

GA_P

Gómez-Acebo & Pombo

No. 1 | 2017

Automotive Newsletter

Ainara Rentería

Senior counsel, Automotive GA_P



Contents

Legislation	4
▶ Spain.....	4
— Order PRA/499/2017, of 1 June 1997, amending Annex IX to the Road Vehicles Regulations, approved by Royal Decree 2822/1998 of 23 December 1998.....	4
— Self-Employment (Urgent Amendments) Act 6/2017 of 24 October (published in the Official Journal of Spain (BOE) on 25 October 2017)	5
— Royal Decree regulating the road worthiness test (ITV) of vehicles (pending publication in the BOE)	5
— Decree Act 5/2017, of 1 August, on urgent planning measures for passenger transport services providing up to 9-seater vehicles (Regional Government of Catalonia) (published in the BOE on 28 September 2017).	6
— Motion on the promotion and development of the autonomous vehicle, for debate at full sitting of the lower House (published in the Journal of the Spanish Houses of Parliament (BOCG) on 8 September 2017)	6
— Public consultations	7
▶ European Union.....	7
— Commission Recommendation (EU) 2017/948 of 31 May 2017 on the use of fuel consumption and CO ² emission values type-approved and measured in accordance with the World Harmonised Light Vehicles Test Procedure when making information available for consumers pursuant to Directive 1999/94/EC of the European Parliament and of the Council (Official Journal of the European Union (OJ), L 142, 2 June 2017)	7
— Commission Regulation (EU) 2017/1151 of 1 June 2017 supplementing Regulation (EC) No 715/2007 of the European Parliament and of the Council 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, amending Directive 2007/46/EC of the European Parliament and of the Council, Commission Regulation (EC) No 692/2008 and Commission Regulation (EU) No 1230/2012 and repealing Commission Regulation (EC) No 692/2008 (OJ L 175/1, 7 July 2017).....	9

— Commission Delegated Regulation (EU) 2017/1576 of 26 June 2017 amending Regulation (EU) No 540/2014 of the European Parliament and of the Council as regards the Acoustic Vehicle Alerting System requirements for vehicle EU-type approval (OJ L 239/3 of 19 September 2017)	11
— Commission Delegated Regulation (EU) 2017/1926 of 31 May 2017 supplementing Directive 2010/40/EU of the European Parliament and of the Council with regard to the provision of EU-wide multimodal travel information services (OJ L 272/5 of 21 October 2017)	11
— Public consultation: on specifications for cooperative intelligent transport systems	12
Judgments and decisions	12
— Judgment no. 107/2017 of the Provincial Court of the Balearic Islands of 11 April 2017, appeal 43/2017	12
— Judgment no. 159/2017 of the Companies Court No. 12 of Madrid of 13 June 2017 (JUR 2017\16317)	13
— Judgment No. 473/2017 of the Supreme Court of 20 July 2017 (STS 3018/2017)	13
— Judgment no. 255/2017 of the Provincial Court of Asturias (Sixth Chamber) of 21 July, JUR\2017\228915	14

Legislation

Spain

Order PRA/499/2017, of 1 June 1997, amending Annex IX to the Road Vehicles Regulations, approved by Royal Decree 2822/1998 of 23 December 1998¹

This Ministerial Order revises the Road Vehicles Regulations to favour the regular implementation of proven advancements in clean technology.

With regard to aerodynamics, specific devices and improvements to driver compartments contribute to greater energy efficiency and road safety. However, in order to incorporate these technological advancements the maximum length of vehicles must be increased, even if only moderately. With the current maximum length limits, there is no incentive to incorporate aerodynamic improvements, as this would mean having to reduce the load capacity, to the detriment of competitiveness (as a result of the reduction in transport load). For this reason, in order to facilitate the implementation of these improvements without having to reduce the load, the maximum permitted vehicle length is increased.

