The "Top Five" of topical legal issues in the automotive industry

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With the number of motor vehicle registrations in Spain starting to pick up after drawn-out years of economic gloom, operators in the automotive industry estimate that this year's sales may indeed pass the one million units mark. As the car industry as a whole is stepping hard on the gas pedal to reach this target, sight of key legal issues must not be lost. Identifying and managing these issues properly will allow the main operators to position themselves one step ahead of their competition.

1. Knowledge and avoidance of legal risks. Implementation of "Corporate Governance / Compliance" programmes

In view of the Spanish Competition and Markets Authority's (abbrev. CNMC) latest disciplinary proceedings against manufacturers, distributors and dealers for competition law infringements, Corporate Governance and Compliance programmes – increasingly implemented in the industry – are of singular importance to identify the legal risks the different corporate departments (sales, marketing, etc.) face in the course of business and, once identified, put in place the appropriate internal control and prevention measures.

With the amendments of the new criminal code published in the Official Journal of Spain (abbrev. BOE) last 31 March 2015, coming into force on 1 July 2015, the criminal liability of companies can be attenuated or, as a novelty and in certain cases, the companies can be exempted from liability, if there are organisational and management models that include surveillance and control measures to prevent crime or significantly reduce the risk of such crime being committed. Non- or inadequate implementation of these programmes can entail very serious consequences for companies, with penalties that, depending on the crime, can range from the company's winding up-liquidation to the imposition of hefty fines.

Since the possible exemption from liability is linked to the assessment of the adequacy of the implemented measures in respect of the "significant reduction" and prevention of crime, it is essential to not limit oneself to drawing up minimum control and prevention measures that are then stuck in a drawer. A company's compliance programme must conform with the content requirements under the new criminal code and such company must be aware of the need to regularly update its programme, to properly adjust it to the company's specific circumstances at any given time and to internally implement surveillance and control procedures provided for by the criminal code, creating monitoring committees for this purpose that address, *inter alia*, employee training, the introduction of a channel for complaints and the application of the disciplinary system set out in the programme.

2. Introduction of an eCall in-vehicle system. In-vehicle telematics data. Legal trends and aspects to consider

- The Regulation of the European Parliament and of the Council concerning type-approval requirements for the deployment of the eCall in-vehicle system based on the 112 service and amending Directive 2007/46/EC (the "Regulation") was adopted on 29 April 2015.

The Regulation sets out personal data protection rules applicable to vehicles equipped with the 112-based eCall in-vehicle system. In this regard, among other things, manufacturers must ensure that:

(i) in the internal memory of the 112-based eCall in-vehicle system, data are automatically and continuously removed (only the retention of the last three locations of the vehicle shall be permitted in so far as it is strictly necessary to specify the current location and the direction of travel at the time of the event);

(ii) those data shall not be available outside the 112-based eCall in-vehicle system to any entities before the eCall is triggered;

(iii) manufacturers shall provide clear and comprehensive information in the owner's manual about the processing of data carried out through the 112-based eCall in-vehicle system. That information shall consist of:

a) the reference to the legal basis for the processing;

b) the fact that the 112-based eCall in-vehicle system is activated by default;

c) the specific purpose of the eCall processing (limited to emergency situations);

d) the types of data collected and processed and the recipients of that data;

e) the time limit for the retention of data;

f) the arrangements for exercising data subjects' rights as well as the contact service responsible for handling access requests;

g) the fact that there is no constant tracking of the vehicle.

The Regulation provides that with effect from 31 March 2018, national authorities shall only grant EC type-approval in respect of the 112-based eCall in-vehicle system to new types of vehicles and to new types of 112-based eCall in-vehicle systems, components and separate technical units designed and constructed for such vehicles which comply with this Regulation. Initially, the Regulation shall only apply to vehicles of categories M1 and N1 (passenger cars and light commercial vehicles) as defined in Part A of Annex II to Directive 2007/46/EC.

- As for in-vehicle telematics applications (in general), pioneers in the development of applications for the insurance, renting and automotive industries predict that the number of cars with mobile connectivity will multiply sevenfold over the next five years. Challenges related to personal data protection legislation implementation and application to these telematics applications shall emerge (and indeed are already emerging). It will be important, therefore, for operators to be aware of the development of such applications to reconcile their use with the applicable legislation and optimize their use within the limits imposed by such legislation.

  The following is noteworthy:

  — The Spanish Data Protection Authority (abbrev. AEPD), through its Legal Department, has analysed, for instance, the applicability of the Personal Data Protection Act 15/1999 to a telematics application project that "will incorporate a set of systems to evaluate risk situations for drivers of heavy vehicles while driving" (Report 434/2008).

