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Gómez-Acebo & Pombo

# Automotive and Mobility

**Automotive and Mobility Sector**

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# Judgments

## Spain

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These Supreme Court orders settle the question of jurisdiction between the court of the place where the vehicle rental contract was concluded and the place where the payments were not made and thus where the vehicle was appropriated.

The Court had already pointed out on several occasions (for example Order of 22 September 2021, CC 20550/2021), that jurisdiction in relation to "criminal offences of misappropriation lie with the Court of the place where the offence was committed, being the one in which the perpetrator, assuming powers of ownership that do not rest with him, transforms the legitimate possession of the good received and takes ownership of it, incorporating it into his estate or giving it a use different from the one for which it was received or denying having received it".

In both cases, the Court settled the issue by granting jurisdiction to the Court of the place where the vehicle had been appropriated, which is where the perpetrator, by failing to meet the payment obligations without returning the leased vehicle, turned legitimate possession into illegitimate possession.

These Orders clarify this issue, which has been raised by several operating lease companies in the sector in recent years, as in the analysed case of Volkswagen Renting, Gedescoche and Arval Service Lease S.A..

### Biscay Provincial Court Judgment no. 165/2023 of 8 June - Dismisses the unconscionability of clauses relating to the recalculation of instalments and compensation for early termination of a vehicle operating lease agreement - ALD AUTOMOTIVE

This important judgment adjudicates on and rejects the appeal lodged against the judgment handed down by Bilbao Court of First Instance no. 11 on the lack of control over Transparency and Inclusion and the unconscionability of certain clauses of a vehicle operating lease agreement, specifically those relating to the recalculation of instalments (which allowed an increase of 44%) and compensation for early termination (for breach of a minimum-stay commitment based on the Agreement's Standard Terms and Conditions). The appellant claimed a lack of contractual negotiation after completing the online application and the provision of clauses in very small print which were difficult to understand.

The Provincial Court determined that the clauses in question pass the Transparency and Incorporation control as they were accepted by the lessee (appellant) in the electronic contracting when the need for reading and acceptance was indicated and that said acceptance referred to all the contractual documents, their content being legible and easily understandable.

As regards the claimed unconscionability, the Provincial Court acknowledges that a factor

relevant to the automotive sector must be taken into account. It is expressly considered that the good covered by the agreement is a rapidly depreciating good and that in the event of early termination the lessor recovers the good at a much lower price; for this reason, the agreement includes the possibility of a shorter contractual term, but with a higher penalty, depending on what the consumer requests, which is why it cannot be concluded that there is a lack of reciprocity in the agreement.

The compensation envisaged for early termination and cancellation is a liquidated damages clause whose enforceability depends on the early termination due to causes attributable to the lessee and its purpose is to mitigate the loss of profit for the lessor, so there is no unconscionability or lack of reciprocity, given that the amount payable is substantially lower than the established monthly instalments.

# Legislation

## Spain

### Order ICT/736/2023, of 5 July, laying down the regulatory bases for granting aid to projects promoting the value chain of electric and connected vehicles within the Strategic Project for Economic Recovery and Transformation in the Electric and Connected Vehicle sector, within the framework of the Recovery, Transformation and Resilience Plan, and the call for applications for the granting of aid for electric vehicle battery production projects for the year 2023.

In order to access the European "Next Generation EU" funds in Spain, the Recovery, Transformation and Resilience Plan was approved. In this context, Order ICT/736/2023 responds to the need to include the amendments made to the regulation on State aid and the regulatory bases applicable to the next calls for applications, which have as their regulatory source the Temporary Crisis and Transition Framework and Commission Regulation (EU) No 651/2014 of 17 June 2014.

The granting of aid is structured in two sections, A and B. The first is focused on incentivising investment in the industrial capacity of batteries for electric vehicles, their essential components and the production or recovery of essential raw materials needed; the second on supporting investment plans aimed at the industrial value chain of electric and connected vehicles, their systems, subsystems and components, and certain ancillary infrastructure systems necessary for their deployment.

The deadline for the call for applications under section A began on 17 July and ends on 15 September 2023. The call for applications under section B was published in the Official Journal of Spain ("BOE") on 21 July and will complete this second round of calls. The deadline for submitting applications is from 16 August to 15 September, coinciding with the end date of section A.

