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Automobile Newsletter

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Contents

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Judgments and decisions

Spain

Judgment no. 188/2019 of the Zaragoza Provincial Court of 27 February 2019

The Provincial Court holds **valid the termination by General Motors España S.L.U. of the dealership sales and service agreement and the authorised repairer agreement** it was party to with one of its dealers, on the grounds of a **loss of trust** arising from a breach of said agreements. Before the end of the contractual term, the dealer had made **false statements regarding the sale of demonstration and courtesy vehicles** through a subsidiary company, channelling and concealing the payments until the end of said contractual term.

The dealer brought actions to void the express 'termination for lack of trust' clause in the dealership and workshop agreements, claiming lack of reciprocity and negotiation in respect of said clause, and therefore lack of grounds for contractual termination in the present case, with the consequent claim for damages.

With respect to the claimed lack of reciprocity, the Court states that such type of claim cannot be accepted, especially when the dealership agreement has been **entered into taking into account the person with whom the agreements are entered into as they are *intuitu* personae agreements,** whereby the lack of trust in the other party is a valid ground for contractual termination.

The Court similarly rejects the **claim of a dominant position of the carmaker resulting in non-negotiation of agreements by the dealer** (negotiated by the carmaker with the dealer's representatives), stating that these are **"arguments unsuitable for professional relations and more in keeping with the relations between sellers or suppliers and consumers".**

According to the Supreme Court ruling of 3 June 2016, in relations between sellers or suppliers only a control of inclusion in contractual standard terms and conditions (grammatical comprehension) applies, but not a control of material transparency (unconscionability), beyond good faith and a fair balance in the mutual consideration to avoid an unconscionable contract.

Consequently, the Court concludes that the dealer is not entitled to any damages.

Judgement no. 75/2019 of the Ourense Provincial Court of 1 March 2019

The Provincial Court dismissed in its entirety the appeal lodged by an individual - **joint and several surety** of a vehicle leasing company - in a **claim for money for breach of an operating lease agreement** initiated by the undertaking **Caixabank S.A.,** assignee of the lessor's receivables, **Arval Service Lease S.A.** Upon default, the lessor invoked **early termination of the agreement,** requesting a settlement of the amounts owed, as well as **50% of the outstanding balance.**

The claim is directed against the surety as a natural person, and not against the lessee company (subject to insolvency proceedings), who claims that **the clauses are unconscionable under consumer law.**

Since **the status of joint and several surety is ancillary to the main agreement - of a commercial nature, to which consumer law does not apply because it is concluded between two companies** - the Court believes that **the status of consumer does not apply.** The defendant's natural personhood does not change the commercial nature of the main relation. In this respect, the Court states that the **Order of the Court of Justice of the European Union of 19 November 2015 in Case C-74/15** must be interpreted as meaning that consumer law shall only apply to those natural persons acting for purposes outside their trade, business or profession and not having any link of a functional nature with the commercial company in respect of which they act as sureties.

In this case, the Court concludes that there is no evidence of the total disassociation of the joint and several surety-defendant from the lessor company, nor of his actions for exclusively private purposes, and that the early termination clause expressly agreed by the parties in the event of default is therefore not void.

With regard to **the penalty clause - agreed at 50% of the pending instalments - and the default interest - 20.5%**, the Court believes that **judicial adjustment does not apply**, since it understands that the amount claimed for accrued revenue is reasonable and proportional to the **frustrated legitimate expectations of the lessor who proceeds to acquire property according to the specifications of the lessee in order to make it available exclusively for a certain period of time and sees his expectations of business profit frustrated when he recovers possession of property not chosen by him,** reduced in its sale or new lease price and with a limited useful life, all of which are fully subject to compensation.

The fact that we are dealing with **a standard form contract** and that the allegedlyunconscionable clauses have the nature of **standard terms and conditions subject to the Standard Terms and Conditions of Contracts Act** (also applicable to agreements concluded between sellers or suppliers) does not determine their voidness either in the opinion of the Court, since for such an imperative provision would have to be contradicted to the detriment of the acceptor.