In terms of fuels, it has been demonstrated that propulsion systems that are an alternative to fossil energy sources reduce pollution, making road transport a more sustainable means of conveyance. However, these alternative fuels lead to an increase in the vehicle's tare weight, reducing its load capacity. In line with the foregoing, an increase in the maximum mass of the vehicle has been considered appropriate in order to make compatible the use of these fuels without having to reduce the load volume and without, therefore, reducing its competitiveness.

On the other hand, the increasingly frequent use of 45-foot interchangeable containers (or swap bodies) in intermodal transport slightly exceeds the current maximum permitted length of the vehicle or its assembly, as well as the maximum permitted length between the hitch pivot shaft and the rear of the container. In order to make it possible to use these containers or bodies with higher capacity, the aforementioned maximum lengths for intermodal transport operations are increased by 15 cm, which will help to maintain the competitiveness of vehicles in intermodal freight transport between Member States.

¹ Orden PRA/499/2017, de 1 de junio, por la que se modifica el anexo IX del Reglamento General de Vehículos, aprobado por el Real Decreto 2822/1998, de 23 de diciembre.

Self-Employment (Urgent Amendments) Act 6/2017 of 24 October² (published in the Official Journal of Spain³ (BOE) on 25 October 2017)

During the passage through Parliament of the above Act, the personal income tax deductibility of “*expenses related to vehicles partially attached to a business activity*” was deleted from Art. 11 of the lower House text sent to the upper House on 17 July. Judgment no. 343/2017 of the *Tribunal Superior de Justicia de la Comunidad Valenciana* of 12 April explains the reasons behind this deletion, arguing that self-employed workers can deduct up to 100% of the VAT paid on vehicle expenses, including purchase, fuel, repairs and maintenance, given that a vehicle is an indivisible asset that could never give rise to a partial attachment, provided it is used exclusively for the business activity (the simultaneous engagement in the business activity and private needs, even if the latter are irrelevant, would determine non-attachment). While clarifying the VAT treatment of vehicles for self-employed workers, the new Act finally does not include any mention of a vehicle allowance for the purposes of self-employed workers’ personal income tax.

Royal Decree regulating the road worthiness test (ITV) of vehicles⁴ (pending publication in the BOE)

This secondary executive legislation requiring the Cabinet’s approval transposes Directive 2014/45/EU of the European Parliament and of the Council of 3 April 2014 on periodic roadworthiness tests for motor vehicles and their trailers and repealing Directive 2009/40/EC. Said Directive requires Member States to “adopt and publish, by 20 May 2017, the statutory, regulatory and administrative provisions necessary to comply with this Directive”. For the first time, *ITV* testing stations are required to have diagnostics reading tools connected to vehicles’ on-board computers, which is a first step towards testing electronic safety systems and improving emission control. This new piece of legislation, which maintains the periodicity of roadworthiness testing (for cars, every two years as from the fourth year of its registration and every year as from the tenth year of its registration), allows the free choice of *ITV* testing station in the event of a test failure; until now, re-testing had to be performed at the same testing station. It also clarifies the system by which the mandatory date for the next periodic test is determined; from now on, you can keep the same renewal date getting an *ITV* up to a month before it runs out. It will also allow recognition of *ITV* pass certificates issued by other Member States when there is a change in ownership of vehicles, i.e. when the user has bought it abroad and registered it in Spain. For rental service vehicles, with or without driver, and driving school vehicles of M1 and L categories, the periodicity of the tests shall be as follows: up to two years, exempt, from two to five years, annual and more than five years, half-yearly.

² Ley 6/2017, de 24 de Octubre, de Reformas Urgentes del Trabajo Autónomo.

³ Boletín Oficial del Estado.

⁴ Real Decreto por el que se regula la inspección técnica de vehículos.

Decree Act 5/2017, of 1 August, on urgent planning measures for passenger transport services providing up to 9-seater vehicles⁵ (Regional Government of Catalonia) (published in the BOE on 28 September 2017)

This piece of legislation provides that the assignment of authorisations domiciled in Catalonia which enable the provision of passenger transport services in the form of a private hire vehicle - provided with the services of a driver for the purpose of carrying passengers - licence (VTC) will be subject to the fact that the assignor holds the licence for a period of not less than two years, counted from the date of effective granting of the same. An electronic record of communications of private hire vehicle services is created. Such communications must include, inter alia, the relevant particulars of the contract made, the service roadmap, and the name and ID card number of the provider and the hirer of the service. Vehicles must be appropriately identified with a visible mark.

