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Legislation

Spain

Report of the Spanish Competition and Markets Authority ("CNMC") on the draft Royal Decree, of 6 March 2018, amending Royal Decree 647/2011, of 9 May, regulating the activity of charging suppliers in the provision of electric recharge services.

Report issued by the CNMC in response to the request of the State Secretary for Energy on the proposed "*Draft Royal Decree amending Royal Decree 647/2011, of 9 May, regulating the activity of charging suppliers in the provision of electric recharge services*" ("Proposal for a Royal Decree" or "Draft Royal Decree", indistinctly). This Draft Royal Decree develops the role of charging suppliers included in the regulatory framework of the electricity sector, setting out their rights and obligations and the requirements for their activity (provision of recharge services for electric vehicles, as well as storage of electricity), specifically:

— The rights and obligations of charging suppliers are simplified, allowing these to engage the services of a representative for the management of obligations.

— The administrative procedure is updated so that the start of the activity is carried out electronically.

— It is provided that the Ministry of Energy, Tourism and Digital Agenda will keep the list of charging suppliers updated.

— The requirement that the corporate purpose of commercial companies intending to act as charging suppliers should expressly mention their capacity to sell and buy electricity is removed.

— The requirement for specific metering of the electricity sold through the recharging points is abolished.

— The consequences of a failure to comply with the requirements and obligations to carry on the activity of a charging supplier are clarified.

— The inspection regime for the activity is modified.

The main conclusions of the CNMC regarding the Draft Royal Decree are as follows:

a) The simplification of the requirements for charging suppliers allows for further development of the electric vehicle, favouring its introduction in the market. However, the Electricity Sector Act 24/2013 of 26 December provides a series of limitations in relation to the obligation to become a commercial company, the possibility of allowing only the charging supplier to resell electricity and to establish recharging points.

In the opinion of the CNMC, this Proposal for a Royal Decree can only mitigate the above limitations, but does not in any event eliminate them as it lacks appropriate force and effect. Therefore, in order to increase the number of recharging points, the maintenance of the aforementioned requirements under Act 24/2013 and the need for a charging supplier should be reconsidered.

b) On the other hand, although the Proposal for a Royal Decree does not analyse the role that the electricity distributor should play in the recharging sector, the CNMC believes that the development of such infrastructure should take place in a context of competition, limiting regulated earnings unless very specific and exceptional circumstances are met. Likewise, the development of recharging infrastructure must be included in the national strategy to promote electric vehicles and the use of alternative energy in the transport sector, so that all sectors concerned are involved and costs between all those involved is efficiently shared.

c) In turn, in the opinion of the CNMC, it would be appropriate for the Royal Decree to clarify that undertakings that do not charge for their recharging services (such as hotels, supermarkets, etc.) need not constitute themselves as a charging supplier, since the multitude of queries in this regard indicates that it has not been sufficiently clarified in the piece of legislation.

d) The Proposal for a Royal Decree facilitates the configuration of the measurement, eliminating the requirement for specific metering of the electricity sold through low-power charging points. Although the CNMC considers this measurement to be appropriate, it considers that the limit imposed (450 kW) means, in practice, excluding almost all charging suppliers from complying with this obligation, with the loss of information that this means for the management of the electricity system. The proposal in this respect from the CNMC is to limit this obligation to charging points with an installed power of more than 50 kW or at least to those connected at high voltage. In addition, these measuring devices should be part of the measurement system in order to allow an adequate monitoring of the development of the activity and its impact on the electrical system.

e) In relation to the procedure for disqualification of non-compliant charging suppliers, the Proposal for a Royal Decree provides a six-month period for disqualification, increasing the general administrative period by three months. In view of the problematic experience in the disqualification processes up to now, the CNMC advises to proceed to the suspension of the electricity supplier as market agent and the automatic transfer of the consumers to a regulated electricity supplier.

f) Finally, with regard to the inspection regime, the CNMC highlights that the Proposal for a Royal Decree eliminates any reference to itself as the body responsible for inspecting compliance with the requirements for carrying out the activity of charging supplier, replacing such references with a more generic “body responsible for inspections”, which may lead to confusion. The CNMC suggests replacing said wording with “the Competition and Markets Authority”.

