



# **LAW AND THE AUTOMOTIVE INDUSTRY**

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## Introduction

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**The automotive industry is going through tough times. The COVID-19 pandemic has caused a sharp drop in car sales (except for electric and hybrid vehicles). This isn't the only challenge facing companies from this sector. In this publication we discuss legal aspects of vital importance to the entire automotive industry.**

The European Union's environmental policy seeks to cut greenhouse gas emissions, including through introduction of more and more restrictive limits on exhaust emissions. New emission standards entered into force from the start of 2021 throughout the EU, and there are plans for more restrictions. We discuss this issue more thoroughly in the article "New emission standards."

Damaged or post-accident vehicles are often imported into Poland. They can sometimes be classified as "waste," which poses risks for importers. Recent rulings by the administrative courts take a strict approach to this issue. More in the article "When is a car 'waste?'"

Automobiles today process vast quantities of data. Apart from purely technical information, they also process personal data. We discuss how this translates into obligations under the GDPR in "What does your car know about you?"

Automobile manufacturers are investing in sensors and machine-learning technology. But exports of some of these technologies may be subject to restrictions because of their potential military applications. We describe these issues in "Export control of automated and autonomous vehicle technologies."

In the context of autonomous vehicles, there is also a need to fill a legal gap involving mandatory civil-liability insurance. The article "Third-party liability insurance for owners of autonomous vehicles" discusses the problems this raises for insurance companies.

Firms from the automotive sector can count on support under the EU's new financial perspective. The programmes Smart Europe and Green Europe in particular align with the aims of the contemporary automotive industry, including clean mobility. We outline the aims of the new cohesion policy in "EU funds in the 2021–2027 financial perspective and the automotive sector."

The article "Supply chains in the pandemic era" raises the issue of disruption in the supply chain and related risks for manufacturers. Restrictions on operations can even lead to insolvency. This in turn entails certain consequences under bankruptcy law.

We invite you to read our report.

## New emission standards

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**The new emission standard Euro 6D ISC-FCM has been applicable in the European Union since 1 January 2021. It is not only limited to the issue of cleanliness, but also includes an obligation to monitor combustion levels. Gradual reduction of emission limits is included in the consistently implemented EU policy to reduce greenhouse gas emissions.**

Regulation (EU) 2018/842 (known as the Effort-Sharing Regulation) requires member states to meet the European Union target of reducing greenhouse gas emissions by 40% below 2005 base-line levels by 2030. This is applicable to sectors not covered by the EU Emissions Trading System (established by Directive 2003/87/EC).

A significant proportion of emissions from these sectors comes from road transport. Moreover, this is on an upward trend and remains significantly above 1990 benchmarks. As a result, further emissions growth in this area could wipe out reductions achieved by other sectors in the fight against climate change. For this reason, as a matter of priority, the European Commission is taking further steps to reduce pollution produced by cars.

### **New Euro 6D ISC-FCM emission standard**

Entry into force of the new emission standard comes as no surprise. Its introduction was planned much earlier. Suffice it to say that the Euro 6D-TEMP (from the word “temporary”) standard had already been in force in the European Union since 2018, and was slated to come into full force from 1 January 2021 as Euro 6D ISC-FCM. Despite strong opposition from the automotive industry and the raging pandemic, the date was not changed.

What does ISC-FCM stand for? ISC (in-service conformity) is a confirmation that the emission of harmful substances during normal use will comply with results of homologation tests. FCM (fuel consumption monitoring) refers to the obligation to equip every vehicle registered after 1 January 2021 with a device monitoring fuel consumption or electricity use (in electric vehicles). The new standard applies to all passenger car manufacturers. For heavy goods vehicles, the new rules will take effect from 2022.

### **Individual level of carbon dioxide emissions**

Under Regulation (EU) 2019/631 of 17 April 2019 setting CO<sub>2</sub> emission performance standards for new passenger cars and for new light commercial vehicles, the European Commission will publish through implementing acts a list containing a specific emission target and an average specific emissions level of CO<sub>2</sub> in the preceding calendar year for each manufacturer. The list also includes the difference between the manufacturer’s average specific emissions of CO<sub>2</sub> in the

preceding calendar year and its specific emissions target for that year, and indicates whether the manufacturer has complied with the specific emissions target for the preceding calendar year.

### Reductions of CO2 emissions

In 2020, the average carbon dioxide emissions for vehicles sold by specific brands had to be below 120 g/km. Since 1 January 2021, this limit has been reduced to 95 g/km. This amount is also slightly different for each manufacturer. Among other things, this depends on the average weight of the vehicles they produce. For example, for Daimler, producing larger and heavier cars, the CO2 limit is 103 g/km. Manufacturers offering more smaller cars, such as Peugeot and FCA (Fiat Chrysler Automobiles), will have to achieve an emissions score below 91 g/km. To put it simply, the heavier the vehicles a company produces, the higher the carbon dioxide emission limit in practice.

The 95 g/km limit on average CO2 emissions is the most rigorous in the world. By comparison, in 2021 this limit is set at 125 g/km in the United States, 122 g/km in Japan and 117 g/km in China.

For nitric oxides (NOx), the allowed emission limit in laboratory tests is the same for the new and previous standard, at 80 mg/km for diesel and 60 mg/km for petrol engines. However, a difference arises when measuring in road tests. The Euro 6D TEMP standard allowed the emission limits to be exceeded by a factor of 2.1. From 1 January 2021, this factor is 1.43, and is to be reduced in subsequent years until the laboratory results equal road results.

The table below shows the difference in maximum nitric oxides emissions limits between the discussed standards.

Maximum emission limit of nitrogen oxides	Diesel		Petrol	
	Laboratory tests	Road tests	Laboratory tests	Road tests
Through 31 December 2020	80.0 mg/km	168.0 mg/km	60.0 mg/km	126.0 mg/km
From 1 January 2021	80.0 mg/km	114.4 mg/km	60.0 mg/km	85.8 mg/km
Difference		53.6 mg/km		40.2 mg/km

### Premiums

According to Art. 8 of Regulation 2019/631, the European Commission will impose an excess emissions premium on a manufacturer if its average specific emissions of CO2 exceed its specific emissions target. Manufacturers who do not meet the CO2 emission standards run the risk of having to pay high premiums imposed by the Commission. They amount to EUR 95 per gram of carbon dioxide emitted over the limit and are charged for every car sold. The proceeds from premiums are treated as revenue for the general budget of the European Union.

Recently, the effects of violating the CO<sub>2</sub> emissions limit have been felt acutely by Volkswagen, whose limit for 2020 was 99.3 g/km. VW failed to meet this target and closed the year at an emission level of 99.8 g/km. Half a gram may seem a small difference, but given the volume of sales of this brand's vehicles, the premium imposed by the Commission was more than EUR 100 million.

### **Options for the industry**

The EU regulations reward the production of low-emission vehicles (below 50 g of CO<sub>2</sub>/km). This allows for a reduction of the results of a manufacturer's entire fleet and, consequently, avoidance of charges for exceeding the CO<sub>2</sub> emission standards. Regulation 2019/631 provides that in 2021, each new low-carbon passenger car counts as 1.67 cars. This ratio was 2.00 in 2020 and will drop to 1.33 in 2022. This has a significant impact on the sales of electric and hybrid cars.