Motion on the promotion and development of the autonomous vehicle, for debate at full sitting of the lower House (published in the Journal of the Spanish Houses of Parliament⁶ (BOCG) on 8 September 2017)

This motion argues that the main impediments to the implementation of autonomous vehicles will not be the limitations in driving technologies, but socio-political, legal, regulatory, and infrastructure factors that must be addressed. An appropriate legal framework is required that allows for the renewal and replacement of old laws with new ones and that lays the foundations for the first fully autonomous vehicles to be completely safe. Namely:

- “1. *To promote the development of autonomous vehicles by evaluating the operation of current specific legislation and identifying possible improvements to the same so as to promote research and development and the validation of prototypes.*
2. *To promote the development of the automotive industry, as well as the ecosystem of highly innovative companies and SMEs associated with vehicle manufacturing and the creation of quality jobs, all this supplemented by R&D&I programmes for the industry.*
3. *To develop measures that strengthen the competitiveness of the automotive industry in our country, facilitating the transition to the needs of the autonomous vehicle, promoting the specialization and qualification of employment associated with the new technological needs of this new industry.*

⁵ Decreto-ley 5/2017, de 1 de agosto, de medidas urgentes para la ordenación de los servicios de transporte de viajeros en vehículos hasta nueve plazas.

⁶ Boletín Oficial de las Cortes Generales.

4. *To promote actions that allow the consolidation of Spain as a world benchmark for the testing of connected autonomous and semi-autonomous or assisted vehicles, at all levels. Evaluating also the social and environmental impact of the development of this industry.”*

Public consultations

- Ministry of Public Works, Directorate-General for Land Transport. Public consultation regarding the draft Royal Decree providing rules supplementary to the Land Transport Planning Regulations in relation to the commercial use of private hire vehicle licences. (Prior public consultation until 10 October 2017).
- Ministry of Economy, Industry and Competitiveness. Public consultation concerning the draft Royal Decree laying down the requirements for the placing on the market and putting into service of registration plates for vehicles and trailers and amending the Road Vehicles Regulations. (Prior public consultation until 28 October 2017).
- Ministry of Justice. Public consultation on the amendment to the Civil Procedure Act 1/2000 of 7 January regarding enforcement, streamlining of procedures and promotion of mediation. (Prior public consultation until 17 November 2017).

European Union

Commission Recommendation (EU) 2017/948 of 31 May 2017 on the use of fuel consumption and CO² emission values type-approved and measured in accordance with the World Harmonised Light Vehicles Test Procedure when making information available for consumers pursuant to Directive 1999/94/EC of the European Parliament and of the Council (Official Journal of the European Union (OJ), L 142, 2 June 2017)

Member States should ensure that the NEDC values recorded in the certificates of conformity of new registered cars are used for the purpose of communicating the official fuel consumption and official specific emissions of CO², as defined in points (5) and (6) of Art. 2 of Directive 1999/94/EC, to consumers until 31 December 2018, after which date all new vehicles placed on the Union market are to be tested and type-approved in accordance with WLTP.

From 1 January 2019, Member States should ensure that only WLTP fuel consumption and CO² emission values are used for consumer information purposes.

Member States should ensure that after 1 January 2019, when end-of-series vehicles may still have NEDC values only, those values are accompanied by a disclaimer that the vehicle is an end-of-series vehicle and that the values are not comparable to values based on the WLTP.