Decision of 14 March 2018 of the Directorate-General of the Institute for Energy Diversification and Saving, amending the Decision of 10 January 2018 establishing the Call for Applications of the Grant Scheme for the Implementation of Electric Vehicle Charging Infrastructure ("PLAN MOVALT Infraestructura"). Official Journal of Spain ("BOE"), 24 March 2018, no. 73.

Call for applications to fund actions to support mobility based on criteria of energy efficiency, sustainability and promotion of the use of alternative energy, including the creation of appropriate energy infrastructure.

Having exhausted the available funds, with the scheme in force and a high number of applications on the waiting list, the budgetary allocation for the grant scheme for the implementation of an electric vehicle charging infrastructure has been increased by 5 million euros, up from the initial 15 million euros to 20 million euros.

The Trade Secrets Bill, Journal of the Houses of Parliament ("BOCG") of 1 June 2018.

At its meeting of 28 May 2018, the Lower House Commission entrusted the approval of the Trade Secrets Bill to the Justice Committee, with full legislative powers. This piece of legislation incorporates in our legal system Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, which provides a harmonised legal framework for the whole European Union.

The automotive industry needed greater legal certainty in this area, and this initiative can help achieve this. The competition between brands is greater than ever, given the moment of economic growth in which we find ourselves, as we should not forget that this was one of the most affected industries when the global economic crisis reached Spain. To this we must add the introduction of hybrid and electric vehicles to the market, which are now beginning to be attractive to the consumer, driven by technological improvements that are capable of being protected.

This Bill defines the conduct constituting a violation of trade secrets and also those other circumstances in which the practices of acquiring, using and disclosing information are considered lawful, in which case the protective measures provided for in the Bill will not apply.

On the other hand, the potential co-ownership of a trade secret and its transferability are established in cases where there is no agreement between the parties, in particular where carried out by means of a contractual licence.

Likewise, this Bill establishes an open catalogue of actions to defend the owner of the trade secret in order to deal with a possible violation thereof, with special attention to the regulation of damages.

Lastly, the measures that the courts may adopt for a breach of the rules of procedural good faith are aggravated when, in the alleged defence of a trade secret, undue pressure is exerted on the person who has acquired some type of information whose disclosure is covered by any of the exceptions envisaged in the Bill.

European Union

Regulation No 16 of the Economic Commission for Europe of the United Nations (UNECE) — Uniform provisions concerning the approval of: I. Safety-belts, restraint systems, child restraint systems and ISOFIX child restraint systems for occupants of power-driven vehicles; II. Vehicles equipped with safety-belts, safety-belt reminders, restraint systems, child restraint systems, ISOFIX child restraint systems and i-Size child restraint systems [2018/629]. (OJ L 109, 27.4.2018).

This Regulation applies to vehicles of certain categories (M, N, O, L_2, L_4, L_5, L_6, L_7 and T) with regard to the installation of safety-belts and restraint systems, as well as to the installation of child restraint systems, ISOFIX child restraint systems and i-Size child restraint systems.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions of 15 May 2018. On the road to automated mobility: An EU strategy for mobility of the future.

The European Commission ("the Commission") sends a communication to the European Parliament, the European Economic and Social Committee and the Committee of the Regions analysing the future and new challenges of connected mobility in Europe.

Mobility is currently undergoing a period of evolution due to the introduction of vehicle connectivity and the integration of new components into the vehicle, so it is essential to ensure cybersecurity, data protection and access to data.

To this end, the Commission will work with Member States in 2018 on guidelines to ensure a harmonised approach for national ad-hoc vehicle safety assessments of automated vehicles and will initiate work with Member States and stakeholders on a new approach for vehicle safety certification for automated vehicles.