With regard to the first call for applications, a number of improvements have been made, such as, for example, the extension of the maximum investment execution period, the new guarantee scheme, a new aid disbursement mechanism,

and an increase in the maximum proportion of eligible costs in the building and installations chapter.

Some of the salient features of the aid for both sections, A and B, are:

— The aid will be articulated in non-competitive, open, annual calls for applications, with the verification and selection procedure being based on the order of presentation.

— There will be one call for each of the sections.

— This aid will be financed in the form of grants and/or loans.

— The geographical scope of application shall be the whole of the national territory.

— Commercial companies with their own legal personality, legally incorporated in Spain and duly registered in the appropriate registry, irrespective of their size, which carry out industrial activity in one of the sectors listed for each section in Schedule I to this Order and which do not form part of the public sector are eligible.

— The aid, whatever the type, will be granted in a single advance payment.

— All stages of the procedure, including the submission of the application and the required documentation, will be carried out by telematic means.

— Interested entities must register as such with the State Register of entities interested in the PERTE.

— The aid must have an incentivising effect on the activity of the company, i.e. the application must be submitted before the start of the work for which the aid is requested.

# Europe

## Proposal for a Regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act)

The proposal considers that, in the current context, the volume of data has been increasing exponentially, yet most data are unused and their value is concentrated in the hands of relatively few companies, impeding the full realisation of the potential of data-driven innovation. This is why the European legislator considers it necessary to ensure measures that provide opportunities for all actors and that favour the development of the European data economy. The legislation stems from the Commission Work Programme 2020, which encompasses the European Data Strategy, which aims at building a genuine single market for data and at making Europe a global leader in the data-agile economy.

To this end, the *Data Act* lays down harmonised rules (i) on making data generated by the use of a product or related service available to the user of that product or service, (ii) on making data available by data holders to data recipients and (iii) on making data available by data holders to public sector bodies or Union institutions, agencies or bodies, where there is an exceptional need. It applies to manufacturers of products and suppliers of related services placed on the market in the Union and the users of such products or services; data holders; data recipients; public sector bodies and Union institutions and providers of data processing services.

The obligation to make data generated by the use of products or related services, by the design and manufacture of the product or service itself, accessible by default to the user is very relevant. Where data cannot be directly accessed by the user from the product, the data holder shall make available to the user the data generated

by its use of a product or related service without undue delay, free of charge and, where applicable, continuously and in real-time. Also, upon request by a user, or by a party acting on behalf of a user, the data holder shall make available the data generated by the use of a product or related service to a third party, without undue delay, free of charge to the user, of the same quality as is available to the data holder and, where applicable, continuously and in real-time. These obligations shall not apply to data generated by the use of products manufactured or related services provided by enterprises that qualify as micro or small enterprises. Where a data holder is obliged to make data available to a data recipient, it shall do so under fair, reasonable and non-discriminatory terms and in a transparent manner and may agree with the data recipient on reasonable compensation, which in the case of a micro or small enterprise shall not exceed the costs directly related to making the data available to the data recipient.

This regulation provides that the data holder may apply appropriate technical protection measures, including smart contracts, to prevent unauthorised access to the data and to ensure compliance with the Regulation's articles, as well as with the agreed contractual terms for making data available. Such technical protection measures shall not be used as a means to hinder the user's right to effectively provide data to third parties.

The adoption of a number of measures is established to ensure that customers of one service can switch to another data processing service, covering the same service type, which is provided by a different service provider. In particular, providers of a data processing service shall remove commercial, technical, contractual and organisational obstacles, which inhibit customers from terminating the contractual agreement of the service, concluding new contractual agreements with a different provider of data processing services covering the same service type, porting its data, applications and other digital assets to another provider of data processing services or maintaining functional equivalence of the service. The rights of the customer and the obligations of the provider of a data processing service in relation to switching between providers of such services shall be clearly set out in a written contract. The provider shall assist and, where technically feasible, complete the switching process and ensure full continuity in the provision of the respective functions or services. The contract shall include (i) a detailed specification of all data and application categories exportable during the switching process, including, at minimum, all data imported by the customer at the inception of the service agreement and all data and metadata created by the customer and by the use of the service during the period the service was provided, and (ii) a minimum period for data retrieval of at least 30 calendar days. In order to carry out such switching, the provider may impose charges on the customer for up to three years after the entry into force of the Regulation.