In turn, Art. 10 of Regulation 2019/631 provides for the possibility to derogate from the specific emissions targets. According to this provision, a manufacturer producing fewer than 10,000 new passenger cars or 22,000 new light commercial vehicles registered in the European Union per calendar year may apply for a derogation from the limits (for a maximum of 5 years). The condition is that the manufacturer:

- Is not part of a group of connected manufacturers
- Is part of a group of connected manufacturers that is responsible in total for fewer than 10,000 new passenger cars or 22,000 new light commercial vehicles registered in the European Union in a calendar year, or
- Is part of a group of connected manufacturers but operates its own production facilities and design centre.

Regulation 2019/631 allows the formation of groups by manufacturers who have not benefited from the above derogation. In practice, they are a cost-effective way to meet specific emission targets. In this case, the average limits are calculated collectively for the whole group, as it is treated as a single manufacturer. This is a solution especially beneficial for manufacturers not offering electric or hybrid vehicles. The merger of FCA fleets with Tesla, through which Fiat/Chrysler has successfully reduced the allowable CO<sub>2</sub> emissions in its vehicles to a level within the targeted norm, is an example.

### **Exemptions**

The new emissions standards do not apply to all vehicles. There is a small group of exceptions that do not have to meet the exacting standards. These include armoured cars and vehicles for transporting disabled persons. Manufacturers of vehicles with less than 1,000 registrations per year are completely exempt from the obligation to apply specific emissions limits and the excess CO<sub>2</sub> emissions premium.

## What's next?

The European Commission assumes that in 2050 only zero-emission vehicles will be driving in the EU. But there are already plans to introduce another standard: Euro 7. The date of its entry into force is not yet known, but work is already underway and it is anticipated that it may be introduced by the end of 2025. Commission specialists are analysing data on emissions and combustion, and their conclusions are expected to be issued in June 2021. Then work will begin on setting appropriate standards.

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## What does your car know about you?

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**In recent days, it was widely reported in the media that a well-known manufacturer began testing a system allowing for display of personalised ads in cars. But attentive drivers are not surprised. It is no secret that a modern car is a computer on four wheels, as it processes large amounts of data to ensure safety, transport efficiency, and access to navigation and infotainment services.**

The nature of the processed data varies. Some of them are purely technical machine data. But there is no doubt that some of them are personal data revealing a lot not only about the driver, but also about passengers. This applies to data that uniquely identify a person, such as the driver, and seemingly neutral data that may constitute personal data once they are given a certain context.

Some of these data are particularly sensitive, as the context in which they are processed may pose serious risks to the fundamental rights and freedoms of data subjects. Most commonly, these are:

- Location data
- Special categories of personal data within the meaning of Art. 9 of the General Data Protection Regulation (2016/679), and
- Data that may reveal a prohibited act or traffic offences.

For example, rides taken do not just reveal residential and work addresses, but can also reveal the religion (through place of worship) or political views (through visited places) of persons using the car. Nevertheless, more and more often these data are widely shared with other vehicles, road infrastructure, and various public and private entities.

## **If there is processing, there must be information**

In this context, data protection poses particular challenges to each of the core principles set out in the GDPR. Below we will focus on the first of these, i.e. the requirement to process personal data in a way that is transparent to the data subject.

Implementation of this principle is reflected in the familiar obligations aimed at informing data subjects of relevant aspects of the processing of their personal data. According to the GDPR, notices should be provided in a concise, clear, understandable and easily accessible form, in clear and simple language.

The data subject's right to information is considered one of the pillars of data protection law. Proper implementation of this obligation is intended to allow individuals to exercise actual control over their personal data. Is this possible on the small interface of a user's car?

Cars enable processing of personal data for a variety of purposes. Typically, such processing is carried out with participation of car manufacturers, insurers, road infrastructure managers, law enforcement authorities, various service providers (from navigation and infotainment services to car-sharing) and many other third parties, even including car repair shops. According to the GDPR requirements, the data controller (or controllers or joint controllers) should be identified, i.e. the entity which alone or jointly with others determines the purposes and means of the processing of personal data. It is the data controller that is responsible for fulfilment of information obligations under the GDPR.

### **One car, multiple profiles?**

As a rule, information on processing should be provided to each data subject. This primarily means the drivers of a vehicle and their passengers, i.e. potentially many different people. Therefore, it is not sufficient to provide this information exclusively to the primary owner (or lessee or renter) of a car, who does not necessarily drive it every day. Therefore, the possibility of creating a user profile for each driver using the car (similar to profiles used in streaming services or VOD platforms) seems to be the right solution. Such an individualised user profile would not only fulfil the information obligation towards individual drivers but would also allow them to change their privacy settings, as well as exercise their rights under the GDPR. Furthermore, it would limit the risk of data breach for individual drivers, which is particularly relevant when the car is used by unrelated persons, as in the case of car-sharing services or traditional car rental companies.

### **Several layers of information**

Information can also be provided to data subjects in layers.

In addition to the controller's identity, the first layer includes the purpose of the processing and the data subject's rights. It should also include any additional information about processing having the greatest impact on the data subject, including information that may surprise them (e.g. details on multiple recipients of their personal data).

The second layer contains all the information required under Art. 13–14 GDPR. The small interface presented to the driver of a car may not allow the data subject to effectively explore this layer, so making it available simultaneously in another way, e.g. on a website or by email, should be considered.

Apart from verbal information, standard graphical characters (icons) can also be used to provide transparency. Ideally, these should be the same symbols, regardless of the make or model of the vehicle (e.g. a commonly recognised location tracking icon).

### **Connected cars mean more data and more responsibilities**

The principles outlined above refer to the simplest situation, i.e. processing of the vehicle user's data. The situation of data processing by connected cars can be much more complicated. We signal three examples of factors that may lead to extension of information obligations.

First, connected cars may also process other traffic users' data (e.g. users of other vehicles, cyclists or pedestrians). Fulfilling information obligations towards them can be particularly challenging.

Second, if within the meaning of Art. 22 GDPR, an automated decision-making system is installed in the car, the information obligation should include additional information. In that case, the data subject should be provided relevant information on the decision-making rules of such systems and the significance and foreseen consequences of such processing.

Third, devices installed in vehicles can be classified as telecommunication terminal equipment, which entails the need to meet additional information obligations provided for by Telecommunications Law.

Proper implementation of the information obligation affects the possibility for data subjects to exercise their rights. Therefore, in this context, all controllers processing personal data should pay special attention to this issue at the stage of designing how the data will be processed, in accordance with the principle of “data protection by design.”

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# Export control of automated and autonomous vehicle technologies

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**Autonomous vehicles will be an essential part of the mobility of the future. Cars can already relieve the driver in many situations, and the R&D sector for autonomous vehicles is booming. Companies are investing in sensor and machine-learning technology, creating pilot programmes to test self-driving vehicles at levels 4 and 5 of automation. But the export of some of these technologies may be restricted due to potential military applications.**

Vehicle automation is divided into several levels. The first three levels imply a non-autonomous vehicle, as the driver is responsible for monitoring the environment. At higher levels (3, 4 and 5) the environment is monitored by a computerised on-board system, supported by various cameras and sensors. From automation level 4 onwards, the driver can take control of the vehicle, but does not necessarily have to, as the car controls all aspects of driving the vehicle.