In addition, in order to make automated mobility safe, the Commission here proposes new safety features for automated vehicles as part of the revision of the General Safety Regulation for motor vehicles as well as requirements in the Road Infrastructure Safety Management Directive, and will also:

— Present in 2018 the work priorities in the EU and in the United Nations to implement the new vehicle safety legislation for automated and connected vehicles in particular for vehicles with the highest levels of automation.

— Intensify coordination with Member States on traffic rules (e.g. the Geneva and Vienna Conventions) so that they can be adapted to automated mobility in a harmonised way.

— Adopt by the end of 2018 a delegated regulation under the Intelligent Transport Systems Directive to ensure secured and trustful communications between vehicles and infrastructure, sound data protection level in compliance with the General Data Protection Regulation and interoperability of messages for safety-related and traffic management services.

The Commission is also proposing to regulate data recorders for automated vehicles as part of the revision of the General Safety Regulation for motor vehicles to clarify who was driving (the vehicle or the driver) during an accident.

In addition, the Commission proposes to regulate platooning under the revision of the General Safety Regulation for motor vehicles to ensure standardisation of data exchange across different brands. The implementing legislation will build on the results of the call on platooning (2018-2020) in the Horizon 2020 research and innovation framework programme and complement the delegated Regulation on Cooperative Intelligent Transport Systems.

Lastly, the Commission will continue monitoring the situation on access to in-vehicle data and resources and will consider further options for an enabling framework for vehicle data sharing to enable fair competition in the provision of services in the digital single market, while ensuring compliance with the legislation on the protection of personal data. In this respect, the Commission is proposing to regulate the protection of vehicles against cyber-attacks as part of the revision of the General Safety Regulation for motor vehicles and will:

— Consider the need for specifications for access to vehicle data for public authorities' needs, in particular traffic management in 2018/2019 (delegated act under the Intelligent Transport Systems Directive) and in 2019/2020 for the collection of anonymised largescale real-world fuel/energy consumption information.

— Implement a pilot on common EU-wide cybersecurity infrastructures and processes needed for secure and trustful communication between vehicles and infrastructure for road safety and traffic management related messages according to the published guidance on the certificate and security policy.

– Issue in 2018 as a first step a Recommendation on the use of pioneer spectrum for 5G large scale testing, cybersecurity and on a data governance framework that enables data sharing, in line with the initiatives of the 2018 Data Package, and with data protection and privacy legislation.

Other

China vows to lower auto import tariffs set at 25%.

According to a press release dated 10 April 2018, the President of China pledged to significantly reduce import tariffs on automobiles, then standing at 25%, thus continuing his plans to relax foreign ownership limits for companies wishing to produce automobiles in the Asian country. Currently, foreign firms are required to form a 50-50 joint venture with a local manufacturer and cannot establish their own wholly owned factories. These measures would remove the competitive disadvantage and thus increase exports to China. Brands that are not yet locally produced in the country will benefit most.

The Chinese municipality of Chongqing issues first licence plates to road test driverless vehicles.

According to a press release dated 19 April 2018, the south-western Chinese municipality of Chongqing, the country's largest vehicle manufacturer, issued licence plates for self-driving vehicles owned by seven automakers for public road testing.

To this end, the city opened 9.6 kilometres of public roads, taking another step forward and leaving behind the testing period in closed circuits. It is the first batch of self-driving car testing licence plates issued by Chongqing after it issued regulations governing road testing of unmanned vehicles in mid-March, following Beijing and Shanghai.

Judgments and decisions

Judgment no. 8/2018 of the Palma de Mallorca Provincial Court (Fifth Chamber) of 18 January 2018.

A car rental company filed a lawsuit against the supplier of part of its fleet, claiming damages for loss of earnings due to the defendant's delay in supplying the necessary parts for the repair of a vehicle.

