act 7/2021, stating that the operators of fuel supply facilities are not obliged to comply with these thresholds in the following cases:

— Facilities that already have a recharging point providing a service, provided that it operates on direct current and has a power output equal to or greater than that which it is required to install (i.e. 150 kW or 50 kW depending on its aggregate annual sales volume).

— Facilities where the technical conditions or industrial safety requirements to be met by these facilities cannot be fulfilled.

— Facilities where the distribution company owning the electricity distribution network determines the technical unfeasibility of the necessary service connection.

Article 7 of the Order also provides that the ownership or operation of recharging points by third parties is compatible, provided that such points are located at a distance of no more than 300 metres from the fuel supply facility. In this respect, the land on which both facilities are located must belong to the same owner, or there must be an agreement between the two owners. It should also be borne in mind that the owner of the obliged supply facility will not be exempted from his obligation to install an electric recharging infrastructure in cases where the land adjacent to the facility, by its nature, is already subject to this obligation.

Communication from the Directorate-General for Traffic on the mandatory use of the Highway Electronic Address ("DEV") for legal persons - 1 November 2022

Article 60 of Royal Legislative Decree 6/2015, of 30 October, approving the recast version of the Traffic, Use of Motor Vehicles and Road Safety Act ("LTSV"), establishes in point 3, that the "Central Traffic Authority shall also assign to all holders of a driving licence or permit or of a vehicle registration certificate, and prior to obtaining it, a Highway Electronic Address (DEV). This address will be automatically assigned to all authorisations held by the holder in the Vehicle and Driver and Infringer Registers of the Central Traffic Authority". This DEV is an electronic mailbox used by the Directorate-General for Traffic to send communications and notifications to its users.

In this regard, the Directorate-General for Traffic reported that as of 1 November 2022, legal persons will be obliged to register in the aforementioned mailbox, in order to "receive notifications related to traffic sanctioning procedures, both within the remit of this Authority and of any other body that processes traffic fines".

Thus, the Directorate-General for Traffic will no longer send paper notifications to legal persons and they will have to be registered in the DEV.

Royal Decree 1030/2022, of 20 December, amending Royal Decree 159/2021, of 16 March, regulating roadside assistance services

The main new feature of Royal Decree 159/2021 is the replacement of the traditional emergency pre-signalling triangle with the V-16 light signal from 1 January 2026 and, as a quality of these devices, the incorporation of geolocation functionality if used (together with the technical requirements for the certification of V-16 devices that incorporate this geolocation function), which is an unprecedented new measure in road safety regulations with respect to other countries, as well as the need to verify the connectivity and communication transmission capacity of these devices with the DGT's connected vehicle platform.

A transitional period is established, allowing the use of V-16 devices lacking the required connectivity, provided that they had received certification prior to the publication of the Royal Decree, while ensuring maximum transparency, information and consumer protection.

The revision of the regulatory framework for V-16 signals, following the amendment of Royal Decree 1030/2022, is as follows:

a) 1 January 2026 is set as the date until which the use of V-16 devices that do not comply with the technical characteristics relating to the geolocation of vehicles will be allowed.

b) As a result of technical progress, the General Vehicle Regulation[3] are amended so that the luminous intensity of V-16 devices is required to be between 40 and 700 effective candelas at degree 0, and between 25 and 600 effective candelas at degrees ±8, and this intensity must be maintained for at least 30 minutes in both cases. Likewise, with regard to the frequencies of switching on and off, as well as the time between flashes, it shall be in accordance with the provisions laid down in UNECE Regulation No. 65.

c) Finally, the General Vehicle Regulation includes the obligation for manufacturers of V-16 devices to have a certificate of periodic verification of the production control of these devices, which will be issued by a technical service in accordance with the requirements of UNECE Regulation No. 65.

Royal Decree 1052/2022, of 27 December, regulating Low Emission Zones ("LEZ")

The Climate Change and Energy Transition Act 7/2021 of 20 May (the "Climate Change Act"), establishes in its article 14 the promotion of emission-free mobility and - in the framework of urban mobility - the duty of municipalities with more than 50,000 inhabitants, island territories and municipalities with more than 20.000 inhabitants that exceed the regulated pollutant limit values[4], to adopt sustainable urban mobility plans by 2023 that introduce mitigation measures to reduce emissions from mobility, including, among others, the establishment of low-emission zones. With regard to this obligation, this Royal Decree was published in the Official Journal of Spain on 27 December, in order to establish the minimum requirements to be established by municipalities for LEZs, and to contribute to the improvement of air quality and the mitigation of climate change.