It will probably be a few more years until we can drive fully autonomous cars. However, the level of vehicle automation and access to increasingly sophisticated driver assistance features is steadily growing. Self-parking, avoiding traffic jams, lane-keeping, blind-spot monitoring, speed limitation systems: we owe all of these automated functions in new cars to modern software, powerful computers, and numerous environmental perception systems such as cameras, radars and laser scanners (Lidar). Now, one of the key technological challenges is to perfect deep-learning algorithms to allow collision-free navigation along a designated route.

However, export controls have not kept pace with technological progress. First, states must establish which products are subject to an export ban or licence, and second, effectively supervise the operation of the control system.

It is important to remember that transfer of technology and know-how doesn't mean just physical transfer of products, but mainly involves intangible transfer of technology (ITT), posing a serious challenge to any control effort. ITT encompasses transfer by electronic means (e.g. sending an email, providing information over the phone or during a virtual meeting), as well as the transfer of knowledge and skills (e.g. technical assistance, research papers presented at scientific conferences, etc).

In the European Union, the export control regime for dual-use items (i.e. items that can have both military and civilian uses) is based on the Dual-Use Regulation (Council Regulation (EC) No. 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items). The list of dual-use items forming an integral part of

the regulation contains several categories of export control numbers (ECNs) relevant for autonomous vehicle technologies, including among other things semiconductor devices and integrated circuits (ECN Category 3), encryption devices and software (ECN Category 5), cameras and sensors (ECN Category 6), and GPS devices and radars (ECN Category 7).

Depending on its parameters, the export of a particular product, technology or related service may require a licence.

However, many new technologies and services related to autonomous vehicles are not included in the list of dual-use items or are subject to non-binding interpretations. Therefore, exports of technologies related to research and development in the field of autonomous driving rarely require obtaining export licences.

But this situation may change, and the first steps in this direction have already been taken in both the United States and, to a lesser extent, the EU. And the US regulations are already exerting an impact on the export obligations of European entities.

### **Changes in export controls in the US for emerging and foundational technologies**

The changes implemented in US policy over the past few years could significantly hinder the export of autonomous vehicle technology from the United States. In light of the growing importance of certain new technologies to security and defence, and concerns about China's influence in this area, in 2018 the US introduced the Export Control Reform Act (ECRA).

ECRA is intended to restrict the export of “emerging” and “foundational” technologies with the potential of being used for civilian and military purposes, which have not historically been subject to export controls.

Targeting emerging technologies, the first group of control measures went into effect in January 2020. They imposed licensing requirements on export and re-export to all countries (except Canada) of US-originated software specifically designed for AI-powered geospatial imaging, used, among other things, in autonomous vehicles. In January 2021, it was decided to extend this temporary control measure for another year. Also, discussions are underway to reach an agreement with other countries to impose parallel control obligations.

Persons operating or having access to US-originated software used to train AI systems for image recognition should review the technology they possess to determine whether it is covered by the new classification, and consider the potential licensing lead time when planning procurement schedules.

These regulatory changes may have a direct impact on the obligations of exporters involved in the development of autonomous driving, and the introduced measures have the potential to lead to fragmentation of global supply chains and research and innovation networks.

Indeed, it is important to remember that the US rules governing trade in dual-use products (Export Administration Regulations, EAR) have a broad scope of application. They regulate not only exports from the territory of the United States, but also the movement of US-origin goods and technology between third countries or between nationals of other countries.

Products are subject to US export-control regulations if they are goods, software, or technology located in the US, manufactured in the US, or admittedly outside the US, but the content of US-origin components or technology exceeds the de minimis level specified in the regulations (25% in most cases). A similar regulation applies to certain products consisting of a direct product of US-origin technology (i.e. products developed directly using US-origin technology or software).

### **EU is modernising the export controls of dual-use goods**

The European Union has been working on new regulations on export of dual-use goods for several years, although their scope and impacts will not affect the export of automated vehicle technology as much as regulations introduced by the US.

In November 2020, the European Parliament and the Council of the EU reached agreement on a draft amendment to Regulation 428/2009. The new regulation is to strengthen the EU's export control toolbox so that the EU can address the risk of human rights abuses associated with trade in cyber-surveillance technologies, as well as gain greater control over trade flows in new and emerging technologies of particular importance.

The very definition of dual-use goods will change to reflect the emergence of cyber-surveillance technology. The definition of an exporter will also change to include individuals and researchers involved in the transfer of dual-use technology.

Stricter export control rules will be introduced for specific cyber-surveillance technologies whose misuse may lead to serious human rights violations and security risks. On the other hand, new EU General Export Authorisations for dual-use products (EU GEAs) are planned for intra-group transfers of software and technology (007) and encryption items (008).

The revised draft of the EU regulation still has to be adopted by the European Parliament, but its entry into force is planned for the first half of 2021.

### **Conclusions**

Autonomous vehicles can bring about many economic and social changes in personal and commercial transport, public infrastructure, urban planning, and supply chain management. It ap-

pears that if work on the implementation and diffusion of autonomous vehicle technology does not slow down, the scope of export controls associated with encryption, machine-learning, and artificial-intelligence technology will increase proportionately.

Automotive suppliers, original equipment manufacturers, and other entities involved in the development of automated and autonomous vehicles, among other things, through creation of machine-learning algorithms, should systematically review and update their security policies to ensure they comply with export control regulations.

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## Third-party liability insurance for owners of autonomous vehicles

MATEUSZ KOSIOROWSKI

**Autonomous cars are slowly becoming a reality, accompanied by logistical, technological and legal barriers. The Polish parliament has already made some initial legislative steps by introducing, for example, a definition of an autonomous motor vehicle and a procedure for testing such vehicles on public roads. However, there is a need for further statutory regulation of insurance products and insurance companies tasked with providing compulsory third-party liability protection in a situation of great uncertainty and legal gaps.**

### **First problem: a business model for a new technological challenge**

To fully understand the issue at hand, we must first understand the insurers' business model. Insurance is based on an inverted business cycle, where first the insurance company generates revenue by collecting insurance premiums, only later to incur its most significant costs in the form of monetary claims paid (compensation or damages). It is inverted by comparison with, for example, the traditional form of trade, where a firm first purchases goods (generates costs) and then sells them to buyers, thus generating its basic income.

In the insurance business, it is essential to properly calculate the net premium. The total amount (collected from all insureds in a given community of risks) should match the benefits to be paid by the company, i.e. the expected loss value (also understood as a fixed loss). This value is calculated using the law of large numbers and advanced mathematical models, i.e. based on statistics (public and the insurer's own) and historical data. The aim is to identify various risks: to determine their

number, frequency of occurrence, potential size, reasons for their creation, proper selection, etc. For example, if the calculation shows that for a given risk community the expected value of loss is PLN 20 million, the total net premium charged should reflect that number.

Such calculations will only converge with the actual frequency of events and the magnitude of damages when properly scaled. There is no doubt that in the absence of such data (or when there is insufficient data or the sample is too small), there is a risk of obtaining an inappropriate amount of net premium. Both overestimation and underestimation generate undesirable effects for insurance activity.

The problem of the lack of such data is already arising because, according to definitions in the Traffic Law and the Compulsory Insurance Act, an autonomous vehicle is a motor vehicle subject to compulsory third-party insurance. This means that an insurance company cannot refuse to conclude a compulsory insurance contract even though it does not yet have the relevant statistics and historical data necessary to properly identify the risks and their extent, and thus the real value of the expected loss is unknown. This problem is particularly important as vehicle insurance is one of the two largest sub-groups of Division II insurance activity (owners' third-party liability for land vehicles and collision cover (*autocasco*) for land vehicles).