Member States should ensure that the label which is attached to or displayed near each new passenger car at the point of sale includes information on the official fuel consumption and official specific CO² emission values of the vehicle to which it refers. Member States should ensure that the guide on fuel economy and CO² emissions as well as the poster or display to be displayed at the point of sale includes information on the official fuel consumption and official specific CO² emission values of the vehicle to which it refers. Where several variants and/or versions are grouped under one model, the values to be given should be those of the individual vehicle with the highest values within that group. Member States should ensure that promotional material containing a reference to any particular new passenger car model, version or variant includes information on the official fuel consumption and official specific CO² emission values of the vehicle to which it refers. Where more than one model is specified, Member States should ensure that the information includes the official fuel consumption and official specific CO² emission values of all the vehicles to which it refers or the range between the worst and best values of all the vehicles to which it refers. For vehicles type-approved in accordance with the WLTP, the worst and best values should reflect the values of the new passenger cars available on the market, as recorded in the certificates of conformity.

Member States should ensure that promotional material distributed by electronic means which allow consumers to configure a specific vehicle, such as online car configurators, clearly demonstrate to consumers how different specific equipment and optional extras affect the fuel consumption and CO² emission values type-approved and measured in accordance with the WLTP.

In case Member States allow that WLTP fuel consumption and CO² emission values are provided as additional information prior to 1 January 2019 in order to provide consumers as early as possible with access to CO² emission and fuel consumption values that are more representative of real driving conditions, Member States should ensure that the additional information is presented clearly and separate from the labels, guides, posters or promotional literature and material required under Directive 1999/94/EC and that it contains the warning information.

Member States should ensure that consumers, before taking a decision on the purchase of a car, are informed about the changes in fuel consumption and CO² emission values resulting from the introduction of the WLTP and about the implications that those changes may have at the time of registration. Member States should ensure that the official fuel consumption and official specific CO² emission values include at least the 'combined' values measured in accordance with the relevant test procedure. Where information relating to fuel consumption or CO² emissions based on non-harmonised test protocols within the scope of voluntary schemes by manufacturers is provided to consumers separate from the labels, guides, posters or promotional literature and material required under Directive 1999/94/EC, Member States should ensure that such information includes the provided warning information. Member States should consider the possibility of also including the information regarding the maximum value for real-driving air pollutants declared on each vehicle's certificate of conformity on the label which is attached to or displayed near each new passenger car at the point of sale.

Commission Regulation (EU) 2017/1151 of 1 June 2017 supplementing Regulation (EC) No 715/2007 of the European Parliament and of the Council 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, amending Directive 2007/46/EC of the European Parliament and of the Council, Commission Regulation (EC) No 692/2008 and Commission Regulation (EU) No 1230/2012 and repealing Commission Regulation (EC) No 692/2008 (OJ L 175/1, 7 July 2017)

In order to receive an EC type-approval with regard to emissions and vehicle repair and maintenance information, the manufacturer shall demonstrate that the vehicles comply with the requirements of this Regulation when tested in accordance with the test procedures specified in Annexes IIIA to VIII, XI, XIV, XVI, XX and XXI. The manufacturer shall also ensure that the reference fuels comply with the specifications set out in Annex IX.

The emissions tests for roadworthiness purposes set out in Annex IV, tests for fuel consumption and CO² emissions set out in Annex XXI and the requirements for access to vehicle OBD and vehicle repair and maintenance information set out in Annex XIV shall be required to obtain EC type-approval with regard to emissions and vehicle repair and maintenance information. The approval authority shall inform the Commission of the circumstances of each type approval granted under the provided approval procedure. The terms of access to vehicle OBD and vehicle repair and maintenance information are also provided.

This Regulation was partially amended by **Regulation 2017/1154/EU of 7 June** to supplement it⁷.

Regulation 2017/1154 states that provisions should be laid down allowing for hybrid electric vehicles to be evaluated. For plug-in hybrids the methodology should be adapted in order to ensure practicality and robustness of RDE provisions and to prepare a more complete evaluation method that can provide an accurate picture of the RDE emissions of plug-in hybrid vehicles and can thus be also included in local or national incentive schemes designed to promote the use of such vehicles.

Regeneration should be included in the evaluation of vehicle emissions under the RDE procedure. In order to ensure consistency of the RDE procedure with the Worldwide harmonised Light-duty vehicles Test Procedures (WLTP), it is appropriate to introduce a methodology which mandates the use of Ki-factors for excess emissions through regeneration and a related evaluation scheme. Updating of the Ki-factors may be required to reflect changes in vehicle specification and technological progress. Revisions may be necessary to ensure that Ki-factors reflect the real-world occurrence and magnitude of regeneration events.