Judgment no. 123/2019 of the Madrid Provincial Court of 7 March 2019

The Provincial Court concludes that the claim of the claimant company – lessee of a lorry under a capital (finance) lease agreement - seeking to impose on the lessor **the recovery of the property and the deduction of its value from the debt in response to an application for enforcement proceedings made by the lessor for failure by the lessee to pay the capital lease instalments** - should not succeed.

The Provincial Court concluded that the capital lease agreement was clear in its terms and provided the lessor with two possibilities in the event of the lessee's default: 1) a claim for the

instalments due and accrued, including the amount representing the residual (salvage) value; and 2) a claim for the immediate return of the lorry, the payment of the instalments due and payment of 10% of the instalments accrued. The lessor chose the first option.

The claimant submits that, on the basis of **paragraph 3 of the First Additional Provision of the Instalment Sales of Chattels Act 28/1998 of 13 July**[1], the lessor should have sought the recovery of the property, together with instalments due, default interest and compensation for loss of value. However, paragraph 3 does not lay down an obligation on the finance lessor to request the recovery of the property, but rather lays down the rules that would govern a possible request for the recovery of property. **Therefore, the finance lessor is not obliged to request recovery of the property and may only claim payment as contractually agreed (Articles 1089, 1091 and 1255 of the Civil Code).**

Judgment of the Supreme Court (Civil Chamber) of 9 April 2019

In view of the **conflict of territorial jurisdiction** arising in relation to the claim filed for **damages for infringement of competition law** by the so-called **"truck cartel"**, the Supreme Court concludes that, in accordance with the Supreme Court's Order of 26 February 2019 in case no. 262/2018, on the same issue of territorial jurisdiction, the criteria to determine the competent court are as follows:

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

— The transposition in Spain of the Damages Directive[2], carried out through RDL 9/2017, which determined the amendment of the Competition Act and the Civil Procedure Act ("LEC"), did not introduce express rules on territorial jurisdiction in such actions.

— The application of Article 51 LEC, which provides that the registered office of the defendant or alternatively the place where he has an establishment open to the public will determine the competent court. However, since the dealer cannot be considered an establishment open to the public or a representative authorised to act on behalf of the carmaker (as they are independent companies), the criterion of defendant's registered office or establishment open to the public cannot match that of the dealer, and a problem therefore arises when the infringing carmaker has its registered office in another Member State.

[1] "In the event of breach of a capital lease agreement that appears in any of the documents referred to in Article 517(2)(4) and (5) of the Code of Civil Procedure or that has been entered on the Register of Instalment Sales of Chattels and formalised in the official form provided for this purpose, the lessor may seek the recovery of the chattel in accordance with the following rules: [...]."

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

— Therefore, the Supreme Court considers that the most appropriate venue for private competition law actions is that established for cases of unfair competition, as provided in Article 52(1)(12) LEC, which **confers jurisdiction to the court of the place where the defendant has his establishment, and, in the absence of such, to the court of the domicile or place of residence. As a last alternative venue, if the defendant does not have his registered office or domicile in Spain, the appropriate venue shall be that of the place where the act was performed or where its effects take place.** And, should the claim lie with judges from more than one location, the claimant may choose either of them.

In the case under judgment, where a private individual sues **Renault Trucks, S.A.S. and Renault España, S.A.,** the Supreme Court holds the courts of Valladolid, where Renault has its registered office in Spain, as competent, without prejudice to said court verifying whether it should refer the case to the courts of Santander because the purchase of the vehicle took place there.

Sanctioning proceedings S/0471/13 re. Audi, Seat and Volkswagen dealers. Set of judgments of the *Audiencia Nacional* of 26 March 2019 against the decision of the Spanish Competition and Markets Authority ("CNMC") of 28 May 2015

It is in consequence of the **sanctioning proceedings S/0471/13, against the dealers of Audi, Seat and Volkswagen carmakers** ("the Carmakers") that fines are imposed for **alleged restrictive trade practices** prohibited by Article 1 of the Competition Act 15/2007 of 3 July ("LDC").

These practices, initially restrictive of trade, consisted of the establishment of **agreements on prices and terms and conditions of sale of vehicles** by the Carmakers, adopting and implementing such agreements in Spain in up to seven territorially differentiated areas.