Therefore, actuaries can be expected to rely on scientific studies, data for example from reinsurers, and observations from test drives on public roads (although even such test drives will also be subject to compulsory third-party liability insurance).

### **Second problem: lack of adequate civil regulations**

The second problem arises from general civil regulations on torts, i.e. events giving rise to obligations. In this context, it is worth recalling the definition of an autonomous vehicle, that is, a motor vehicle equipped with systems controlling the movement of the vehicle and allowing it to move without the intervention of a driver, who can take control of the vehicle at any time. Under the definition, every autonomous vehicle must have a driver, regardless of the level of automation of the vehicle. Currently, international standards specify five levels of automation (above level 0, no automation). Level 5 means the highest degree of automation: the car is completely autonomous, can move without a driver, perform the most complex manoeuvres, drive to a selected point, etc.

With such a high level of vehicle autonomy, the least problematic case seems to be a traffic accident where an autonomous motor vehicle collides with a person who consequently suffers, for example, a bodily injury or health disorder. In this case, under the applicable provisions of the Civil Code, the owner of an autonomous motor vehicle will be liable for damage on a risk basis (strict liability). Here, the level of autonomy of the vehicle will be irrelevant, as the risk of driving a vehicle powered by natural forces (electricity, fuel, etc) will determine liability. Potential reduction in the compensation or damages payable will depend solely on the extent to which the victim has contributed to the injury; nevertheless, a question arises as to whether the extent of

the contribution may vary in light of the specific characteristics of the autonomous vehicle and its algorithm (such as atypical reactions to sudden crossing of a lane by a pedestrian, etc).

A collision between two motor vehicles, with at least one of them being an autonomous vehicle, will be more problematic. There the aggrieved parties may mutually demand compensation for damage suffered, but only on general principles, i.e. on the basis of fault. Undoubtedly, it will be necessary to determine whether the autonomous car was driving entirely independently (guided by an algorithm) or was controlled by the driver at the time of the collision. If the vehicle is being steered by an algorithm, it is difficult to assume that the driver could have been at fault for the accident (unless taking control at the right moment would have prevented the collision). It seems that in relation to the algorithm steering an autonomous vehicle itself, it is impossible to speak of independent will, as the algorithm only “obeys” certain programmed and coded rules. Thus, no fault in the traditional understanding of fault according to general principles should be attributed to it, which consequently results in a lack of civil liability. Another question also arises: what if “fault” in the collision is mixed, i.e. the driver was partly at fault and there was partly an error in the algorithm driving the autonomous vehicle?

These issues directly affect the scope of liability of the insurance company, as it is vicariously liable, on the same principles as the insured.

### **Third problem: lack of adequate regulations reflecting the nature of autonomous vehicles**

Insufficient industry regulations taking into account the specifics of autonomous vehicles is undoubtedly another problem. In the case of compulsory insurance against civil liability of motor vehicle owners, the law in Poland includes special rules concerning such issues as insurance recourse, which may not prove sufficient in respect of autonomous vehicles. Thus, under current legal solutions, an insurance company has the right to seek reimbursement of compensation paid from the driver of a motor vehicle if, for example, the driver caused damage intentionally, after using alcohol or drugs, or fled the scene of the accident.

These examples seem not to address the specifics of autonomous vehicles. What if a level 5 autonomous vehicle was used, and the driver (essentially a passenger) was intoxicated but not driving the vehicle at all, and the driver’s taking control could not have objectively prevented the accident or collision? What if the vehicle fled the scene due to a technical error in the software (the algorithm driving the autonomous vehicle)? Would the condition of the driver fleeing the scene still be satisfied?

It also seems that the catalogue of events entitling the insurer to seek recourse should include, among other things, unlawful interference with the algorithm driving an autonomous vehicle. For example, if in the course of the proceedings for indemnification of loss under an insurance policy it is proved that interference in the algorithm directly caused the accident, the insurer should be entitled to seek recourse against the person who carried out the unlawful interference.

## Conclusion

These issues are only the seed of the problem of autonomous vehicles in relation to the existing regulations on compulsory insurance. The dynamics of technological development and insurance technology mean that legislation relating to these issues must be brought up to speed to meet the challenges. It is vital for legislative solutions to be founded on sound principles and balance the interests of all stakeholders: insurers, insureds, and persons who may be injured in an accident involving an autonomous vehicle.

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## When is a car “waste”?

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**The classification of damaged and post-accident vehicles imported to Poland as waste still raises many doubts. Recent judgments of administrative courts confirm a strict approach to this issue in judicial practice, posing significant risk for importers of such cars.**

### International shipments of waste

Shipments of waste between European Union member states as well as imports into and exports out of the European Union are subject to the Waste Shipment Regulation ((EC) 1013/2006). In Poland, the regulation is supplemented by the International Shipments of Waste Act of 29 June 2007, specifying the competence of the authorities and the financial penalties for breaching the obligations set out in the regulation and the act. The following instruments of international law are also relevant:

- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal
- OECD Council Decision C (2001)107/Final concerning the control of transboundary movements of wastes destined for recovery operations, amending OECD Decision C(92)39/Final.

### Consequences of importing damaged and post-accident vehicles

In practice, it is particularly problematic to assess whether and in what situations second-hand cars imported to Poland, including post-accident and damaged vehicles, constitute waste and are subject to the above regulations. This results in numerous disputes between the importers of such vehicles and environmental inspectors determining that a car imported from abroad is waste. Those appealing against the decisions of the inspection authorities and subsequently lodging complaints with the administrative courts argue that such vehicles do not meet the definition of waste, as after repair they have passed technical inspection and have been registered. But if an

imported vehicle is considered waste, it can be concluded that an illegal international shipment of waste has taken place. Such vehicles are classified under the European Waste Catalogue under EWC code 16 01 04\* (end-of-life vehicles).

If an imported vehicle constitutes waste, it is subject to the procedures under the aforementioned provisions, and violations are severely sanctioned. Under Art. 24(3) of the Waste Shipment Regulation, if responsibility for an illegal shipment of waste lies with the consignee, then the competent authority of destination (in Poland, the Chief Inspector of Environmental Protection) should ensure that the illegally shipped waste is recovered or disposed of in an environmentally sound manner. In principle, this obligation lies on the consignee (with the exception of a situation where execution by the consignee is impracticable). The consignee of illegally imported waste is subject to a fine imposed by the province inspector of environmental protection, currently up to PLN 500,000.

Doubts about the classification of damaged vehicles have arisen for many years. To minimise discrepancies in interpretation, in Poland and the EU guidelines have been issued to facilitate correct vehicle assessment. One such document is the methodological guidelines of the Chief Inspector of Environmental Protection on recognition of vehicles as waste in transboundary shipments of waste (from 3 April 2008, with revisions of 15 July 2008 and 21 March 2013), serving to ensure uniform interpretation of provisions on transboundary shipments of waste. According to the guidance, a cross-border shipped vehicle meets the definition of waste if:

- The previous owner disposed of a damaged vehicle with a vehicle ownership document showing that it is unrepairable or was written off as a total loss (“certificate of destruction,” “damage equal to value,” “for parts only,” “non-rebuildable,” “non-repairable,” etc)
- The previous owner disposed of a damaged vehicle with a vehicle document other than in the preceding point and the damaged vehicle requires repairs beyond the minor repairs specified in Correspondents’ Guidelines No. 9 on shipment of waste vehicles
- It appears from the party’s statement or documents (invoice) that the party purchased the vehicle for parts, or
- A part of the vehicle or individual parts not suitable for direct installation in vehicles, and parts removed from vehicles the reuse of which threatens the safety of road traffic or has a negative impact on the environment, are transported.