⁷ Corrigendum to Commission Regulation (EU) 2017/1154 of 7 June 2017, OJ L256 of 4 October 2017.

In order to ensure that light commercial vehicles with a speed limitation can also be tested under the RDE procedure, special provisions for the speeds boundaries should be included for those vehicles.

In order to allow independent small volume manufacturers with worldwide annual production of less than 10 000 units to adapt to the RDE procedure, they should be provided extra time to fully meet the NTE limits. However, it is appropriate to require them to monitor the NO^x emissions during that period.

The ultra-small volume manufacturers should be exempted from the provisions of the RDE procedure. With a volume of less than 1 000 vehicles sold each year in the Union they contribute only marginally to the total emissions of the light passenger and commercial vehicle fleet.

An examination of the legal provisions of Directive 2007/46/EC shows that the requirements of Regulation (EU) 2017/1151 should be applicable to newly registered vehicles, including those the types of which were previously approved on the basis of the NEDC tests laid down in Regulation (EC) No 692/2008. All new vehicles, whether their types were previously approved on the basis of the NEDC tests or whether their types are approved on the basis of the WLTP tests for the first time, must, in accordance with Art. 15 of Regulation (EU) 2017/1151, fulfil the requirements of Annex IIIA to that Regulation as of 1 September 2019. For N1 vehicles of classes II and III and category N2 vehicles, the relevant date is 1 September 2020.

The provisions regarding the obligation of manufacturers to declare the auxiliary emission strategies (AES) are clearly linked to the prohibition to use defeat devices. Therefore, the need for the approval authority to make a decision during type approval based on the risk assessment and health and environmental effects of the AES should be clearly stated in the legislation and the contents of the extended documentation package should enable that authority to make that decision.

In order to ensure transparency, to allow comparison with values measured during independent testing and to allow for the development of incentive schemes by local or national authorities, the obligation for the manufacturer to declare the maximum value of NO^x emissions and the maximum PN in RDE tests in the certificate of conformity of each vehicle should be introduced.

Commission Implementing Regulations (EU) 2017/1153 and 2017/1152, both of 2 June 2017, set out a methodology for determining the correlation parameters necessary for reflecting the change in the regulatory test procedure and amended, respectively, Regulation (EU) No 1014/2010 and Implementing Regulation (EU) No 293/2012.

Commission Delegated Regulation (EU) 2017/1576 of 26 June 2017 amending Regulation (EU) No 540/2014 of the European Parliament and of the Council as regards the Acoustic Vehicle Alerting System requirements for vehicle EU-type approval (OJ L 239/3 of 19 September 2017)

Measures are set out concerning the Acoustic Vehicle Alerting System (AVAS) for hybrid electric and pure electric vehicles. The AVAS shall automatically generate a sound in the minimum range of vehicle speed from start up to approximately 20 km/h and during reversing. The sound to be generated by the AVAS shall be a continuous sound that provides information to the pedestrians and other road users of a vehicle in operation. The sound shall be easily indicative of vehicle behaviour and shall be similar to the sound of a vehicle of the same category equipped with an internal combustion engine. This Regulation entered into force on the third day following that of its publication in the Official Journal of the European Union.

Commission Delegated Regulation (EU) 2017/1926 of 31 May 2017 supplementing Directive 2010/40/EU of the European Parliament and of the Council with regard to the provision of EU-wide multimodal travel information services (OJ L 272/5 of 21 October 2017)

Each Member State shall set up a national access point. The national access point shall constitute a single point of access for users to at least the static travel and traffic data and historic traffic data of different transport modes, including data updates, as set out in the Annex, provided by the transport authorities, transport operators, infrastructure managers or transport on demand service providers within the territory of a given Member State. National access points shall provide discovery services to users, for example services allowing for the search of the requested data using the contents of the corresponding metadata and displaying such contents.