Of the 70 judgments handed down by the Judicial Review Division of the Madrid *Audiencia Nacional,* **58 of them dismissed the appeals lodged by the dealers,** considering that Article 1 LDC has been violated.

In seven of the judgments, the *Audiencia Nacional* partially upheld the appeals lodged by the dealers, reducing the penalties imposed on them, because their participation in the cartel was not proven in respect of all the years on the basis of which the penalty had been calculated and because the penalty was calculated using an erroneous tax base.

Lastly, **five dealers had their appeals upheld** by the *Audiencia Nacional*, as in these cases there was not enough evidence to prove their involvement in the cartel.

Legislation

Spain

By-law regulating the use of personal mobility vehicles on the roads of the city of Caceres. Official Journal of the Province of Caceres ("BOPC") No. 100 of 28 May 2019

This by-law (ordinance, US), which is scheduled to come into force on 18 June, **considers personal mobility vehicles (PMV) as vehicles (wheels, platforms, electric scooters)** - in line with **DGT Instruction 16/V-124** - and classifies them into three differentiated classes (A, B, C0-1-2) according to their size, weight and maximum speed. The minimum age allowed for driving PMVs is 16 years, with the exception of class C1 (used for business) and C2 (used for the transport of goods), which may only be driven by persons over 18.

With regard to traffic regulations, **PMVs must be used on roads and, in general, may not be used on pavements, parks and walkways intended for pedestrian use**. PMVs may be used on cycle paths separated from the rest of the traffic and from pedestrian transit areas, on spaces shared between pedestrians-cycle lanes and pedestrians-PMVs - below 10 km/h -, as well as on tourist routes or organised routes accompanied by a guide and in groups of no more than 6 people.

PMV drivers must respect the priority of pedestrians and maintain a distance of at least one metre from the façade of buildings as well as pedestrians. On the carriageway, PMVs shall preferably be on the right-hand lane and, if there is a lane reserved for other vehicles, PMVs shall be on the lane adjacent to it. In addition, PMV drivers must **wear a helmet** when driving on roads open to traffic.

PMV drivers do not require a municipal administrative authorisation for use of PMVs on urban roads, except for classes C1 and C2, which require an authorisation from the City Council before commencement of the activity.

With regard to the insurance of PMVs, **those in classes C1 and C2 used on urban roads must have civil liability insurance, which is not obligatory for the rest of the classes**. In addition, drivers of PMVs in the above classes must obtain an **urban driving license**, which will be obtained upon payment of a fee.

In relation to the penalties provided for in the By-law, infringements are classified as minor, serious and very serious, with penalties of 100, 800 and 2,000 euros, respectively.

Decision of the Regional Minister of Territory, Energy and Mobility of the Balearic Islands determining, in compliance with the Climate Change and Energy Transition Act 10/2019 of 22 February, the form and electronic means to provide data on vehicle fleets, and also the types of stickers to be placed in a visible place. Official Journal of the Balearic Islands ("BOIB") No. 72 of 30 May 2019

This Decision approves the **form to be used in providing data on** the total number and identification of vehicles in the fleet as well as **emission-free** cars and motorcycles **to be used by car rental companies and large and medium-sized enterprises that annually replace more than 30% of their vehicles when renewing their fleets.**

The Administration will thus be notified of compliance with the obligation to progressively replace its internal combustion vehicles with emission-free vehicles on the basis of the **Climate Change and Energy Transition Act 10/2019.**

The affected companies **must file electronically the initial communication in respect of their fleets before 30 June 2019**, and must make new communications whenever they modify the fleets.

Finally, it is provided that the emission-free vehicles of the fleets affected by the Climate Change and Energy Transition Act 10/2019 must have the '**MELIB' environmental mark** - identifying the Balearic Islands' electric vehicles – placed in a visible place.

