

THE NEXT STEP IN LEGISLATING FOR THE USE OF SELF-DRIVING VEHICLES

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Legal Briefings - By **Anthony Dempster, James Allsop and Simon Watson**

The Automated and Electric Vehicles Act 2018 received Royal Assent in July 2018. While providing (in broad terms) for a system of civil liability where an accident is caused by an automated vehicle and establishing core definitions, the Act does not seek to address a number of important issues. Instead, the task of fleshing out the regulatory framework for automated vehicles was referred to the Law Commission of England and Wales and the Scottish Law Commission.

On 8 November 2018, the Commissions published a Joint Preliminary Consultation Paper - the first step of a three-year review into the laws and regulations needed to support the introduction of automated vehicles.

This briefing considers the Consultation Paper in its wider context and highlights the (tentative) proposals and questions upon which the Commissions seek responses by 8 February 2019 from all interested parties.

BACKGROUND

As previously [reported](#), the Automated and Electric Vehicles Act 2018 (the "**Act**") received Royal Assent in July 2018.

In order to supplement the fairly narrow scope of the Act, the UK Government asked the Law Commission of England and Wales and the Scottish Law Commission (together, "**the Commissions**") to undertake a three-year review of the UK's regulatory framework to enable the safe and effective deployment of automated vehicles on Britain's roads. The three stated objectives of the Commissions are: (i) safety (both before and after the deployment of automated systems); (ii) clear allocation of both civil and criminal liability; and (iii) the identification and removal of unnecessary blocks to the benefits of automated vehicles.

The Joint Preliminary Consultation Paper (the "**Paper**") published on 8 November 2018 is the first step in the review process: the Commissions have sought to identify issues, make tentative proposals, and invite opinions and feedback from interested parties (the Commissions have posed 46 questions across the Paper's topics). The Commissions intend to publish their final recommendations by March 2021.

THE CONSULTATION PAPER

Broadly, the Paper addresses issues in seven main areas:

- The human factor: including issues of handover from system to human in vehicles with Level 4 automated capabilities (on the SAE International J3016 Standard), human responsiveness to 'requests to intervene' in Level 3 vehicles, and issues involved in placing any responsibility on a human to avoid an accident while a vehicle is driving itself.
- Safety regulation and approvals in testing and production: interaction with UN and EU bodies for certification and type approval, and establishing a UK system of safety assurance for automated vehicles.
- 'On the road' safety regulation: issues ranging from advertising of products, MOTs for automated systems and amended driver training.
- Civil liability: issues relating to the contributory negligence provisions in the Act, the meaning of causation, and data retention.
- Criminal liability: introducing new offences (or amending existing offences) in respect of either the 'human-in-charge' or the developer of the automation system.
- Interference: introducing new offences (or amending existing offences) in respect of tampering with automated vehicles or road systems.
- Road rules: investigating whether an automated system might ever be programmed to break road rules, and ethics and bias issues arising from programming a system to choose between two damaging outcomes (e.g. harming one person vs harming several – the 'trolley problem').

We provide more detail on some of the key (tentative) proposals of the Commission below.

User responsibility to avert incidents

The Commissions have asked for responses on the question of whether a user of a 'fully automated' vehicle (i.e. Level 4 vehicles in their operational design domain (e.g. motorways) or Level 5 vehicles) should be under any responsibility to take reasonable steps to avoid an accident that they are aware of, but that the automated vehicle system is at risk of causing.

While it may seem wrong to suggest that the user would be under no duty to intervene, to suggest otherwise risks blurring the lines between the automated system and the user and therefore blurring any apportionment of liability. If a user is expected to jump into action to avoid an accident, this could be seen to undermine the principle that the systems are safe.

The Commissions link this issue to the general difficulty of Level 3 vehicles - those which incorporate 'conditionally autonomous' systems relying on a user responding to a 'request to intervene'. The Commissions note the clear distinction between 'driver assistance' (Levels 1 and 2) and autonomous systems (Levels 4 and 5) and suggest that the regulation of Level 3 vehicles (the "mushy middle" of driving automation) is likely to be problematic. The Commissions propose treating Level 3 as 'driver assistance' - thereby placing responsibility and legal liability with the user at all times.

Advertising

Given the nuances between the different levels of automated vehicle systems, the Commissions have proposed that consumer information and marketing of automated driving systems be regulated by a new safety assurance agency. The specific risk being addressed here is that developers 'over-selling' or exaggerating the automated aspects of their products may encourage end-users to over-rely or rely inappropriately on the automated aspects of the product.

Causation in civil liability

As set out in our [previous note](#) on the Act, civil liability in the first instance (relating to an accident caused by an automated vehicle) is assessed on a strict liability basis, with an injured party having a direct right against the insurer of the automated vehicle. Having paid or been ordered to pay to an injured party, the insurer has a right to claim against any other person responsible for the accident (e.g. the vehicle manufacturer).

The Commissions suggest that the insurer's right to claim against other persons responsible for the accident should be considered in the light of established law on causation and on a case-by-case basis, rather than requiring further legislation. However, the Commissions have asked for specific feedback on this point given that insurers may desire greater certainty on their rights of recovery.

Data retention

There are a number of issues relating to the data generated by automated vehicles, including the sheer volume of data, limitations on long-term storage, issues over ownership and accessibility (e.g. by insurers) and application of the GDPR. The Commissions (very) tentatively suggest that time-limits on reporting incidents to police or insurers may overcome these first two issues (in that there would be no obligation to retain such data once the limitation period has expired), but also make a wide request for responses on these or any other data issues.

Criminal liability

The Act sets out a framework for civil liability, but does not touch on criminal liability. The Commissions tentatively propose that a user of a fully automated vehicle (i.e. Levels 4 and 5) should not be considered a 'driver' for the purposes of criminal liability, and that liability for criminal offences relating to how such an automated vehicle is driven should lie with the manufacturer and not the user (such offences to be managed by enforceable undertakings, fines, and suspension / withdrawal of regulatory approvals). However, the Commissions also propose that bespoke criminal offences should attach to the user, covering appropriate qualifications, fitness to drive and the user's compliance with updating system software (including refraining from installing unauthorised software).

The Commissions also note that criminal liability for some offences (including those relating to insurance, road worthiness and compliance with seatbelt regulations) should lie with the user notwithstanding that the vehicle may be fully autonomous.

The Paper also invites views on (very tentatively) proposed new corporate offences, which would seek to extend current corporate manslaughter and homicide legislation to developers and manufacturers of autonomous vehicles in order to extend the legislation to serious injury and also to make prosecution of large multi-national companies easier.

TIMELINE FOR RESPONSES

The Commissions have posed a total of 46 tentative proposals and requests for feedback/opinions, ranging across all areas that the review has touched upon. Responses from all interested parties are invited, and should be submitted to the Commissions by 8 February 2019 (this can be done by online form, email or post).

OTHER REPORTS

In addition to the Paper, the Commissions intend to publish a separate paper in 2019, which will consider the regulation of automated vehicles in public transport and 'mobility as a service' (for example, taxi and private hire services). Other papers will be informed by the responses received.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



JAMES ALLSOP
OF COUNSEL, TOKYO

+81 3 5412 5409
James.Allsop@hsf.com



SIMON WATSON
ASSOCIATE, LONDON

+44 20 7466 2333
simon.watson@hsf.com

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