The travel and traffic data listed in the Annex and the corresponding metadata including information on the quality thereof shall be accessible for exchange and reuse within the Union on a non-discriminatory basis, through the national or common access point and within a time-frame that ensures the timely provision of travel information services. They shall be accurate and up to date. The foregoing data shall be reused in a neutral manner and without discrimination or bias. Criteria used for ranking travel options of different transport modes or combinations thereof, or both, shall be transparent and not be based on any factor directly or indirectly relating to the user identity or, if any, the commercial consideration related to the reuse of the data and shall be applied on a non-discriminatory basis to all participating users. The first principle travel itinerary presentation shall not mislead the end-user. Where reusing the static and dynamic travel or traffic data, the source of those data shall be indicated. The date and time of the last update of the static data shall also be indicated.

The terms and conditions for the use of the traffic and travel data provided through the national access point may be determined through a licence agreement. Those conditions shall not unnecessarily restrict possibilities for reuse or be used to restrict competition. Licence agreements, whenever used, shall in any event impose as few restrictions on reuse as possible. Any financial compensation shall be reasonable and proportionate to the legitimate costs incurred of providing and disseminating the relevant travel and traffic data. Terms and conditions of linking travel information services shall be defined in contractual agreements between the travel information service providers. Any financial compensation of the expenses of linking travel information services incurred shall be reasonable and proportionate.

Public consultation: on specifications for cooperative intelligent transport systems

The European Commission has launched a public consultation on the specifications of cooperative intelligent transport systems (CITS) which use information and communication technologies to improve transport. These specifications must be incorporated into the production of both vehicles and systems adapted to these and traffic management.

The intention of this consultation is to amend and supplement the ITS Directive 2010/40/EU for aspects where legal certainty is needed, through the preparation of a delegated regulation on these new systems already installed in most of the new vehicles, connected to communications networks.

The consultation sets out how applications and services such as route planners, travel information services, intelligent signals and traffic lights, security applications such as automatic 112 calls, advanced speed control or traffic management should be regulated.

Judgments and decisions

Judgment no. 107/2017 of the Provincial Court of the Balearic Islands of 11 April 2017, appeal 43/2017

The purchaser of a Volkswagen-brand vehicle brought an action, in the main, to void the sale and purchase contract for mistake on the grounds that he was not provided relevant information and, in the alternative, to terminate the contract. Regardless of which of the claims should succeed, the purchaser sought that the defendant be ordered to pay compensation for non-material damage caused by the installation of NO^x deactivation software on the vehicle.

The contract could not be found void because there was no mistake in the provision of consent and it was not established that the emission level was an essential element of the contract. Nor did the termination of the contract apply because neither the end of the contract was frustrated nor the wrong good was delivered.

The Court did find an appropriate order compensation for non-material damage resulting from the installation of an illegal device in the vehicle, as a source of anxiety resulting from the appearance of a latent defect in the vehicle, uncertainty as to the extent of the fraud and uncertainty about the course and outcome of the claim to be filed, as well as to the feasibility or effects of the solution offered by Volkswagen on the performance and power of the engine. Taking into account all of the above, the Court set the compensation for non-material damage at 500 Euros.

Judgment no. 159/2017 of the Companies Court No. 12 of Madrid of 13 June 2017 (JUR 2017|16317)

The judgment does not uphold the claim filed by the claimant, the Madrid licensed taxi drivers' association 'Federación Profesional del Taxi de Madrid', against 'Maxi Mobility Spain, S.L.', which sought a finding that the defendant's practices through its app 'Cabify' were unfair, constituting an infringement of Unfair Competition laws for breach of the rules on passenger transport in private hire vehicles and taxis.

The Court does not uphold the claim on the grounds that: (a) the allegedly infringed rules on which the unfairness claim is based do not impose obligations on the defendant, but on the holders of VTC licences, with which the defendant cannot be confused, and technically these obligations could therefore not have been infringed by acts attributable to Maxi Mobility Spain, S.L.; (b) the only evidence provided of the commission of the facts supporting the claim is in no way conclusive as to the actual reality of any infringement; and (c) if VTC licensed drivers did indeed commit administrative infringements, it has not been proven that Maxi Mobility Spain, S.L. gained with such any advantage over its potential competitors.