In addition to the methodological guidance mentioned above, Correspondents’ Guidelines No. 9, which, like the guidance mentioned above, is not legally binding, also facilitates the desired interpretation of Regulation 1013/2006 in order to correctly distinguish between used vehicles and waste vehicles.

However, the application of these provisions is still not uniform. The lack of consistent application of the provisions was pointed out by Poland’s Supreme Audit Office, which found widely diverging opinions in similar cases. Sometimes vehicles that could be put on the road after the required repairs were held to be waste. Conversely, cars whose documentation indicated they should be dismantled or used for spare parts were held not to be waste.

Recent decisions of the Supreme Administrative Court provide some clarification, but there is a tendency to interpret the notion of “waste” quite broadly. This usually results in upholding the findings of environmental inspectors in disputes with vehicle importers.

### **Criteria for classifying a car as waste**

The key issue for application of the relevant regulations is the classification of an object as waste. It is only if a vehicle is deemed to be waste within the meaning of these provisions that the Chief Inspector of Environmental Protection may conclude that an illegal shipment of waste took place, making it possible to apply the procedure provided for in Art. 24(3) of Regulation 1013/2006.

Here, the case law is essentially uniform. Following the views of the Court of Justice of the European Union, the administrative courts in Poland have held that the assessment of whether waste is involved in a given situation must be made in light of all the circumstances, taking into account the purpose and effectiveness of EU waste legislation. In a recent ruling, the Court of Justice indicated that particular attention should be paid to the fact that the object or substance in question is of no use or no longer useful to its possessor, making the object or substance a burden which the owner intends to dispose of (*C-629/19, Sappi Austria Produktions*). When this situation arises, there is a risk that the owner will dispose of the object or substance in question in a way that may harm the environment. Therefore, the object or substance should be recovered or neutralised without endangering human health and without using processes or methods that could harm the environment. This is what the waste regulations are for.

In this context, it is particularly important to note that the concept of waste does not exclude substances and objects that can be economically reused. In its judgment of 1 December 2020 (case no. II OSK 1313/18), the Supreme Administrative Court stressed that the supervision and management system established by the Waste Directive is intended to cover all objects and substances disposed of by their owners, even if they have commercial value and are collected for commercial reasons for the purpose of recycling, regeneration or reuse.

Under Art. 3(1)(6) of the Waste Act of 14 December 2012, “waste” means any substance or object which the owner disposes of, intends to dispose of, or is obliged to dispose of. According to the administrative courts and the legal literature, this concept of “disposal” should be understood broadly. Whether an item is waste is not determined by the commercial value of the item and whether it can be used.

The decisive factor for recognition of an item as waste is its condition at the time of import into Poland and the intention of its previous owner. In simple terms, it can even be said that it is the previous owner who in fact “decides” whether a vehicle is considered useless (e.g. judgment of the Province Administrative Court in Warsaw of 25 October 2016, case no. IV SA/Wa 1413/16, and further judgment of the Supreme Administrative Court of 5 March 2019, case no. II OSK

961/17). In the latter judgment, the Supreme Administrative Court stressed that disposal cannot be understood merely as loss of control over an object, but rather as a fundamental change in the method of its exploitation, different from its basic purpose, for which the object has ceased to be suitable (useful), which change may also cause serious negative consequences for a person or the environment.

The circumstances to be taken into account are the issues referred to in the aforementioned methodological notes, correspondents' guidelines, etc. Thus, for example, it is relevant whether the damage to the vehicle requires more than "minor repairs." The explanations given to the customs office showing that the importer described the vehicle as a "wreck," and remarks made in foreign vehicle documents (e.g. "do not issue a registration document"), have been held to be relevant. What matters is whether the documentation shows that a post-accident vehicle is in a condition in which it cannot be driven on the road. As a rule, these circumstances are assessed at the time of import into Poland. The case law shows that as a general rule, it is not decisive whether a vehicle is repairable or whether the excise duty has been paid. Documentary evidence is crucial to establish the intent of the previous owner of the vehicle (Supreme Administrative Court judgment of 16 April 2014, case no. II OSK 2793/12).

### **What matters is the state upon introduction to Poland and the intent of the previous owner**

These grounds are best summarised by the judgment of the Province Administrative Court in Warsaw of 25 October 2016, cited above, in which the court held that the decisive factor for considering a given object as waste is its condition at the time of its import into the territory of Poland and the intent of its previous owner. Thus, an object becomes waste at the time of its "disposal" by its previous owner, as it is the previous owner who decides whether a substance or object may be considered useless in a particular place or time (here, the court cited its earlier judgment of 15 October 2009, case no. IV SA/Wa 982/09).

It follows that the acquisition of waste status by a vehicle depends on whether, at the time of crossing the border, it may be used for its original purpose, and therefore whether it can be driven on the roads. In assessing whether an illegal international shipment of waste is involved, the possibility of restoring the vehicle to roadworthy condition is not examined. In one of its rulings, the Supreme Administrative Court held that what happens to a vehicle in the future has no effect on the waste status it had acquired (judgment of 18 June 2015, case no. II OSK 2874/13).

Occasionally, however, the courts recognise a need for particularly meticulous consideration of evidence to determine the status of a vehicle. In one of its rulings, the Supreme Administrative Court held that it was necessary to examine the formal legal status of a vehicle under the law in force at the place of its sale (judgment of 24 June 2019, case no. II OSK 1975/17). In that ruling, the court found it necessary to examine the US law in the state where the vehicle was sold, and to consider US federal law and German law in connection with the certificates of the German customs office attached to the file.

## **Repair and registration of a vehicle does not deprive the vehicle of its waste status**

Repair of a vehicle retired from service at a traditional car repair shop is not acceptable, as waste can only be deprived of its waste status by undergoing recovery processes, in particular recycling. In the ruling of 1 December 2020 cited above, the Supreme Administrative Court held that possible repair of a vehicle retired from service in a garage, or even registration of the vehicle, does not constitute the application of waste management processes which, by depriving waste of some of its features, may allow a finding that the vehicle retired from service, already qualified as waste, has lost this status. Similarly, in the judgment of 5 March 2019 cited above, the Supreme Administrative Court held that the fact that a vehicle was repaired, obtained a certificate of periodic technical inspection, and was even registered, did not cause the vehicle to lose its waste status, as, pursuant to Art. 18 of the Act on Recycling of Vehicles Retired from Service of 20 January 2005, the owner of a vehicle retired from service can only transfer it to a business operating a disassembly station or vehicle collection point. On the other hand, carrying out recovery and recycling processes means not only performing certain factual activities subjecting waste to specific mechanical treatment processes, or physical or chemical processes; it is also necessary to meet formal requirements. Recycling and recovery activities are regulated. Carrying out such waste treatment processes requires a permit. As a result, it is the formal requirements of the waste treatment process that determine whether activities can be qualified as a legally regulated waste treatment process. Carrying out recovery and recycling of a vehicle retired from service outside a disassembly station is an illegal activity and does not alter the vehicle's waste status.