The vehicle in question remained stationary, awaiting the spare part, for more than four months, before finally being repaired after an hour's work. The claimant assessed the loss of earnings taking into account the total time the vehicle was stationary and the vehicle's turnover over the previous four years, whereas the defendant contended that it did not have stock of that particular part and that, furthermore, that model had ceased to be manufactured six years ago. On appeal,

the Provincial Court cites several judgments of the Supreme Court regarding the burden of proof and the correct quantification of loss of earnings in similar cases (Judgments of the Supreme Court ("SSTS") of 4 April and 9 May 2011) and concludes that, *"since the most recent case law in dealing with the requirement to demonstrate the loss suffered has opted for an intermediate criterion based on guidelines of objective probability that take into account the normal course of events and circumstances of the case, establishing that the profits that can be claimed are those in which there is not only full certainty but, equally, sufficient plausibility to be considered as very probable, in the closest approximation to effective certainty (....)"* loss of earnings has been sufficiently proven, on the back of several expert witness opinions, and affirms the judgment of the court of first instance, ordering the supplier to pay 5.634.14 as damages for loss of earnings to the vehicle rental company.

Judgment no. 18/2018 of the Cuenca Provincial Court (First Chamber) of 24 January 2018.

Claim for damages filed by the purchaser of a vehicle against the dealer for failure to comply with the obligation to deliver the vehicle in a timely manner. The parties agreed on the sale and purchase of the vehicle, the buyer signing an order form and leaving with the dealer a deposit at the time of transaction. On the reverse side of said form, the buyer is warned that if, after being informed a second time of the vehicle's availability, the customer refuses to take delivery, it will be understood that the contract has been abandoned, leading to the termination of the same and the forfeiture of the amount left with the dealer. The buyer transferred the entire price and years later he is still waiting for delivery of the car, the dealer invoking the clause mentioned above, claiming that delivery to the buyer was attempted on several occasions.

The buyer states that the signing of the order form is binding as such and perfects the sale of the good from that moment onwards, whereas the dealer claims that it is merely a promise to sell. Citing previous case law, the Court rejects said dealer's claim, stating that, if there is an agreement between the price and the subject matter, provided that its effects are not temporarily deferred, the transaction must be characterised as a sale and purchase transaction and, therefore, the consumer and user protection conditions will apply. The Court considers that the aforementioned clause inserted on the back of the order form is to be deemed excluded, in accordance with consumer and user protection legislation, since it was not expressly accepted by the buyer when signing the front of the order form, nor is the general expression on it that the terms of the contract are accepted deemed sufficient. The Court argues that the claimant amply complies with the obligations imposed by the sale and purchase contract, and that it is the defendant (the dealer seller) who is in breach by failing to deliver in a timely manner the agreed good.

The decision of the court of first instance is affirmed by the court of appeal and the dealer is ordered to pay the amount of 17,666 euros, which corresponds to the value of the vehicle plus the interest of the loan requested for the purchase of the same as compensation.

Judgment no. 27/2018 of the Burgos Provincial Court (Third Chamber) of 29 January 2018.

Claim filed by an individual against a Volkswagen vehicle dealer for the purchase of a vehicle of that brand with an EA 189 diesel engine, which had installed a software that activated a mechanism to optimize the emissions of polluting gases, camouflaging them when they were tested.

The claimant brought an action to void for infringement of mandatory rules, to void for fraud or mistake that vitiated the consent given, to rescind for breach of contract and compensatory damages for the lower value of the vehicle delivered, with damages being awarded only in the amount of 324.17 euros, as the court took the view that not only the vehicle could be driven without legal restrictions and in conditions of full safety and normality, but also that the software neither affected the vehicle's power nor involved greater polluting emissions and could be replaced by another with minimum cost.

The dispute on appeal confined itself to the appropriateness or otherwise of the compensation awarded.