  — In the 7th annual open meeting of the AEPD held last 21 April 2015, in the session on relevant Legal Reports, specifically under "video surveillance / legitimacy for processing", the AEPD's report (not yet published) on the legality of data processing in the front of vehicles when recording is only triggered by an "event" (accident) and on the conditions that would have to be met for such

data processing was the subject of commentary.

3. Proper handling of situations prior to potential insolvency proceedings. Problematics of art. 146 bis of the Insolvency Act regarding the transfer of undertakings subject to insolvency proceedings (prior consent not required to assign "*intuitu personae*" contracts)

As a result of the automotive industry crisis of recent years, and although this year it seems that dealers' net profit as a percentage of turnover may be around 3%, insolvency proceedings involving companies in the industry have been (and still are) common..

There is no escaping being always alert to early signs of insolvency in dealers and/or suppliers. Experience tells us that such early symptoms take the form of delays in entering data in standard computer systems, missed targets, changes in waiting periods for accounts receivable and payable, non-filing and non-publication of annual accounts, etc.

Having detected a situation of "alert" in a company, in the event of serious and repeated breaches, one should not delay decision-making and assess, where necessary, taking specific action to terminate the contract with the breaching company. Experience tells us that insolvency proceedings are protracted, resulting in potential harm to the brand on account of its image and non-fulfilment of targets in the area in the case of insolvent dealers, or, depending on the type of company affected by the insolvency proceedings, other complications such as logistical problems, shortage of supplies, etc.

The *intuitu personae* nature of many of the agreements concluded with dealers has heretofore protected distributors (the brands) in situations involving the sale of production units, within insolvency proceedings, to dealers not licensed by such brands, the latter being able to object to the assignment of said contracts (as part of the production unit) on the grounds of their *intuitu personae* nature. However, the new art. 146 *bis* of the Insolvency Act, introduced by Royal Decree-Act 11/2014, provides that the transferee shall take on the contractual position of the insolvent without requiring consent of the other party, since the legislator is of the opinion that this assignment is essential for the successful transfer of production units and is in the interests of the insolvency proceedings. Note that for such assignment to apply: (i) the contracts must be attached to the continuity of the business; and (ii) the contracts must be in effect, that is, termination thereof has not been requested.

Given this new situation introduced by art. 146 *bis* of the Insolvency Act, "once the sale of the production unit has been accomplished, having consummated the same, such employer may then bring appropriate civil actions", as stated in the Conclusions of the meeting of Judges of the Madrid Companies Court on 7 and 21 November 2014 on the unification of criteria when applying the amendments of the Insolvency Act operated by Royal Decree-Act 11/2014 and Act 17/2014.

That is, once the sale of the production unit has been carried out within insolvency proceedings, if the transferee of the business (for instance, the transferee of the production unit from the dealer subject to insolvency proceedings) does not meet the brand quality criteria, termination of the contract may thus be applied for (although in the civil track, not within the insolvency proceedings).

4. Importance of a correct design / cover against possible legal risks in contracts

Each manufacturer and distributor carefully designs the distribution channels for its products from amongst different alternatives, always within the framework laid down by EU legislation; having Regulation 461/2010 expired with regard to the marketing of motor vehicles, Regulation No 330/2010 concerning categories of vertical agreements and concerted practices nowadays also applies to motor vehicle distribution agreements. Currently, Regulation 461/2010 applies only to the aftermarket, especially workshop repairs and sales of spare parts.

As a result of the specific problems regarding the application and enforcement of contracts as a result of crisis that suffered by the industry, the main operators have carefully analysed the problem areas to be considered in the drafting of new contracts or amendments to existing ones.

Experience tells us that exclusivity areas, if any, should be designed flexibly for non-compliance by the licensee of its sales targets or other brand standards; on the other hand, serious breaches should be regulated in great detail so that they may operate effectively as grounds for termination where the relationship between the parties no longer works.

5. Adequate internal management concerning Personal Data Protection

The increasingly active marketing campaigns of major car brands and dealers aimed at end users render the internal control measures for compliance with the provisions of the Personal Data Protection Act all the more relevant.

The industry has widely implemented such measures, but given the complexity of this trade, where the end client or customer — natural person — has different channels and moments to consent or not to the processing of his personal data (at the time of purchasing the vehicle, upon access to the workshop, in the sending of communication by marketing campaigns, call centres, etc.), in addition to complying with all requirements of applicable law (informative statements, safety documents, data sharing agreements, etc.), adequate internal management of the changes that may occur over time is essential. Poor internal management due to the complexity of data arrays in this area commonly leads to clients or customers who have not consented to the use of their personal data for certain purposes being contacted precisely for one of such purposes, with the risk of complaints being lodged with the AEPD.

Complaints from individuals before the AEPD seem to be on the rise. Fines for these "mistakes", depending on their seriousness, range from 900 to 600,000 euros.