Interestingly, in one of the rulings of the Province Administrative Court in Warsaw, a dissenting opinion was expressed, although it was not considered relevant in the subsequent ruling by the Supreme Administrative Court. The dissenting judge argued that the law normatively linked the notion of recycling with factual activities—subjecting waste to specific physical, chemical and mechanical treatment processes, etc—rather than formal requirements. But the Supreme Administrative Court did not share this position. In turn, in the judgment of 4 February 2020 (case no. II OSK 782/18), the Supreme Administrative Court expressly held that repair of a car and replacement of parts in a paint and body shop do not meet the statutory requirements for waste management. Admitting a vehicle for operation by registering it is not relevant for its classification as waste (Supreme Administrative Court judgment of 20 May 2016, case no. II OSK 2202/14).

### **Historic vehicles**

It should be mentioned that the Act on Recycling of Vehicles Retired from Service does not apply to historic vehicles. These are antique vehicles, or vehicles at least 25 years old, recognised by an automotive expert as unique or of particular importance for documenting the history of the automotive industry. In this respect, the rules described above will not apply, although doubts arise with respect to the application of waste regulations regarding these cars as well.

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## EU funds in the 2021–2027 financial perspective and the automotive sector

JOANNA PROKURAT

**Poland will be the biggest beneficiary of the upcoming European Union financial perspective for 2021–2027. The two main objectives for funding in the new financial perspective, i.e. Smart Europe and Green Europe, are in line with the objectives of the modern automotive sector. Therefore, its players can count on solid support.**

The EU budget consists of the traditional multiannual financial framework and the new European Instrument for Reconstruction, financed by the capital markets. The most important element of this instrument is the Recovery and Resilience Facility (RRF), intended to provide an investment boost in the first years of the financial perspective to support economic recovery after the COVID-19 epidemic. The money from the RRF will mainly go towards energy transition, low-carbon transport, and digitalisation.

### **Opportunities for the automotive sector**

The automotive sector is important at least from the perspective of Green Europe, co-implementing the European Green Deal (EGD) vision. The EGD vision is “to transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases in 2050 and where economic growth is decoupled from resource use.”

One of the seven strategic elements to be implemented by the EGD is clean mobility. In turn, fuel cells and alternative fuels are areas identified by the EU where the industrial revolution is expected to occur first. Also, digital technologies and multimodal transport are important tools for achieving the EGD goals, and they are close to the automotive sector. They can also count on support from EU funds in 2021–2027.

### **Rules for support**

Poland is to receive over PLN 776 billion of support (in current prices) for climate projects: PLN 623 billion in grants and PLN 153 billion in loans.

Poland will benefit from EUR 72.2 billion from EU Cohesion Policy funds in the next perspective. This is supplemented by EUR 3.8 billion from the Just Transition Fund, for a total of around EUR 76 billion.

Published on 8 February 2021, the Partnership Agreement is the basic document defining the cooperation between the EU and Poland, i.e. the strategy for the use of European funds agreed

with the European Commission. Apart from its strategic character, this document presents the key assumptions of the new financial perspective, indicating the priorities of the cohesion policy for the upcoming years and the areas of planned support from EU funds, which may serve as guidelines for the automotive sector and other industries.

### **Objectives of the cohesion policy relevant to the automotive sector**

The intervention involving European funds in the 2021–2027 perspective will be concentrated around five objectives of the cohesion policy, among which the key objectives from the point of view of the automotive sector are objectives 1 and 2, and indirectly also objective 3.

#### **Objective 1: A more competitive and smarter Europe through promoting innovation and smart economic transformation (c. EUR 11.78 billion)**

Funds will be used to support, among other things:

- R&D projects by enterprises and consortia with their participation
- Implementation of the results of R&D work and creation of R&D infrastructure, especially in enterprises
- Investments in SMEs, especially Industry 4.0 solutions
- Growth of exports of innovative products
- Wide-ranging efforts to transform the digital economy.

#### **Objective 2: A greener, low-carbon Europe (c. EUR 20.54 billion)**

In particular, this support will be provided to:

- Energy efficiency projects (also at the enterprise level), supporting investments reducing energy consumption, energy recovery in the production process, and the use of energy-efficient technologies
- Production of energy from renewable sources
- Energy infrastructure and smart solutions
- Measures in the field of waste management and effective use of resources
- Measures in the field of low-emission transport and urban mobility.

#### **Objective 3: A more connected Europe (EUR 17.56 billion)**

Priorities for this objective include:

- Development of transport infrastructure (road, rail, inland waterway and sea transport, co-modal transport)
- Improving transport accessibility of regions and sub-regions and implementing digital solutions into the Polish transport system
- Investment in broadband networks.

#### **Objective 4: A more social Europe (EUR 14.77 billion)**

This objective centres around support for investment in:

- Labour market and human resources development

- Education and competence development
- Social inclusion and integration (in particular, through support to persons threatened by poverty or social exclusion)
- Healthcare (infrastructure, and improving accessibility and quality of health services)
- Culture and tourism.

#### **Objective 5: A Europe closer to citizens (c. EUR 4.75 billion)**

Among other things, its tasks include:

- Increasing the influence of local communities in shaping actions aimed at developing territories and addressing their specific problems, especially in regard to development of tourism resources and related services
- Development and promotion of cultural heritage and cultural services
- Promotion of natural heritage and ecotourism
- Physical regeneration and safety of public spaces.

There is also a secondary objective:

#### **Objective 6: Enabling regions and citizens to mitigate social, economic and environmental impacts of the transition towards a climate-neutral economy (EUR 4.23 billion)**

This intervention will be implemented only in the provinces of Lower Silesia, Lublin, Łódź, Małopolska, Silesia, and Wielkopolska. Among other things, it will include:

- Support for job creation in sectors other than mining and conventional energy
- Creation and development of innovative companies
- Reclamation and redevelopment of post-mining and post-industrial areas
- Measures to improve air quality.

### **Operational programmes**

According to the Partnership Agreement, these objectives will be implemented through 26 operational programmes, financed by the nearly EUR 76 billion mentioned above.

In particular, continuation of the most popular programmes is planned, i.e.:

- Programme in the field of transport infrastructure, energy, environment, health and culture (implementing objectives 2, 3 and 4 of the cohesion policy) with a projected budget of over EUR 25 billion (successor to the current Infrastructure and Environment Operational Programme)
- Programme in the field of research, development and innovation (implementing objective 1) with a projected budget of nearly EUR 8 billion (successor to the current Smart Growth Operational Programme)
- Programme in the field of development of digitalisation (objectives 1 and 3) with a projected budget of about EUR 2 billion (successor to the current Digital Poland Operational Programme)

- Programme in the field of human capital development (objective 4) with a budget of c. EUR 4.3 billion (successor to the current Knowledge Education Development Operational Programme)
- Programme relating to eastern Poland (objectives 1–4) with a projected budget of c. EUR 2.5 billion (successor to the current Eastern Poland Operational Programme). This will continue to cover the less-developed provinces of eastern Poland (Lublin, Podkarpacie, Podlasie, Świętokrzyskie and Warmia-Masuria) as well as the subregion of Masovia which is in similar condition (a separate NUTS2 statistical unit excluding Warsaw and nine neighbouring counties)
- 16 regional operational programmes (objectives 1–5), managed by province governments, with a total projected budget of EUR 21.5 billion.