It should be made clear at this point that an action for damages requires the claimant to prove that harm has been suffered by him or her or his or her property, a harm that must be certain and attributable to the other party. In the present case, the appellate court holds that the there is no real and certain harm that can be used as a basis for an action for damages, since the harm for which damages were awarded is hypothetical.

Consequently, the appellate court finds for the dealer and reverses the award of damages.

Judgment no. 46/2018 of the Barcelona Provincial Court (Fourteenth Chamber) of 2 February 2018.

Action brought by an official motorcycle dealer, claiming 642,513.65 euros in compensatory damages and goodwill compensation for unjustified termination of the dealer contract.

As regards the term of the contract, the claimant contends that an uninterrupted collaboration of 30 years makes it possible to establish a permanent relationship, even if several fixed-term contracts have been signed over the years. The Court concludes that it is clear from the wording of the terms of each contract that each of them was for a fixed term (five years) and, furthermore, there is no evidence suggesting the claimant disagreement to limiting the duration in time. The Court cites several Supreme Court rulings, which state that the mere succession of contracts does not make them one, nor does it make the relations permanent when the intention of the parties was to enter into a fixed-term contract, as is the case here (Judgment of the Supreme Court no. 1077/04 of 4 November).

With regard to the unjustified termination of the contract, the motorcycle maker terminates the dealer contract because it reaches its end, so it does not need to prove any breach of contract by the dealer, nor does notice or compensation need to be given.

As regards compensation for goodwill, the Court decides to award the dealer 40,763.7 euros. The specific facts taken into consideration are, on the one hand, that the motorcycle maker set up its subsidiary only two years before starting to collaborate with what would be its official dealer for more than thirty years, a relationship that lasted until the time of the claim. On the basis of the particular circumstances mentioned above, the Court takes the view that this motorcycle maker was practically unknown when its contractual relationship with the dealer began and that, at the time the contract was terminated, it was widely recognised in the market, and therefore concludes that "*this long collaboration over time, together with the fact that when the defendant started it had practically no presence in the Spanish market, justifies awarding the claimant goodwill compensation*".

Judgment no. 41/2018 of the A Coruña Provincial Court (Third Chamber) of 2 February 2018.

Claim filed by a consumer against a carmaker for engine software configuration whereby NOx emissions on test benches could be adjusted to the emission limit set out in Regulation (EC) No 715/2007 (Euro 5 and Euro 6), though under actual driving conditions these limits are exceeded with a detrimental effect on the environment. In this lawsuit, an action to void is brought for latent defects.

The carmaker defends itself claiming that fraud in the engine does not affect the driving, safety or use of the car and can continue to be used normally.

The court of first instance takes the view that voidance of the contract does not lie, but orders the carmaker to repair the vehicle and pay 1,650 euros in damages.

The carmakers appeals against the judgment, which the appellate court reverses, finding the carmaker not liable.

Judgment no. 75/2018 of the Barcelona Provincial Court (Eleventh Chamber) of 14 February 2018.

Action brought by a financial institution of a carmaker, claiming from two customers (lessee and surety, respectively) the payment of outstanding debts for non-payment of the instalments of an operating ('renting') lease contract. There is a failure to pay the instalments, the parties terminate the contract, sign an admission of debt and the vehicle is returned. In addition, they agree to the payment by the lessee of a financial penalty for early termination of the contractual relationship.

On first instance, all the claims of the financial institution are upheld, the defendants being ordered to pay the amount of 9,340.48 euros. The defendants appeal on the grounds that the admission of debt is between the defendant-lessee and the financial institution, excluding the defendant-surety, claiming that the financing clause binding the surety in the contract, once terminated and replaced by an admission of debt, no longer applies. However, the appellate court rejects this reasoning, considering that the admission does not a constitute a definitive termination of the operating lease contract, but an amendment to the same, a renegotiation of the outstanding debt with the establishment of new payment terms, also financed. Therefore, the financing agreed between the parties to the original contract subsists with the amendment, leaving the parties in the same position in which they were.