The Court pointed out with regard to the foregoing that, even admitting, as some legal scholars do, that the unfair act could be blamed not only on the principal, but also on the accessory before the fact, who derives a competitive advantage from such fact, "no evidence has been provided by the parties to these proceedings showing that the defendant company induces private hire vehicle licence holders to commit any infringement", so without further unnecessary reasoning, the alleged wrongdoing must be rejected."

Judgment No. 473/2017 of the Supreme Court of 20 July 2007 (STS 3018/2017)

Appeal on the grounds of a breach of the rules and procedures governing the determination of disputes.

Under a dealership contract for the sale of vehicles and pre-sales and after-sales services, following the insolvency of the dealer of a vehicle manufacturer's brand, the question arises as to whether the offsetting of debts and obligations between the brand and its dealer in their business relationship responds to a statutory set-off (under Art. 1196 of the Civil Code) or to a balancing of accounts set-off under the current account system established between the parties.

The Supreme Court concludes that this is a closeout settlement of a single contractual relationship from which obligations have arisen for both parties. In its judgments 188/2014 of 15 April and 428/2014 of 24 July, the Supreme Court held that, even in the case of a contractual relationship from which insolvency claims arise, we are faced with a settlement mechanism to closeout the contract and not with offsetting as such, to which Art. 59 of the Insolvency Act applies.

The balancing of accounts, derived from the current account, is excluded from the concessionaire's insolvency, and therefore does not infringe the principle of *par condicio creditorum* (equal treatment of creditors).

Judgment no. 255/2017 of the Provincial Court of Asturias (Sixth Chamber) of 21 July, JUR\2017\228915

Operating lease contract: early termination: liquidated damages clause: reduction of damages. Early termination without good cause in the event of a breach of an obligation that is to be considered ancillary and which justifies not a release from payment of liquidated damages, but a reduction of the same.

The Provincial Court holds that the breaches referred to above do not have sufficient weight to lead to a contractual termination, given the nature of the contracts entered into, which are operating leases. The alleged breaches were, on the one hand, the lack of ownership of two of the three vehicles covered by the contracts (which had been acquired under the rent-to-own formula) and, on the other hand, the lack of comprehensive insurance cover for these vehicles (as agreed). The judgment explains that ownership is not an indispensable requirement and not even necessary to dispose of vehicles by assigning their use to third parties under the rent-to-own formula, nor is it necessary that the vehicles be fully insured. In the opinion of the Provincial Court, account must be taken, for the purposes of insurance cover, of the guarantee offered by the lessor itself, which may have arranged basic car insurance guarantee for the entire fleet and then offer each vehicle comprehensive or additional cover, assuming it directly.

However, the judgment clarifies that the discrepancy between the agreed insurance cover and that contracted for each of the three vehicles is a clear breach of contract, which also translates into a significant saving for the appellant, which logically should have translated as lower cost of the price agreed for the rental of each and every one of the vehicles, which justifies in this case the acceptance not of the defence of a full breach, but that of a partial breach, also relied on by the defendant in the statement of case raised.

Therefore, the reduction of liquidated damages agreed for early termination of the contract, the amount of which was modified in the aforementioned ruling, is not based on an exercise of an adjustment power on the part of the court (which, according to the judgment itself, could never be exercised in this case since the contract envisages a partial breach of the contract for the application of the liquidated damages clause), but on a partial breach found by the Provincial Court that justifies a reduction in the amount of rent paid by the lessee for the entire term of the contract, which also applies to the liquidated damages for failure to comply with the term which refers to the same amount of rent.

For any questions please contact:

Ainara Rentería Tazo

Senior counsel, Automotive GA_P

Tel.: (+34) 91 582 91 00

arenteria@ga-p.com

For further information please visit our website at www.ga-p.com or send us an e-mail to: info@ga-p.com.