Specifically, these requirements are as follows:

— With regard to air quality, LEZ projects shall *a*) define quantifiable air quality objectives; *b*) contribute to achieving within a reasonable timeframe the guideline values of the World Health Organisation's Guidelines on Air Quality; and *c*) in the event that air quality values exceed the limits provided in the regulation[5] , establish measures and targets to achieve compliance in the shortest possible time, and implement a timetable and criteria for assessing the impact of such measures.

— In the area of climate change, modal shift and energy efficiency, *a*) local authorities shall define measurable and quantifiable targets for 2030 in accordance with the National Integrated Energy and Climate Plan (PNIEC); *b*) local authorities shall ensure that they have instruments in place to facilitate the processing and location of publicly accessible electric vehicle charging points; *c*) establish complementary measures to encourage migration to zero-emission technologies in the building

[3] In particular, Schedule XI to Royal Decree 2822/1998, of 23 December 1998, approving the General Vehicle Regulation is amended.

[4] Specifically, this regulation is provided for in Royal Decree 102/2011, of 28 January, on the improvement of air quality.

[5] See footnote 12.

sector; and *d*) promote urban interventions to mitigate the "heat island" effect.

In addition to these measures, local authorities should also establish additional measures to *a*) meet noise quality targets; *b*) encourage modal shift towards more sustainable modes of transport; and *c*) promote energy efficiency in transport use.

Royal Decree 1052/2022 also establishes the obligation for local authorities to set up a system for monitoring and follow-up of the measures adopted in the LEZs, the minimum requirements of which are detailed in Schedule II to the aforementioned regulation.

The Directorate-General for Traffic and the competent regional traffic authorities must be informed of the information on the outline of the LEZs, timetables, if any, and permitted vehicles, based on their environmental classification, within a maximum period of one month from their establishment.

Similarly, local authorities must inform the Ministry for Ecological Transition and the Demographic Challenge and the regional body responsible for the environment about the LEZs established in their territory, including at least the delimitation and surface area of the LEZ, the measures adopted and their timetable for implementation, and the results of the mandatory monitoring indicators, within a maximum period of one month from their establishment.

The LEZ projects must be reviewed at least three years after their establishment, and thereafter at least every four years, in order to ensure that the objectives set out in the project are being achieved and that they comply with the provisions of this Royal Decree.

Public Consultation

Spain

Report of the Spanish Competition and Markets Authority ("CNMC") [IPN/CNMC/036/22] on the Draft Sustainable Mobility Bill of 13 December 2022

The CNMC analyses the Draft Sustainable Mobility Bill ("DSMB") and calls for taking advantage of the sustainable mobility law to review the historical barriers to the development of competition in the sector. Among other issues, it points out that access to mobility data will be a key determinant of competition in the sector.

Thus, the CNMC makes the following recommendations on the articles of the DSMB:

1. Firstly, within the Preliminary Title of the DSMB, Article 5 establishes the guiding principles of the sustainable mobility system that should govern the actions of general government[6], in which respect the CNMC points out that the principles of *a*) competition are not provided for, stressing that this is a fun-

[6] Safety of people and of the mobility system as a whole; social and territorial cohesion; environmental, social and economic sustainability; service to sustainable economic development; digitalisation, universal accessibility; resilience of the transport system; compliance with Spain's international commitments; transparency, awareness and citizen participation; promotion of the city of proximity.

damental tool for supporting the ecological transition; *b*) the principle of competitive neutrality, which implies preventing public intervention from leading to privileges, advantages or unjustified benefits for some companies over others; and *c*) on the basis of the previous principle, the principle of technological neutrality.

2. On the other hand, in its report, the CNMC stresses the guiding principles for the establishment of public service obligations ("PSOs")[7] and public sector contracts ("PSCs") (Articles 43 to 45 of the DSMB);

   In this line, the supervisor establishes the need to add the aforementioned priority between PSOs and PSCs to the DSMB, as well as to make the elimination of both of them imperative as soon as the services that motivate any of these measures are no longer justified.