The order to pay the amount initially claimed against the defendants is therefore affirmed.

Judgment no. 73/2018 of the Barcelona Provincial Court (Nineteenth Chamber) of 22 February 2018.

Claim for non-payment of amounts filed by a financial institution to which receivables had been assigned by a lease operator against an operating lease company with which the lease operator had entered into a vehicle operating lease contract.

The lease operator sends a content-certified letter with acknowledgment of receipt ('burofax') to the lease company, giving notice of the termination of the contract for breach of its payment obligations and the assignment of receivables to a financial institution. The defendant returns the vehicle on the understanding that this act constituted a termination of the contract by mutual agreement and the settlement of the same. However, the judgment of the court of first instance concludes that the verbal agreement of termination could not be considered to be proven and, in any event, the delivery of the vehicle does not imply per se the termination of the contract with full and final settlement of the same as there are outstanding payments. The defendant is therefore ordered to pay 7,548,22 euros to the financial institution.

Judgment no. 127/2018 of the Barcelona Provincial Court (Fourth Chamber) of 27 February 2018.

Action brought by a lease operator against an end consumer with whom it had signed an operating lease contract, claiming successfully on first instance unpaid amounts and compensation for early termination of the contract. The defendant appeals, contending as follows:

— Firstly, that it is a consumer and requests that several clauses of the operating lease contract signed with the lease operator, specifically those relating to the cash security deposit, the termination by the lessor and the late payment interest at a rate of 18% per year, be voided on the grounds of being unconscionable.

— In the alternative, inappropriateness of the penalty for early termination.

Thus, with regard to the defendant being a consumer, such capacity is confirmed by the judgment of the Court of Justice (Fourth Chamber) of 3 September 2015, which necessarily leads to the legal doctrine of said EU court for the purposes of determining the unconscionableness of any of the clauses contained in contracts not individually negotiated with consumers under Standard Terms and Conditions. The case law of the European Court of Justice states that "*any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession*" is a consumer and that, in contrast, "*any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned*" is a seller or supplier. In the judgment under analysis, the provincial court determines that where the operating lease contract does not determine the use of the vehicle that is the subject matter of the contract, a self-employed worker, such as the defendant lawyer, can be considered a consumer.

With regard to the invalidity of the above-mentioned clauses, the contractual clause concerning the cash security deposit provided that the lessee would have to hand over a certain amount upon signing the contract as cash security deposit, which would be returned at the end of the contract, once full performance and satisfaction of the terms had been established. The provincial court does not consider it unconscionable, since it does not cause an imbalance to the consumer because the purpose of the clause is to guarantee the return of the vehicle at the end of the contract, in perfect condition, and the payment of the rent and compensation agreed upon.

With regard to the contractual clause providing for compensation to the lessor in the event of early termination of the contract, of the amount resulting from the application of 50% to the outstanding instalments (i.e. owed rental payments) at the time of termination, the provincial court takes the view that the determined percentage is excessively high and unconscionable for the consumer, stating, therefore, that said clause must be deemed excluded.

With regard to the contractual clause concerning late payment interest, a monthly rate of 1.5% (i.e. 18% per year) was agreed, which was regarded as unconscionable and deemed excluded.

In conclusion, the contractual clauses concerning the late payment interest and the penalty clause providing for a penalty of 50% of unpaid instalments were held void, whereby the only amount the defendant is ordered to pay is the unpaid rent.

Judgment no. 125/2018 of the Valencia Provincial Court (Sixth Chamber) of 8 March 2018.

Action for a price reduction and for damages for latent defects brought by a private individual against the seller of a second-hand passenger car. The claimant submits expert evidence which shows that there was bad faith on the part of the seller in failing to inform the buyer of the damage

suffered by the vehicle, and that such damage clearly predates the purchase of the vehicle. With this expert evidence, the Court is of the opinion that the conditions for a reduction in the price paid by the buyer are met. The following is taken into consideration:

— With regard to the delivery of a defective good, the defect may consist either of a fault or flaw or an alteration of the quality or qualities of the thing. The existence of the damage to the vehicle is proven by means of the aforementioned expert evidence, which establishes that the defect existed, in any case, prior to the transaction.