Europe

Opinion of the European Committee of the Regions on 'Road safety and automated mobility'. OJ C 168/81 of 16 May 2019

In this Opinion, the European Committee of the Regions (CoR) highlights the potential contribution of automated mobility to EU cohesion objectives, and stresses that in rural areas priority should be given to the development of smart vehicles, while in urban areas more emphasis should be given to the development of smarter roads, noting in particular that such could reduce intraregional disparities and make longer distance commuting more convenient, thus helping to mitigate saturation of major urban areas

With regard to public transport, the CoR stresses that automated mobility makes it more competitive by means of non-timetabled, demand-based, personalised, shared, high-quality, energy efficient mobility services within and outside of settlements, though technology and the regulatory environment will need to be developed in concert.

In addition, **the CoR advises that urban-interurban planning and regional spatial planning practices of European towns and cities should include the designation of areas for automated transport and mobility, and emphasises the need to use automation to improve public transport networks, proposing that links and interoperability with public transport and between the different modes be promoted through targeted measures.**

Finally, with regard to the evolving digital environment, the CoR advises simpler and universal connection of smart road systems and vehicles. In this respect, it notes that road users such as cyclists and pedestrians might remain disconnected from the network and that any legal, digital and physical framework for smart vehicles will need to take mixed traffic into account**, emphasising the need for development and harmonisation of road markings and signs.**

The CoR concludes by calling for measures to be taken in order to tap the full potential of automated mobility and vehicle to vehicle communication.

Regulation No 134 of the Economic Commission for Europe of the United Nations (UN/ECE) — Uniform provisions concerning the approval of motor vehicles and their components with regard to the safety-related performance of hydrogen-fuelled vehicles (HFCV) [2019/795]. OJ L 129/43 of 17 May 2019

The Regulation contains the **specifications and requirements for the approval** of hydrogen-fuelled vehicles and the **specifications of the compressed hydrogen storage system,** as well as the **specifications of specific components for the compressed hydrogen storage system** and the **specifications of a vehicle fuel** system incorporating the compressed hydrogen storage system, and **conformity of production**. It applies to **hydrogen-fuelled vehicles of category M** (power-driven vehicles having at least four wheels and used for the carriage of passengers) **and N** (power-driven vehicles having at least four wheels and used for the carriage of goods) incorporating compressed hydrogen storage system.

In particular, for the approval of such systems, components and vehicles, **different test procedures** (e.g. gas leak, pressure, strength, etc.) shall be carried out to verify conformity in performance.

Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC. OJ L 136/28 of 22 May 2019

Directive (EU) 2019/771 (the Directive), which must be transposed by the Member States by 1 July 2021 and will **apply from 1 January 2022, increases consumer protection through the incorporation of guarantees applicable to contracts for the sale of products incorporating digital products or services** concluded between sellers and consumers.

The Directive shall apply to tangible movable items that incorporate or are interconnected with digital content or digital services in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions, irrespective of whether such digital content or digital service is supplied by the seller or by a third party. This Directive **will undoubtedly apply in the automotive sector, where the sale and purchase of goods increasingly integrates digital content interlinked with the vehicle itself. It does not apply to contracts for the provision of digital content and digital services that are regulated by EU Directive 2019/770 adopted on the same day.**

The aim of the Directive is to harmonise consumer protection at European level in the face of the growing supply of this type of product. In particular, the Directive lays down **rules on the conformity of goods with the contract, remedies in the event of a lack of such conformity, the modalities for the exercise of those remedies, and on commercial guarantees.**

In this respect, Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more, or less, stringent provisions to ensure a different level of consumer protection. They may, however, exclude from the scope of this Directive contracts for the sale of second-hand goods sold at public auction and living animals.

Conformity requirements: The seller shall deliver goods to the consumer that meet certain subjective, objective and installation requirements in order to conform with the sales contract.

As regards **subjective requirements for conformity**, the goods shall (a) be of the description, type, quantity and quality, and possess the functionality, compatibility, interoperability and other features, as required by the sales contract; (b) be fit for any particular purpose for which the consumer requires them and which the consumer made known to the seller at the latest at the time of the conclusion of the sales contract, and in respect of which the seller has given acceptance; (c) be delivered with all accessories and instructions, including on installation, as stipulated by the sales contract; and (d) be supplied with updates as stipulated by the sales contract.