3. Thirdly, the supervisor stresses access to data and dissemination of information, emphasising that such policies should be appropriately designed to foster competition without distorting operators' incentives. Special situations may be recognised to reinforce the reporting obligations of certain operators (such as those subject to PSOs and PSCs or sandbox participants). Furthermore, the CNMC establishes the need not to postpone the obligation to procure static data and to regulate the provision of dynamic data to the national access point regulated in EU law. It also recommends that the DSMB should provide for the participation of the CNMC in the supervision and resolution of data access disputes and regulate as a serious infringement the non-compliance with the obligations of neutrality, non-discrimination and transparency.

4. On the other hand, this report recommends, in relation to the sustainable mobility plans (articles 24 to 26 and Transitional Provision 1 of the DSMB), strengthening coordination to determine the content and obligations of the mobility plans and avoid duplication, as well as the adoption of measures to ensure effective accounting, functional and legal separation between infrastructure management and service operation.

5. With regard to the sandboxes (article 77 of the DSMB) in the area of mobility, the CNMC takes a positive view of this provision in the DSMB, although it does not recommend the participation of the project promoter in the drafting of the regulatory proposal after the completion of the tests, and recommends that it should not be regulated if this is not necessary.

Europe

Proposal for a Directive of the European Parliament and of the Council of 28 September 2022 on liability for defective products

This important proposal (the "Proposal") aims to establish a regulatory framework for product liability, taking into account the scientific and technological advances that have taken place since 1985, when the - currently in force - Council

[7] According to Article 42 of the DSMB, PSOs are "requirements determined by the administration in order to guarantee public transport services of general interest which an operator, if it were considering exclusively its own commercial interest, would not assume or would not assume to the same extent or under the same conditions without receiving compensation in return".

Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products ("Directive 85/374") was enacted.

It starts from the identification of three main shortcomings of Directive 85/374, namely: *a*) it was not clear from a legal point of view how to apply the decades-old definitions and concepts of the Product Liability Directive to products of the modern digital economy and the circular economy (e.g. software and products that need software or digital services to function, such as smart devices and autonomous vehicles, or products modified or improved as a result of the circular economy); *b*) the need to mitigate the burden of proof (both of damage, defect and the causal link between them) in complex cases, such as those that might arise from products based on artificial intelligence ("AI"); and *c*) removing the limitation of EUR 500 for property damage, for bringing claims for damages.

The proposal broadly and inclusively defines the different terms such as product manufacturer or product, in line with the shortcomings identified above, and similarly broadly articulates what should be considered as a product defect.

1. Products and defectiveness of a product

The new concept of 'product' encompasses "all movables, even if integrated into another movable or into an immovable", as well as "electricity, digital manufacturing files and software". Within this concept, the Proposal incorporates the term "digital manufacturing file", which is defined as "a digital version or a digital template of a movable".

Similarly, the Proposal expands the factors that allow a product to be categorised as defective in the event that the product does not provide the safety that the public at large is entitled to expect. It incorporates changes in terms of factors to be reviewed.

a) the presentation and instructions for use and maintenance of the product;

b) the reasonably foreseeable use and misuse of the product;

c) the effect on the product of the possibility of further learning after deployment;

d) the effect on the product of other products that can reasonably be expected to be used together with the product;

e) the moment in time when the product was placed on the market or put into service or, where the manufacturer retains control over the product after that moment, the moment in time when the product left the manufacturer's control.

Manufacturer's control means authorisation by a product manufacturer of *a*) the integration or interconnection or provision by a third party of a component, including software updates or upgrades, or *b*) modification of the product;

f) security requirements, including cyber security requirements, and

g) the specific expectations of the end-users for whom the product is intended.

2. Economic operators liable for defective products

The proposal for a Directive also lays down which economic operators will be liable for defective products.

Firstly, the manufacturer of the defective product will be liable for damage caused by defective products, with the definition being significantly broadened to include any natural or legal person who develops, manufactures or produces a product or who has a product designed or manufactured, or who markets it under his name or trademark, or who develops, manufactures or produces a product for his own use.

Where a defective component has caused the product to be defective, the manufacturer of that defective component shall be liable for the damage caused. For this purpose, it is important to take into account the new definition of components, which includes any item, tangible or intangible, or any related service, which is integrated into or interconnected with a product by or under the control of the manufacturer of that product.

Where the manufacturer of a given product is located outside the EU, the importer and the authorised representative may be held liable for damage caused by the product. Furthermore, in cases where neither the manufacturer (either of the product or of components), nor the importer or the authorised representative is established in EU territory, Article 7(3) of the Proposal requires that the fulfilment service provider be held liable. A fulfilment service provider means any natural or legal person offering, in the course of his business, at least two of the following services: warehousing, packaging, addressing and dispatching of a product, without having ownership of the product, with the exception of postal services, parcel delivery services, and any other postal services or freight transport services.