— The defect must exist at the time of conclusion of the contract. To the best of the expert's knowledge, the car's defects were hidden from view and were known to the seller, who concealed them at the time of the sale. The first indications of these defects occurred only a month and a half after the purchase of the vehicle.

— The defect must be latent. The Court found that the damage or defects were latent, as the expert stated that the vehicle appeared to be in good condition and that he had to dismantle it in order to see the damage and analyse it.

— The defect must be serious; any kind of defect is not enough. The seriousness of the defects can be concluded from the expert valuation of the work required to repair the defects, which amounted to 25,260.99 euros when the purchase price was 35,000 euros.

Therefore, the Court concludes that the action for a price reduction and for damages for latent defects should succeed, awarding a compensation in the amount of 25,260.99 euros as proportional reduction in the price of the vehicle and 2,136.16 euros in damages.

Judgment no. 272/2018 of the Barcelona Provincial Court (Seventeenth Chamber) of 9 March 2018.

The financial institution of a carmaker sues an individual for non-payment of instalments of the financing loan taken out to buy the vehicle. The defendant argues that the clauses of the contract, because of the poor quality of the document, were illegible. The judgments made at first instance and on first appeal held that the illegibility of the clauses led to the claim succeeding only at the nominal amount of the claim, rendering invalid the individual's arguments, who argued that, since the clauses were illegible, he could not know the terms of the contract or the amount to be paid. Since the defendant had already paid some instalments, the provincial court concluded that the claim regarding the illegibility of the capital and interest clauses could not be upheld.

Judgment no. 158/2018 of the Santander Provincial Court (Second Chamber) of 13 March 2018.

Action brought by a consumer in respect of a vehicle affected by the 'Dieselgate' scandal.

The claimant bases his claim on the failure of the vehicle to comply with the minimum standards required to be type-approved and, therefore, to be driven.

At first instance, the claimant is awarded damages for non-material damage amounting to 500 euros, which on appeal is reversed and set aside, on the basis that what was put forward as non-material damage (the claimant's disquiet upon discovering the facts, the administrative uncertainty or the inconvenience caused by the need to undertake repairs) is insufficient and cannot be regarded as grounds for the aforementioned damages.

Judgment no. 196/2018 of the Barcelona Provincial Court (Thirteenth Chamber) of 16 March 2018.

A financial institution sues an individual, in his capacity as joint and several surety for the company leasing a vehicle, for early termination of the operating lease contract entered into between the parties when the lessee returns the vehicle before the contractually established date. The claimant claims the instalments that the individual failed to pay, and the penalty for early termination of the contract, set at 60% of all outstanding rental payments, plus any excess mileage.

The judgment at first instance orders the defendant to pay the amount sought, the defendant appeals on the following grounds:

— The wrong measurement of the car's mileage, so that the amount he is ordered to pay should be reduced.

— The defendant is the surety, not the joint and several debtor.

— He has the status of consumer and, consequently, requests that the penalty clause set at 60% be held unconscionable and void.

The court of appeal, first of all, denies the individual consumer status, acting as joint and several director of the company leasing the vehicle and, therefore, the clause in dispute is not held unconscionable. The court holds that in the present case there is no evidence that the defendant is acting for purposes which are outside his trade, business or profession, particularly having functional ties to the aforementioned leasing company. In fact, the court concludes, when a person acts as joint and several surety in a commercial transaction to which consumer protection legislation does not apply, such surety becomes part of that relationship, without enjoying then the status of a consumer.

On the other hand, the claim regarding the wrong measurement of mileage is rejected as it is not sufficiently substantiated. In the light of the foregoing, the court does not uphold the defendant's appeal and affirms the judgment at first instance in its entirety.