Others among the 26 operational programmes include:

- A new programme to assist the most deprived (Food Aid Operational Programme, so far financed by the Fund for European Aid to the Most Deprived (FEAD), which is outside the scope of the Partnership Agreement)
- A new programme implementing objective 6 (Just Transition Fund)
- Continuation of programmes in the fields of fisheries and maritime (FISH Operational Programme), Interreg and technical assistance.

Evidently, the possibilities are truly wide. Companies from the automotive sector should carefully consider which of their activities may qualify for support under specific programmes.

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## Supply chains in the pandemic era

MICHAŁ BARŁOWSKI

**Vehicle production is based on a supply chain system. During a pandemic, the risk increases that not all links in the chain will function properly. It is worth considering this risk in the context of restructuring and bankruptcy law.**

In a well-organised system, parts arrive on the production line “just in time.” The just-in-time system requires excellent logistics and management of the organisation and close cooperation between its participants.

The introduction of lean manufacturing can increase economic efficiency, achieving a more competitive price for the final product (e.g. vehicle). It can also cut many costs (including storage) and losses resulting from downtime on the assembly line.

The key to this model is original equipment manufacturer (OEM) supplies, ideally executed by one or more certified parts suppliers. When production is organised this way, an obstacle encountered by one business in the supply chain has an adverse knock-on effect on subsequent recipients. Correct and timely fulfilment of contractual obligations by one business determines correct performance by other producers in the chain, and above all, the quality of the final product (and errors may even result in the need to recall batches of products). (For more on this topic, see Patrick Mears & Michal Barłowski, “Global Supply Chain,” *Bloomberg BNA International Trade Reporter*, vol. 32 no. 6, 2 May 2015.)

In a pandemic, an obvious obstacle is restrictions on freedom to operate, which can even lead to insolvency. This in turn brings certain consequences under bankruptcy law.

### **Legal consequences of insolvency**

The restrictions on conducting business put in place to deal with the COVID-19 pandemic have resulted in reduction, or in some industries a total collapse, in demand, causing revenues to decline. Liquidity problems threatening insolvency give businesses the right to open restructuring proceedings. In case of a total loss of liquidity, insolvency requires the undertaking’s representatives to file a bankruptcy petition. In the automotive industry, a fall in demand for a manufacturer’s vehicles also has a negative impact on immediate suppliers and sub-suppliers involved in the production of components and parts for that manufacturer.

In Poland, the Restructuring Law and the recast Bankruptcy Law in force since 2016 meet the needs of businesses at risk of insolvency or insolvent, enabling them to open a restructuring procedure at an early stage as financial problems arise. The goal of the procedure is to reach an agreement with creditors and avoid bankruptcy. Timely opening of restructuring proceedings in the event of total insolvency will prevent the managers of the insolvent debtor’s business from being held personally liable. The Restructuring Law allows the debtor to file a petition for opening one of the four restructuring proceedings, i.e.:

- Proceedings for approval of an arrangement (*postępowanie w sprawie zatwierdzenia układu*)
- Accelerated arrangement proceedings (*przyspieszone postępowanie układowe*)
- Arrangement proceedings (*postępowanie układowe*)
- Reorganisation proceedings (*postępowanie sanacyjne*).

The first of these proceedings begins with the conclusion of an agreement with a restructuring adviser. The other three are opened by a court decision.

The key element in each of the proceedings is the conclusion of an arrangement, on the basis of which receivables arising prior to the opening of one of the restructuring proceedings (or the date of the arrangement in the proceedings for approval of an arrangement) are subject to modification, e.g. reduction, spreading out payment in instalments, or conversion into equity in the debtor.

Reorganisation proceedings have an additional benefit of staying enforcement proceedings against the debtor, and require that the debtor's assets and liabilities be restructured before a vote on the arrangement can be taken. Without first restructuring the debtor's business (restoring profitability), it would be irrational to propose an arrangement to the creditors. As a rule, reorganisation proceedings involve removal of the debtor from management of its own business. Then management is transferred to an administrator (restructuring adviser). In some cases, with the court's approval, it is possible to partially maintain the debtor's own management, if it would be beneficial to the restructuring of the debtor's business.

When a state of insolvency arises, the Bankruptcy Law requires the debtor's representative to file a bankruptcy petition within 30 days. There is a state of insolvency when there is a permanent inability to meet liabilities as they become due or when the amount of monetary liabilities exceeds the market value of the debtor's assets and such state of affairs lasts longer than 24 months.

### **Revised rules during the pandemic**

During the pandemic, the Restructuring Law and Bankruptcy Law were amended, most significantly by suspending the obligation to file for bankruptcy and by introducing a simplified restructuring procedure.

### **Suspension of the obligation to file for bankruptcy**

From 13 April 2020, for the duration of the pandemic the obligation to file for bankruptcy has been suspended as long as the reason for the debtor's insolvency is based on COVID-19 (Art. 15zzra of the Act on Special Support Instruments in Connection with the Spread of the SARS-CoV-2 Virus of 16 April 2020). To take advantage of this provision, the state of insolvency must arise during the period of either epidemic threat or a state of epidemic declared due to COVID-19. There is a presumption that if insolvency occurred during the pandemic, it is caused by it. However, in the event of a dispute, it will be up to the debtor to demonstrate that the insolvency did not arise from other causes. Therefore, it is worth collecting relevant evidence and connecting the lack of payment in a given period with restrictions imposed on the industry, the lack of payment of invoices by contractors affected by the lockdown, etc. The above does not mean that bankruptcy cannot be declared at the creditor's request. Suspension of the filing obligation does not resolve the underlying problem of insolvency.

### **Simplified restructuring procedure**

In relation to the pandemic, a new restructuring procedure was introduced from 1 July 2020, to remain in force for one year: the simplified restructuring procedure (*uproszczone postępowanie restrukturyzacyjne*). It is based on the procedure for approval of an arrangement, and greatly simplifies what was already the simplest restructuring procedure. Judging by the number of open proceedings (and agreements concluded so far), the simplified restructuring procedure enjoys considerable popularity. Its major pluses for the debtor are:

- **Ease of opening.** The proceedings begin with an announcement of the opening in *Monitor Sądowy i Gospodarczy*, preceded by signing a civil contract with a restructuring adviser.

- **Time for agreement with creditors.** The debtor has 4 months from the announcement in *MSiG* (without the possibility of an extension) to agree with creditors, i.e. for acceptance of the arrangement by creditors; if that does not happen, the court will discontinue the proceedings *ex officio*.
- **Stay of enforcement.** As of the date of publication of the announcement in *MSiG*, all enforcement proceedings against the debtor are stayed, including, under certain conditions, those initiated by creditors whose receivables are secured *in rem* against the debtor's assets (e.g. by mortgage, pledge, or transfer of title for security). This allows for restoration of cash flow and conduct of negotiations at a time when the assets are protected against execution.
- **Protection against termination of key contracts.** During the proceedings, there is a ban on termination of key contracts with the debtor covered by the simplified restructuring procedure, unless the supervisor of the arrangement consents to termination. This protects the debtor's business from actions of counterparties that could adversely affect the operation of the business.

After the opening of simplified restructuring proceedings, as in the case of other restructuring proceedings, the debtor should perform on an ongoing basis the obligations arising after the opening of the proceedings. With the consent of the supervisor of the arrangement, it may raise new financing for this purpose.