Likewise, and as a development in relation to the transformation of products derived from the new circular economy, the Proposal for a Directive expressly establishes that any natural or legal person that modifies a product that has already been placed on the market or put into service shall be considered a manufacturer of the product.

In the event that none of the economic operators referred to above can be identified, each distributor of the product can be held liable where the claimant requests that distributor to identify the economic operator or the person who supplied the distributor with the product within 1 month of receiving the request; such provision shall also apply to online platforms that allow consumers to conclude distance contracts with traders and that are not manufacturers, importers or distributors.

3. Concept of "damage", burden of proof and cases of exclusion of economic operators' liability

- **"Damage"**

  The excess of 500 euros is eliminated, and the concept of damage is extended to include medically recognised harm to psychological health and the loss or corruption of data that is not used exclusively for professional purposes. It also excludes from the concept of "damage" the defective product itself, a product damaged by a defective component of that product, and property used exclusively for professional purposes.

- **Burden of proof**

  As a general rule, the claimant must prove the defectiveness of the product, the damage suffered and the causal link between the defectiveness and the damage.

However, national courts shall have the power, upon application by an injured person claiming compensation for damage caused by a defective product ("the claimant"), who has presented sufficient facts and evidence to support the plausibility of the claim for compensation, to order the defendant to disclose the relevant evidence at his disposal. This must be necessary and proportionate to support the claim.

This is particularly important, as the product is presumed to be defective if any of the following conditions are met:

a) the defendant has failed to disclose relevant evidence at its disposal at the request of the court;

b) the claimant demonstrates that the product does not comply with mandatory safety requirements laid down in Union or national law which are intended to protect against the risk of the damage that has occurred; or

c) the claimant proves that the damage was caused by an obvious malfunction of the product during normal use or under ordinary circumstances.

The causal link between the defectiveness of the product and the damage shall be presumed where it has been established that the product is defective and the damage caused is of a kind typically consistent with the defect in question.

Where a national court considers that the claimant faces excessive difficulties, due to technical or scientific complexity, to prove the defectiveness of the product or the causal link between its defectiveness and the damage, the defectiveness of the product or the causal link between its defectiveness and the damage shall be presumed where the claimant has demonstrated, on the basis of sufficiently relevant evidence, that:

a) the product contributed to the damage; and

b) it is likely that the product was defective or that its defectiveness is a likely cause of the damage, or both.

The defendant shall have the right to contest the existence of excessive difficulties or the likelihood referred to above.

The defendant shall have the right to rebut any of the presumptions referred to above.

- With regard to the cases of exclusion of producer liability, the proposal is based on the cases provided for in Directive 85/374, although it incorporates the special features resulting from the provision of new liable parties.

  An economic operator shall not be liable as long as it proves: *a*) in the case of a manufacturer or importer, that it did not place the product on the market or put it into service; *b*) in the case of a distributor, that it did not make the product available on the market; *c*) that it is probable that the defectiveness that caused the damage did not exist when the product was placed on the market, put into service or, in respect of a distributor, made available on the market, or that this defectiveness came into being after that moment; *d*) that the defectiveness is due to compliance of the product with

mandatory regulations issued by public authorities; *e*) in the case of a manufacturer, that the objective state of scientific and technical knowledge at the time when the product was placed on the market, put into service or in the period in which the product was within the manufacturer's control was not such as to make it possible to discover the defective character; *f*) in the case of a manufacturer of a defective component, that the defectiveness of the product is attributable to the design of the product in which the component has been integrated or to the instructions given by the manufacturer of that product to the manufacturer of the component; or *g*) in the case of a person who modifies a product, that the defectiveness that caused the damage is related to a part of the product not affected by the modification.

However, the Proposal qualifies these cases of exemption from liability, specifying that economic operators will be liable where the defectiveness of the product is due to any of the following, provided that it is within the manufacturer's control: *a*) a related service; *b*) software (including its updates or upgrades); or *c*) the lack of software updates or upgrades necessary to maintain safety.

4. Liability of multiple economic operators and joint and several liability

Where two or more economic operators are liable for the same damage under this Directive, they may be held jointly and severally liable.