In the case of goods with digital elements, the seller shall ensure that the consumer is informed of and supplied with **updates, including security updates, that are necessary to keep those goods in conformity**, the seller not being liable for any lack of conformity if the consumer fails to install such updates, provided that the seller informed the consumer about the consequences of the failure to install and the failure to install was not due to shortcomings in the installation instructions.

Any lack of conformity resulting from the incorrect installation of the goods shall be regarded as lack of conformity of the goods if the installation forms part of the sales contract and was carried out by the seller or if the installation, intended to be carried out by the consumer, was done by the consumer and the incorrect installation was due to shortcomings in the installation instructions provided by the seller.

Similarly, where a **restriction resulting from a violation of any right of a third party (in particular intellectual property rights) prevents or limits the use of the goods (and their digital content)**, such shall be deemed a lack of conformity of the goods.

The goods shall be deemed to meet the **objective requirements for conformity** if fit for the purposes for which goods of the same type would normally be used, taking into account, where applicable, any existing Union and national law, technical standards or, in the absence of such technical standards, applicable sector-specific industry codes of conduct. They must also be of the quantity and possess the qualities and other features, including in relation to **durability, functionality, compatibility and security** normal for goods of the same type and which the consumer may reasonably expect given the nature of the goods and **taking into account any public statement** made by or on behalf of the seller, or other persons in previous links of the chain of transactions, including the producer, particularly in advertising or on labelling.

As far as remedies for lack of conformity are concerned, the consumer shall be entitled to have the goods brought into conformity (repair or replacement) - free of charge, without significant inconvenience to the consumer and within a reasonable period of time - and, if this is not possible or entails the imposition of disproportionate costs on the seller, a proportionate reduction in the price or termination of the contract.

As for the liability of the seller, the seller shall be liable to the consumer for any lack of conformity which exists at the time when the goods – including goods with digital elements – were delivered and which becomes apparent within two years of that time. In the case of goods with digital elements, where the sales contract provides for a continuous supply of the digital content or digital service over a period of time, the seller shall also be liable for any lack of conformity of the digital content or digital service that occurs or becomes apparent within two years or within the period of time during which the digital content or digital service is to be supplied under the sales contract. Member States may provide that, in the case of second-hand goods, the seller and the consumer can agree to contractual terms or agreements with a shorter liability or limitation period, provided that such shorter periods shall not be less than one year.

The commercial guarantee statement shall be provided to the consumer including a clear statement that the consumer is entitled by law to remedies from the seller, the name and address of the guarantor, the procedure to be followed by the consumer to obtain the implementation of the commercial guarantee, and the terms of the commercial guarantee.

With respect to the burden of proof, **any lack of conformity which becomes apparent within one year of the time when the goods – including goods with digital elements – were delivered shall be presumed to have existed at the time when the goods were delivered.** This period may be extended by the Member States to two years.

Member States may maintain or introduce provisions stipulating that, in order to benefit from the consumer's rights, the consumer has to **inform the seller of a lack of conformity within a period of at least 2 months of the date on which the consumer detected such lack of conformity.**

Finally, any contractual agreement which, to the detriment of the consumer, excludes the application of national measures transposing this Directive, derogates from them, or varies their effect, before the lack of conformity of the goods is brought to the seller's attention by the consumer, shall not be binding on the consumer.

Where the seller is liable to the consumer because of a lack of conformity resulting from an act or omission by a person in previous links of the chain of transactions, the seller shall be entitled to pursue remedies against the person or persons liable in the chain of transactions (**right of redress**).

The Directive repeals, with effect from 1 January 2022, Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, and amends the Annex to Regulation (EU) 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws and Annex I to Directive 2009/22/EC on injunctions for the protection of consumers' interests.