Of particular importance are also the interoperability requirements, whereby operators of data spaces shall sufficiently describe the dataset content or restrictions on its use to allow the recipient to find, access and use the data. Data structures, data formats or code lists shall be described in a publicly accessible and consistent manner. In order to facilitate data sharing, its mechanism shall have, for example, application programming interfaces, and their terms of use and quality of service shall be sufficiently described to enable automatic access and transmission of data between parties, including continuously or in real-time in a machine-readable format.

The regulation provides that where the vendor of an application using smart contracts or, in the absence thereof, the person whose trade, business or profession involves the deployment of

smart contracts for others in the context of an agreement to make data available, such vendor or person will have to comply with a series of essential requirements, such as ensuring that the smart contract has been designed to offer a very high degree of robustness to withstand manipulation by third parties or that it provides for the possibility of archiving transactional data. When such contracts are used, a conformity assessment must be performed with a view to fulfilling the essential requirements and on their fulfilment an EU declaration of conformity must be issued.

## Regulation (EU) 2023/1542 of the European Parliament and of the Council of 12 July 2023 concerning batteries and waste batteries, amending Directive 2008/98/EC and Regulation (EU) 2019/1020 and repealing Directive 2006/66/EC

The Council adopted on 10 July 2023 this Regulation which strengthens the rules on the sustainability of batteries and waste batteries.

The Regulation lays down sustainability, safety, labelling and information requirements for the placing on the market or putting into service of batteries, requirements for the collection, treatment and recycling of waste batteries, and due diligence obligations on categories of batteries placed on the market or put into service within the Union, regardless of whether they were produced in the Union or imported. It should apply regardless of whether a battery is incorporated into appliances, light means of transport or other vehicles or otherwise added to products or whether a battery is placed on the market or put into service within the Union on its own.

Of great importance is the obligation for rechargeable industrial batteries with a capacity greater than 2 kWh, light means of transport (LMT) batteries and electric vehicle batteries to be accompanied by a carbon footprint declaration that contains certain minimum information, e.g. administrative information about the manufacturer, information about the battery model, information about the geographic location of the battery manufacturing plant or the carbon footprint of the battery.

Electric vehicle batteries, rechargeable industrial batteries with a capacity greater than 2 kWh and LMT batteries shall bear a conspicuous, clearly legible and indelible label indicating the carbon footprint of the battery and declaring the carbon footprint performance class to which the relevant battery model per manufacturing plant corresponds.

Performance and durability requirements are also introduced, to meet the minimum values for the electrochemical performance and durability parameters, depending on the type of battery concerned (depending on whether they are portable batteries of general use or rechargeable industrial batteries, LMT batteries or electric vehicle batteries).

Another change is set out in Article 11, whereby portable batteries incorporated in products (with exceptions, not all of them will be able to) shall be readily removable and replaceable by end-users or independent operators during the lifetime of the product, or at the latest at the end of its lifetime. For the purposes of the law, a portable battery shall be considered readily removable by the end-user where it can be removed from a product with the use of commercially available tools, without requiring the use of specialised tools, unless provided free of charge with the product, proprietary tools, thermal energy, or solvents to disassemble the product. However, in the case of LMT batteries incorporated in appliances, such will have to be readily removable and replaceable by an independent professional

at any time during the lifetime of the product, without affecting the functioning, the performance or the safety of the appliance or light means of transport. Of particular importance is the obligation imposed on the party placing on the market products incorporating portable batteries or LMT to ensure that these are available as spare parts of the equipment that they power for a minimum of five years after placing the last unit of the equipment model on the market, with a reasonable and non-discriminatory price for independent professionals and end-users.

Portable rechargeable batteries, LMT batteries and starting, lighting and ignition (SLI) batteries shall bear a label containing information on their capacity. Portable non-rechargeable batteries shall bear a label containing information on their minimum average duration and a label indicating “non-rechargeable”. All batteries shall be marked with the symbol for separate collection of batteries.

The Regulation also introduces an obligation for electric vehicle batteries and industrial rechargeable batteries with a capacity greater than 2 kWh to incorporate a battery management system containing data for the parameters for determining the state of health and the expected lifetime of the batteries.