5. Reduction of liability

The liability of an economic operator is not reduced where the damage is caused both by the defectiveness of a product and by an act or omission of a third party.

The liability of the economic operator may be reduced or cancelled where the damage is caused jointly by the defectiveness of a product and by the fault of the injured person or any person for whom the injured person is responsible.

6. Limitation periods

The limitation period shall be three years for the institution of proceedings to claim compensation for damage falling within the scope of the Directive. The limitation period shall start to run from the day on which the injured party became aware, or ought reasonably to have become aware, of all of the following:

a) the damage;

b) the defectiveness;

c) the identity of the relevant economic operator that can be held liable for the damage.

The laws of the Member States governing the suspension or interruption of the limitation period shall not be affected by the provisions of the Directive. Member States shall ensure that the rights conferred on the injured party by this Directive are extinguished upon expiry of a limitation period of ten years from the date on which the actual defective product which caused the damage was placed on the market, put into service or substantially modified, unless the claimant has in the meantime instituted proceedings before a national court against an economic operator that can be held liable.

Except where an injured person has not been able to institute proceedings within ten years because of latent personal injury, the rights conferred on the injured person under the

Directive shall be extinguished on the expiry of a limitation period of fifteen years.

Proposal for a Regulation of the European Parliament and of the Council of 19 October 2022 on the deployment of alternative fuels infrastructure and repealing Directive 2014/94/EU of the European Parliament and of the Council (the "AFIR Regulation") - COM(2021) 559

This proposal for a Regulation contains mandatory national targets for implementing sufficient alternative fuels infrastructure for road vehicles, vessels and aircraft in the EU, and is in line with the objectives of the European Green Deal[8] and the Sustainable and Intelligent Mobility Strategy[9]. Along these lines, the Sustainable and Intelligent Mobility Strategy stresses the need to boost the uptake of zero emission (and low emission) vehicles, vessels and aircraft, which "must go hand in hand with the creation of a comprehensive network of recharging and refuelling infrastructure based on a geographically fair manner to enable the widespread uptake of low- and zero-emission vehicles in all transport modes".

The explanatory memorandum of this proposal highlights the role of Directive 2014/94/EU[10], as it establishes a framework of common measures for the deployment of alternative fuels infrastructure in the EU, although, considering the European Commission's Report on the application of Directive 2014/19/EU[11], pointed out as shortcomings the lack of a detailed and binding methodology for the calculation of targets and the adoption of measures by Member States, given that the level of ambition in the setting of targets and the support policies put in place varies greatly from one Member State to another. The report also concludes that there is no comprehensive and complete network of alternative fuels infrastructure across the Union.

In this context, the proposal sets the following targets to be achieved by Member States (in relation to vehicles only):

1. Electric vehicle charging infrastructure

For light-duty vehicles, Member States shall ensure:

a) For each battery electric light-duty vehicle registered in their territory, a total power output of at least 1 kW is provided through publicly accessible recharging stations; and

b) For each plug-in hybrid light-duty vehicle registered in their territory, a total power output of at least 0.66 kW is provided through publicly accessible recharging stations.

[8] Full reference: COM(2019) 640, 11 December 2019 - COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS - The European Green Deal (link).

[9] Full reference: COM(2020) 789, 9.12.2020 - COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Sustainable and Smart Mobility Strategy – putting European transport on track for the future (link).

[10] Full reference: Directive 2014/94/EU of the European Parliament and of the Council of 22 October 2014 on the deployment of alternative fuels infrastructure.

[11] Full reference: COM(2021) 103 - REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the application of Directive 2014/94/EU on the deployment of alternative fuels infrastructure (link).

In addition, Member States shall ensure a minimum coverage of public access recharging points for light-duty vehicles on the road network in their territory and shall therefore ensure that along the Trans-European Transport Network ("TEN-T") core network, publicly accessible recharging pools dedicated to light-duty vehicles and meeting the following requirements are deployed in each direction of travel with a maximum distance of 60 km in-between them:

- by 31 December 2025, each recharging pool shall offer a power output of at least 300 kW and include at least one recharging station with an individual power output of at least 150 kW;

- by 31 December 2030, each recharging pool shall offer a power output of at least 600 kW and include at least two recharging stations with an individual power output of at least 150 kW;

In addition, along the TEN-T comprehensive network, publicly accessible recharging pools for light-duty vehicles and meeting the following requirements are deployed in each direction of travel with a maximum distance of 60 km in-between them:

- by 31 December 2030, each recharging pool shall offer a power output of at least 300 kW and include at least one recharging station with an individual power output of at least 150 kW;

- by 31 December 2035, each recharging pool shall offer a power output of at least 600 kW and include at least two recharging stations with an individual power output of at least 150 kW.