### **EU legislation: Directive on Restructuring and Insolvency is on the way**

A key piece of legislation affecting insolvency and restructuring proceedings is the Insolvency Regulation ((EU) 2015/848). Polish law replicates the notion of the “centre of main interests” (COMI), determining the local jurisdiction of the court to open restructuring or bankruptcy proceedings, and thus the law applicable to the debtor (the regulation applies throughout the EU, except for Denmark). The court declaring bankruptcy or opening the restructuring proceedings should confirm in a decision that the COMI for the given undertaking is in Poland.

For businesses operating within the supply chain, and in particular those operating within a single capital group, the notion of COMI may not be obvious or identical to the location of a vehicle dealer or components manufacturer. The opening of main proceedings where the COMI is located determines the possibility of opening secondary proceedings.

Meanwhile, the Directive on Restructuring and Insolvency ((EU) 2019/1023) obliges member states to introduce into their legal systems by 17 July 2021 (unless a country requests a one-year extension under Art. 34(2) of the directive) at least one restructuring procedure, which would include and be based on uniformly understood legal terms and concepts, so that the rescue of economically viable debtors can be carried out similarly in all member states.

It may be easier for Poland to bring at least one restructuring procedure into line with the requirements of the directive than for countries that have had neither existing restructuring proceedings nor a track record applying collective proceedings to prevent insolvency. The simplified restruc-

turing procedure is intended to provide the basis for introducing the procedure required by the directive.

### **Restructuring or bankruptcy of suppliers**

The situation for the end user of the product (the vehicle) is definitely worse when the supplier is declared bankrupt or reorganisation proceedings are opened (containing many legal institutions derived from the Bankruptcy Law).

- **Right to terminate reciprocal contracts**

The bankruptcy trustee or administrator in reorganisation proceedings has the right to terminate a contract if, on the date of declaration of bankruptcy or opening of reorganisation proceedings, obligations under the reciprocal contract have not been performed in whole or in part. (For specific rights and obligations, see Art. 98 of the Bankruptcy Law and Art. 298 of the Restructuring Law.) If maintaining such a contract is not in the debtor's interest, it may be terminated by a unilateral declaration of withdrawal, e.g. when further deliveries would be uneconomic as a result of unfavourable contractual terms concluded prior to opening of the proceedings. If this were to happen in the case of bankruptcy and the contract was terminated by the trustee with effect from the opening of the proceedings, the final recipient is entitled to submit to the bankruptcy estate its claim corresponding to the amount due for the fulfilled part of the contract after the opening of the proceedings and the incurred losses for non-performance of the contract.

But claiming full damages is not easy, and Polish law as a rule does not recognise the notion of indirect damages or consequential loss. The burden of proving damages lies with the claimant, and from an economic point of view, the solution adopted for the recipient of the end product is unsatisfactory. Not only could vehicle production suffer, but getting actual financial compensation is highly questionable. At the same time, as an unsecured claim, the claim under the supply contract is settled after secured claims are satisfied (under the right of segregation). This occurs after a significant lapse of time, at the end of the bankruptcy proceedings.

In the case of reorganisation proceedings, the claim is not included in the arrangement and therefore is not subject to reduction. However, claims exceeding the amount of the benefit and the loss suffered after the opening of the proceedings, e.g. claiming a contractual penalty for withdrawal from the agreement which is grossly excessive, may not be considered or may be mitigated (possible analogy with bankruptcy proceedings).

It is comforting to know that trustees (with the approval of the judge-commissioner) rarely exercise such far-reaching powers. Our experience shows that in the automotive supply chain system, trustees tend not to exercise the right to terminate a contract. From the trustee's perspective, the debtor's entire production is often based on supplying one or more major customers. The trustee is obliged to liquidate the debtor's assets by selling first of all the whole enterprise (within the meaning of Art. 551 of the Civil Code and Art. 316 of the Bankruptcy Law), i.e. including rights under contracts, thus obtaining the highest price (to this end, among other things, provisions

were introduced for a prepared liquidation, erroneously equated with the “pre-packaged sale” in Anglo-Saxon jurisdictions). In this light, ceasing production and laying off staff overnight may be an action that reduces the value of the company (the trustee has the right to run the debtor’s enterprise without the consent of the council of creditors or if a judge-commissioner has not been appointed, for 3 months). However, it is expected that the terms of further deliveries will be renegotiated (payment in advance for a given batch), enabling the trustee to continue production.

- **Invalid termination of a contract due to bankruptcy/restructuring proceedings**

Caution should be exercised against inserting in supply contracts clauses enabling unilateral termination of the contract with immediate effect in the event of filing for bankruptcy or opening of restructuring proceedings (this does not apply to proceedings for approval of an arrangement or simplified restructuring proceedings) or approval of an arrangement by a counterparty to such a contract. Clauses giving this right to one of the parties in the event of a declaration of bankruptcy, opening of restructuring proceedings, or filing for bankruptcy or opening of restructuring proceedings, are quite common in agreements with foreign counterparties. They are invalid under Polish law.

- **Return of forms and templates to the end user**

One of the practical problems arising from the termination of a contract is the need to change the supplier and transfer the production to another manufacturer, including the recovery of forms and templates transferred for the duration of the contract.

Retransfer of possession of forms and templates from the debtor to the end user who owns them (or has an exclusive licence to use them) is often problematic. Licences, as well as tangible elements, are lent under a contract for the production of specific parts of a vehicle (constituting machinery within the meaning of the civil law, Civil Code Art. 51), with forms and templates remaining the property of the end user or another entity. According to the provisions, a third-party property right does not constitute part of the bankruptcy estate, and things and rights should be excluded from the bankruptcy estate on the owner’s application.

From a practical point of view, attention should be drawn to the necessity of fulfilling the formal requirements of the application, as the legal title to forms and templates must be demonstrated in the application, and it may be difficult to complete the relevant documents (due to the lapse of time and the need to find the originals and not copies of documentation). The party should act immediately after the opening of the proceedings, as the trustee may sell the forms and templates (e.g. altogether with the machines and production equipment), in which case the end user will be left with only a claim for repayment of the price received by the trustee.

The impossibility of recovering the forms and templates can be painful for the end user, and given the wear and tear and low economic value of these items (often scrap value), the compensation granted does not constitute any real compensation. Instead, it may generate a risk of breach of

the licence and introduction onto the market of parts produced by an unauthorised person who acquired the machines together with the forms and templates from the trustee.

Finding forms and templates on the debtor's side may also pose a problem. Even if the trustee intends to transfer their possession to the end user, it can be difficult to locate them, especially if production was transferred from one factory to another over the course of long-term cooperation. Therefore, at the stage of concluding a contract, it is recommended not only to permanently mark the owner's details on the forms and templates, but also to require the counterparty to maintain appropriate documentation, including the right to examine the condition and use of the forms and templates during the course of performance of the contract.

### **Conclusions**

Like other sectors, the automotive industry has suffered from the constraints caused by the COVID-19 pandemic. In this situation, production based on a supply chain system may involve additional risks. The threat of insolvency of one of the undertakings in the supply chain has negative economic effects going beyond the typical breach of bilateral contractual relations, given the commonality of economic interests of the participants in the chain.

Therefore, it is worthwhile for businesses participating in a supply chain during the pandemic to recognise the risk and try to reduce it at the stage of establishing the terms of cooperation, taking into account the provisions of the Restructuring Law and the Bankruptcy Law.

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