Conformity assessment procedures are also established depending on whether the batteries are produced in series or not. The EU declaration of conformity shall indicate that compliance with the specified sustainability and safety and labelling and information requirements has been demonstrated in accordance with the model structure set out in the Regulation itself.

The CE marking shall be mandatory, subject to the general principles set out in Regulation 765/2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products, including that the marking shall be affixed only by the manufacturer or authorised representative. The CE marking shall be affixed visibly, legibly and indelibly to the battery before the battery is placed on the market or put into service and shall be followed by the identification number of the notified body where required.

The regulation sets out specific obligations for the different economic operators, i.e. manufacturers, operators making available on the market industrial rechargeable batteries with a capacity greater than 2 kWh and electric vehicle batteries, authorised representatives, importers, distributors and fulfilment service providers.

With regard to due diligence policies, economic operators placing batteries on the market or putting batteries into service shall fulfil the due diligence obligations laid down in the Regulation and shall set up and implement such policies.

Producers shall have extended producer responsibility for batteries that they make available on the market for the first time within the territory of a Member State. This responsibility includes obligations such as the obligation to organise separate collection of waste batteries or to report on compliance with the obligations for batteries first placed on the market in the territory of a Member State.

As regards the collection of waste portable batteries, their producers or the relevant producer responsibility organisations shall ensure that all waste batteries or portable batteries are collected separately in the territory of the State where they are first placed on the market.

Another new feature of this regulation is the creation of a battery passport. From 18 February 2027, each LMT battery, each industrial battery with a capacity greater than 2 kWh and each

electric vehicle battery placed on the market or put into service shall have an electronic record, which will be linked to information on the main characteristics of each battery type and model stored in the system's data sources.

In conclusion, compliance with these measures is expected to ensure the transition to a circular economy, to contribute to the proper functioning of the European internal market and to ensure a high level of environmental protection.

# News

## Europe

### UNECE adopts a number of innovative regulations concerning batteries for heavy duty vehicles, another to introduce a methodology for measuring particulate emissions from car and van braking systems and another concerning the measurement of tailpipe emissions under real driving conditions.

The United Nations Economic Commission for Europe (UNECE) has a World Forum for Harmonisation of Vehicle Regulations (WP.29) (the "Forum"), a working group that develops regulatory frameworks related to the safety and environmental performance of vehicles, their subsystems and parts. The Forum administers three main UN international agreements relating to motor vehicles[1] to which UN Member States can voluntarily adhere. It also has the UN Global Technical Regulations on performance and globally harmonised test procedures, which must be integrated into the national legislation of countries wishing to implement them.

In this context, a number of policy proposals are being developed, one of them concerning battery durability requirements for heavy-duty electric vehicles, such as buses or trucks. Already in March 2022, the Forum adopted UN Global Technical Regulation No. 22 establishing minimum performance requirements for battery durability of light electric vehicles.

In this regard, it has been decided to develop similar provisions for heavy-duty electric vehicles under a new UN Global Technical Regulation, an internationally harmonised procedure to assess and compare battery durability between different models and manufacturers of heavy-duty electric vehicles. This new regulation is expected to be finalised by mid-2024 for consideration by the Forum.

Another regulation recently adopted by the Forum introduces a method to measure emissions from vehicle braking systems under repeatable and reproducible laboratory conditions, the first regulatory tool in the world to analyse non-exhaust particulate emissions. Countries that decide to transpose the proposal into national legislation will be responsible for defining the emission limits for brake particles. In the European Union, the regulation will be used to measure brake particulates in the framework of the planned Euro7 legislative proposal, which will determine emission ceilings.

[1] The 1958 and 1998 Agreements on the regulations for the certification of new vehicles, including performance requirements, and the 1997 Agreement concerning rules for periodical technical inspections of vehicles.

A similar methodology is also being developed for heavy vehicle braking systems.

Finally, UNECE has also adopted a new regulation called "United Nations Regulation on *Global* Real Driving Emissions" (Global RDE) which will serve for the measurement of emissions in most driving conditions, allowing for a more accurate picture of tailpipe pollutant emissions from vehicles. According to the regulation, the resulting emissions under real driving conditions must not exceed the laboratory limits by more than 10% for nitrogen oxides and 34% for particulate matter.

For any questions, please contact:

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