In respect of heavy-duty vehicles, Member States shall ensure that (in identical terms of distance per direction as for light-duty vehicles) for the TEN-T core network:

- by 31 December 2025, each recharging pool shall offer a power output of at least 1400 kW and include at least one recharging station with an individual power output of at least 350 kW;

- by 31 December 2030, each recharging pool shall offer a power output of at least 3500 kW and include at least two recharging stations with an individual power output of at least 350 kW.

While for the TEN-T comprehensive network:

- by 31 December 2030, each recharging pool shall offer a power output of at least 1400 kW and include at least one recharging station with an individual power output of at least 350 kW;

- by 1 December 2035, each recharging pool shall offer a power output of at least 3500 kW and include at least two recharging stations with an individual power output of at least 350 kW.

Furthermore, within the obligations regarding charging infrastructure for heavy duty vehicles: (a) by 31 December 2030, in each safe and secure parking area at least one recharging station with a power output of at least 100 kW is installed; (b) by 31 December 2025, in each urban node publicly accessible recharging points providing an aggregated power output of at least 600 kW are deployed, provided by recharging stations with an individual power output of at least 150 kW; and (c) by 31 December 2030, in each urban node publicly accessible recharging points providing an aggregated power output of at least 1200 kW are deployed, provided by

recharging stations with an individual power output of at least 150 kW.

As regards the requirements for recharging infrastructures, their operators will be free to purchase electricity from any supplier in the EU, and the aforementioned provision establishes the requirements for interoperability and accessibility in terms of means of payment. To this end, from 1 January 2027, the recharging point operator shall ensure that all public access recharging stations it operates with an available power of 50 kW or more comply with:

a) payment card readers;

b) devices with a contactless functionality that is at least able to read payment cards.

2. Hydrogen refuelling infrastructure

For hydrogen refuelling, the proposal lays down the obligation for Member States to ensure that, by 31 December 2030, a minimum number of publicly accessible hydrogen refuelling stations are deployed on their territory; that publicly accessible hydrogen refuelling stations with a capacity of at least 2 t/day and equipped with at least one 700 bars dispenser are deployed with a maximum distance of 150 km in-between them along the TEN-T core and comprehensive networks. The proposal also provides for liquid hydrogen to be made available at publicly accessible refuelling stations located with a maximum distance of 450 km in-between them.

In addition, by 31 December 2030, Member States shall ensure that at least one publicly accessible hydrogen refuelling station is deployed at each urban node (with the best location of such stations to be analysed). In addition, neighbouring Member States shall ensure that the maximum distance referred to above is not exceeded on cross-border sections of the TEN-T core and comprehensive networks.

Finally, the proposal establishes that operators of refuelling stations shall ensure that the station is designed to serve light- and heavy-duty vehicles; and at freight terminals, the operator or owner of the publicly accessible hydrogen refuelling station shall ensure that it also serves liquid hydrogen. Similar to the terms provided for electric vehicle refuelling infrastructure, the proposal sets out requirements for accessibility and interoperability of hydrogen refuelling infrastructures, ensuring the possibility to use payment cards and clear pricing information.

3. Liquefied Natural Gas ('LNG') infrastructure for road vehicles

The proposal lays down an obligation for Member States to ensure that, until 1 January 2025, an appropriate number of publicly accessible refuelling points for LNG are available where demand exists, at least along the TEN-T core network, so that LNG-heavy-duty vehicles can circulate throughout the EU, unless the costs are disproportionate to the benefits, including environmental benefits.

Proposal for a Regulation of the European Parliament and of the Council of 10 November 2022 on type-approval of motor vehicles and engines and of systems, components and separate technical units intended for such vehicles, with respect to their emissions and battery durability (Euro 7) and repealing Regulations (EC) No 715/2007 and (EC) No 595/2009

On 10 November last, the proposal for a Regulation containing the Euro 7 emission standards was made public. The proposal drafted by the Commission has been submitted to the European Parliament and the European Council, which have to reach a position on its content before it is approved, which means that important changes can be introduced in its content. It is expected to apply from 1 July 2025 to passenger cars and vans, and from 1 July 2027 to trucks and buses.