Judgment no. 181/2018 of the Barcelona Provincial Court (First Chamber) of 28 March 2018.

Action brought by a carmaker in connection with the improper termination of its dealer contract and claim for damages.

The dealer engages in business related to the automotive industry and is linked to the carmaker in question since 1969, distributing its new cars and offering after-sales services for the same. In 2003, the parties signed an open-ended contract for the distribution of new cars and original brand spare parts, at the same time as they signed another contract relating to the provision of after-sales services. In 2012, the carmaker sends a letter to the dealer announcing the termination of their contractual relationship with effect from July 2014, i.e. with 2 years' notice, basing its decision on its unilateral power under the contract.

In addition, in its response to the claim, the carmaker points to the existence of a repeated failure by the dealer to meet the sales targets that would have been grounds for termination otherwise.

The dealer requests that the termination of the dealer and distribution contract instigated by the carmaker be held inappropriate and, in turn, claims compensation for the cost of the workers' dismissals. At first instance, the court rules against the claimant holding that the termination of the contract is appropriate, but rules for the claimant ordering the defendant to compensate the dealer for the costs incurred by reason of such termination. On appeal, the court finds the carmaker not only not liable for inappropriate termination of the distribution contract, since there is no evidence of a breach of good faith on its part, but also for any unfair or dishonest conduct that would justify considering the termination of the contract as unconscionable. In addition, the appellate court also rejects the claim for compensation for the dismissal of the employees, since such were transferred to a subsidiary company of the claimant, which in turn was sold to another entity which continued to carry on the sale and servicing of vehicles of a different brand.

Judgment no. 156/2018 of the Valencia Provincial Court (Eighth Chamber) of 28 March 2018.

Action brought by a lease operator against a consumer for non-payment of instalments under an operating lease contract. The amount claimed included unpaid monthly instalments, damages consisting of 60% of the outstanding instalments, deposit, late payment interest and penalty interest.

The defendant objected, arguing (i) that the late payment interest was close to usury and (ii) that, by applying the mileage adjustment clause, *"If the actual kilometres travelled are less than the*

contracted kilometres, the lessor will pay the lessee that amount. For these purposes, 75% of the kilometres shall be considered as having been travelled", being the number of kilometres much lower than that contracted, not only did the lessee not have to pay the lessor, but moreover should receive money for this, and (iii) the compensation of 60% of the instalments for early termination did not apply.

The judgment at first instance upheld the claim and ordered the lessee to pay the claimant, but reduced the amount by adjusting the mileage and the deposit. The defendant appealed, but only with regard to the above-mentioned mileage adjustment clause, contending that this is an unconscionable term in respect of "*For these purposes, 75% of the kilometres shall be considered as having been travelled*", since the car was returned with only 28% covered. However, in this regard, the Court considers that, if the clarity of the terms of a contract leaves no doubt as to the intention of the parties, there is no room for interpretation under article 1.281 of the Civil Code. Therefore, it must be understood that "*75% of the kilometres shall be considered as having been travelled*".

Thus, the judgment at first instance is upheld in its entirety.

Judgment no. 260/2018 of the Barcelona Provincial Court (15th Chamber) of 15 June 2018.

Liability claim filed by a leasing operator against the sole director of a company which defaulted on an operating lease contract by reason of such director not calling a general meeting of shareholders within two months of becoming aware, or of being able to become aware, of a statutory winding up event.

The appellate court takes the view that the moment the debt is incurred for the purposes of the director's liability occurs as the rental payments become due and are unpaid by the lessee. Furthermore, based on when the debts arose and that the winding up event occurred in 2007, said court concludes that the debts are subsequent to the winding up event and, as the defendant does not prove otherwise, liability is presumed to lie with the administrator.

In view of the foregoing, the claimant's appeal is upheld and the judgment of the Companies Court is reversed, ordering the lessee's director to pay the claimant the sum of 19,515.02 euros.

For any questions please contact:

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