Regulation (EU) 2019/631 of the European Parliament and of the Council of 17 April 2019 setting CO_2 emission performance standards for new passenger cars and for new light commercial vehicles, and repealing Regulations (EC) No 443/2009 and (EU) No 510/2011. OJ L 111/13 of 25 April 2019

For the sake of clarity, the Regulation recasts and repeals Regulations 443/2009 and 510/2011 and sets out the **CO_2 emission performance standards for new passenger cars and new light commercial vehicles.**

This Regulation sets the following **fleet-wide average emission targets:** (i) **from 1 January 2020, 95 g CO2/km for new passenger cars and 147 g CO2/km for light commercial vehicles;** (ii) until 31 December 2024 additional measures corresponding to a reduction of 10 g CO2/km; (iii) from 1 January 2025 a 15% reduction of the target in 2021 for both new light commercial vehicles and new passenger cars; and (iv) from 1 January 2030 a 37.5% reduction of the target in 2021 for new passenger cars and 31% for new light commercial vehicles.

In addition, from 1 January 2025, a zero- and low-emission vehicles' benchmark shall apply equal to 15 % share of the fleets of new passenger cars and new light commercial vehicles, a share that will rise to 35 % and 30 %, respectively, from 1 January 2030.

Manufacturers must ensure that their average CO_2 emissions do not exceed the emission targets specified in the Regulation. To this end, they may form a pool, the manager of which shall be responsible for paying any excess emissions premiums imposed on the pool[3].

[3] The excess emissions premium shall be equal to the excess emissions multiplied by EUR 95 and by the number of newly registered vehicles.

Manufacturers may apply[4] **for a derogation** from the specific emissions target if they have fewer than 10,000 new passenger cars or fewer than 22,000 new light commercial vehicles registered in the EU per calendar year and do not form part of a pool or group of connected manufacturers that exceeds these upper limits. This derogation is granted for a maximum renewable period of five years.

CO_2 savings achieved through the use of innovative technologies or a combination of innovative technologies shall be taken into consideration for the calculation of specific CO_2 emissions upon application by the manufacturer.

By 31 October of each year, the Commission shall publish a list indicating (inter alia) for each manufacturer its specific emissions target and its average specific emissions of CO_2 for the preceding calendar year. Type-approval authorities shall also verify the presence of any strategies on board or relating to the sampled vehicles that artificially improve the vehicle's performance in the tests performed for the purpose of type-approval.

Under this Regulation, Regulations (EC) No 443/2009 and (EU) No 510/2011 are repealed with effect from 1 January 2020.

News

Barcelona City Council orders the installation of petrol stations and electric supply stations for vehicles.

Last May, the Barcelona City Council extended for an additional year the suspension approved in May 2018 of licences for new petrol stations or the extension of existing ones, following the initial approval of the special urban development plan (whose final approval is scheduled for the end of 2019), which **will prohibit new supply facilities for motor vehicles in some areas of the city** (Ciutat Vella nuclei, municipalities added to Barcelona, Collserola and Montjuic parks and land assigned to equipment).

On the other hand, this urban development plan aims to **promote the installation of electric car charging stations**, to contribute to the transition to electric vehicles. These charging stations may be located in streets with a width of more than 20 metres and a maximum of 150 metres from the axis of Barcelona's[5] main roads.

[4] The application shall include: (i) the name of, and contact person for, the manufacturer; (ii) evidence that the manufacturer is eligible for a derogation; (iii) details of the passenger cars or light commercial vehicles which it manufactures including the test mass and specific emissions of CO2 of those passenger cars or light commercial vehicles; and (iv) specific emissions target consistent with its reduction potential.

[5] For example, Gran Vía, Avenidas Meridiana and Diagonal or Calle de Aragón.

Finally, the special plan lays down the **obligation for existing petrol stations to install rapid electric car charging points** within a maximum of 2 years from the approval of the plan.

The Ministry of Public Works submits to public consultation the Draft Royal Decree amending Royal Decree 314/2006, of 17 March, approving the Building Code

From 17 May to 14 June 2019, the Ministry of Public Works submits to **public consultation the approval of the Draft Royal Decree for the adaptation of the Building Code** to the provisions of Articles 8(2), 8(3) and 8(5) of Directive (EU) 2018/844 of the European Parliament and of the Council[6], which lays down the conditions and requirements for the development of the **infrastructure necessary for the smart charging of electric vehicles in car parks of buildings.**

[6] Directive (EU) 2018/844 of the European Parliament and of the Council of 30 May 2018 amending Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency.

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