The proposal has the following specific objectives: *a*) to reduce the complexity of the current Euro regulation; *b*) to update the limits for the relevant pollutants; and *c*) to improve the monitoring of emissions in real-life circumstances. The European Commission, with the idea of vehicle affordability in mind of the current economic situation for consumers, has calculated that the proposed emission reductions can be achieved with existing technologies, so that a moderate impact on vehicle costs is expected, of between 90 and 150 euros per vehicle, and around 2,600 euros for buses and trucks.

To overcome the complexity of emissions regulation, the proposal removes the distinction between emission standards for passenger cars and light commercial vehicles and those for heavy-duty vehicles, bringing together the emission limits for all of them in a single body of legislation.

As far as emission limits are concerned, for passenger cars and vans, the exhaust emission limits are set at the lower level currently imposed in the Euro 6 standard for passenger cars, thus imposing lower limits for vans than in the Euro 6 standard; in particular, the limit is set at 60 mg/km for NOx emissionsx (for both petrol and diesel vehicles) and the PM limit at 4.5 mg/km.

However, the limits for trucks and buses are tightened and the limit for NO emissionsx is set at 350 mg/km on a cold engine and 90 mg/km on a warm engine. For PM emissions, the limit is set at 12 mg/km on a cold engine and 8 mg/km on a warm engine.

On the other hand, in order to optimise emission control under real-world circumstances, the proposal extends the period within which vehicles must comply with the emission standards to 10 years, or 200,000 kilometres (whichever comes first). This doubles the existing durability requirements under Euro 6/VI (100,000 kilometres or 5 years old). For buses and trucks, 700,000 kilometres or 15 years is set.

The proposal also lays down (in Article 4.6) a number of requirements for the fitting of on-board diagnostic (OBD) systems, to ensure that they optimally monitor the emissions of vehicles throughout their lifetime and - at the same time - prevent tampering.

Finally, one of the main novelties of this emissions legislation is that it includes (as an extreme to be limited) emissions other than exhaust gases, such as tyre and brake particles, which - according to the Commission's proposal - are equally harmful to health. These particulate limits apply to electric vehicles, for which minimum durability requirements are also set for their batteries[12] :

[12] What the proposal calls 'Minimum performance requirements' (MPR).

[13] Article 3(56) of the proposal: 'Off-vehicle charging hybrid electric vehicle' - means a hybrid electric vehicle that can be charged from an external source.

[14] Article 3(50) of the proposal: 'Pure electric vehicle' - vehicle equipped with a powertrain containing exclusively electric machines as propulsion energy converters and exclusively rechargeable electric energy storage systems as propulsion energy storage systems.

Type of technology	Passenger cars (M1)		Light commercial vehicles (N1)	
	From the beginning of its useful life until 5 years or 100,000 km (whichever comes first)	Vehicles older than 5 years or 100,000 km up to 8 years or 160,000 km (whichever comes first)	From the beginning of its useful life until 5 years or 100,000 km (whichever comes first)	Vehicles older than 5 years or 100,000 km up to 8 years or 160,000 km (whichever comes first)
OVC-HEV[13]	80%	70%	75%	65%
PEV[14]	80%	70%	75%	65%

The tests, which will be stricter than in Euro 6/VI, for type-approving vehicles are extended to include on-road emissions tests for passenger cars and vans, or short trips typical of daily commuting. In the wake of the Dieselgate scandal, the Commission has introduced new tests for measuring on-road emissions: the RDE (Real Driving Emissions) method.

News

Urban Mobility: Only 13% of municipalities have submitted their urban mobility plan regulating Low Emission Zones (LEZs)

As detailed in previous sections of this Newsletter, the Climate Change and Energy Transition Act 7/2021 of 20 May obliges municipalities with more than 50,000 inhabitants, island territories and municipalities with more than 20,000 inhabitants that exceed the pollution limits set out in the environmental regulation to have an urban mobility plan that regulates the LEZs by 2023. These zones are areas delimited by general government, in which traffic restrictions are applied to the most polluting vehicles.

Despite the imminence of this measure, as of 28 December, of the total number of municipalities obliged to implement it, barely 13% have their respective mobility plan, which has caused confusion and uncertainty among environmental associations, companies and individuals, who are demanding certainty and uniformity in the regulation of access to cities.

For any questions please contact:

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