

Automated Driving: The Journey Continues

May 2022

Automated Driving: The Journey Continues



Introduction

It may have been a long and winding road, but after years of research and three rounds of consultations, the Law Commission (of England & Wales) and the Scottish Law Commission (“**the Commissions**”) have finally reached their destination with the publication of their Joint Report on Automated Vehicles (“**the Report**”).

The aim of the project was to produce recommendations for a legal and regulatory framework to assure the safe deployment of automated vehicles (“**AVs**”) on UK roads and other public places. Regulation of the AV sector was seen as essential to “*maximising the benefits, reducing the risk of harm being caused by malfunctioning AVs, and providing incentives and space for responsible innovation to flourish*”¹. The Report makes 75 recommendations for legal reform across a variety of different areas including marketing, safety standards, approval schemes, insurance, duties of candour, and criminal and civil liability. It is a bold step in the journey to a more automated future, and worth exploring in more detail:

A new Automated Vehicle Act – introducing new concepts

The Commissions’ first recommendation is the introduction of a new “Automated Vehicle Act” (“**the AV Act**”). Given the many new definitions, actors, concepts, and regulatory schemes that are proposed for the future regulation of AVs, new and comprehensive primary legislation will be essential to support the development of this area. The key concepts contained in the proposed legislation and in the recommendations more generally are explored in more detail below.

The Report has been laid before the UK and Scottish Parliaments for a decision on whether to introduce new legislation. Some aspects of the reforms fall within devolved competencies, but it is hoped that a joint approach will be taken to enable a uniform scheme to be adopted that will govern the use of AVs throughout the whole of the UK.



¹ Joint Report, para 1.3.

The line between driver assistance and self-driving

Crucial to understanding the recommendations, is understanding what is meant by an AV, and who and what it does (and does not) apply to. The Report provides clarification by introducing a working definition of AVs and recommends that the term “self-driving” is written into law.

A variety of driver assistance features are already common in many conventional vehicles, such as adaptive cruise control which adjusts a vehicle’s speed to maintain a safe distance from vehicles ahead. These features have become far more advanced and can assist with increasing elements of the driving task, but it is envisaged that future development of these features will reach a point where vehicles (including passenger transport vehicles) will be capable of being driven without the need for human monitoring of the situation. Between the current position and the anticipated technological advancements, the line between ‘assistance’ and ‘automation’ becomes blurred. Whereas conventional vehicles with driver assistance features require a human at the wheel to monitor the driving environment and carry out the main driving functions, AVs are vehicles designed to be capable of driving themselves without the need for human monitoring for at least part of a journey. The difference between assistance and automation therefore lies in whether a human driver can be replaced (even just for part of the journey).

In vehicles with driver assistance features the human driver is responsible for the driving task, whereas in an automated or self-driving vehicle the Automated Driving System (“**ADS**”) would be responsible for controlling the vehicle (at least during those parts of the journey that the vehicle is in self-driving mode). ADS systems are to be backed by an Authorised Self-Driving Entity (“**ASDE**”), which will take on (almost) all of the driving responsibilities and also liabilities (both civil and criminal) of a driver, providing the ADS is being used within its limits/guidance given.

The Commissions’ recommendations also set out a test to distinguish whether an ADS feature is or is not truly self-driving, to make it clear where responsibility for driving lies and whether any monitoring is required by the driver. It will be an offence to describe a vehicle as “self-driving” if it has not been authorised as such.

Setting a safety standard

The issue of how safe an AV should be in order to gain approval, was considered by the Commissions. They concluded that AVs should be safer than human drivers (positive risk balance), and should provide increased safety for all users (i.e. no groups or vulnerable road users being disadvantaged or facing further safety risks as a result of AVs). However, consultees were divided about whether AVs need only be “*a little bit safer*” or should be substantially safer. The Commissions have ultimately decided that how safe AVs require to be depends on the level of risk that is acceptable to the public and is therefore a political decision. It has recommended that the Secretary of State for Transport should develop a measurable safety standard which will set out the performance expectations of an AV within a published safety standard. The Report further recommends that this safety standard should be backed-up by a specialised in-use regulator to monitor on-going AV safety.



Safety assurance – pre-deployment, and in-use

Two new regulatory regimes are recommended to ensure AV safety: firstly, a system of pre-deployment safety assurance; and secondly, a system of in-use safety assurance to provide continuous regulatory oversight throughout an AV's lifetime.

Pre-Deployment Safety Assurance - initial approval, and self-driving authorisation

The current system for vehicle approval involves multiple stages and a combination of national and international legal processes, generally with each component and system within a vehicle gaining approval individually before the final vehicle is put forward for approval as a whole. Taking into consideration the changes caused by Brexit, the Report recommends a new two-stage process for the approval and the authorisation of AVs.

Approval – it is proposed that systems type approval for an AV should be capable of being obtained either domestically, in accordance with a new domestic AV technical approval scheme, or internationally following current UNECE regulations. The provision of a domestic approval route was considered particularly desirable to the innovation of vehicles for use in limited local contexts, or of other forms of automated passenger and freight services for which there may be no applicable international approval process. Following systems type approval, an AV would also require national whole vehicle approval (as most conventional vehicles currently do). It is proposed that approval could be obtained either for a 'type' of vehicle (permitting small or large scale production), or for individual vehicles. In any event, approval would be required in order to place a vehicle on the UK market.

Authorisation - the Report recommends that once a vehicle has been approved, it should complete a further process of authorisation for AVs. The key purpose of authorisation is to determine whether a vehicle qualifies as "self-driving", the fundamental consequence of which is to change the status of the vehicle's user: *"Before a person in the driving seat can turn away from the driving task and acquire the legal status of a user-in-charge, the vehicle will need to be authorised as having self-driving features. The same is true for vehicles without anyone in the driving seat"*². Authorisation would test each ADS, ensuring that each individual feature of the driving task undertaken by the system met the required level of autonomy and safety. It would also: specify the intended operational domain of the ADS features (e.g. whether the ADS will only operate when the AV is on a motorway, or at certain times of day); specify whether each ADS requires a 'user in charge'; and register the entity backing the AV as an ASDE if the necessary criteria are met (including that the ASDE must be of good repute, and must have appropriate financial standing to fulfil on-going obligations in relation to the vehicle, such as those to provide technical updates, to organise recalls, respond to regulatory enforcement notices etc). If the ADS features pass the test, then the whole vehicle would be approved, covering both the physical vehicle and the systems inside it.

The Report recommends that the Automated and Electric Vehicles Act 2018 ("**AEV Act 2018**"), which introduced a system of approval for AVs, should be amended to reflect the new authorisation process.



In-use Safety Assurance

The safety assurance of AVs will require to be on-going. For example, ASDEs will be under on-going obligations to ensure that the vehicle continues to drive safely, that it receives necessary updates, and that users are informed about the vehicle's self-driving features and their limitations. In the circumstances, the Law Commissions envisage that on-going safety assurance would be best overseen by a new in-use safety regulator.

² Joint Report, para 5.40.

This new regulator would have an investigatory role for any AV related traffic infractions as well as enforcement powers (ranging from warnings to withdrawal of AV authorisation), which could target both the AV itself and the ASDE behind the vehicle. In addition, it is also recommended that an independent collision investigation unit should be set up with responsibility for investigating serious traffic incidents involving AVs. This recommendation recognises the technical and complex nature of the issues likely to be required to fully investigate collisions involving AVs.

Although cybersecurity was out with the Commissions' remit, they recognised that safety and security in automated vehicles are intrinsically linked. As a result, and in line with overwhelming response from consultees, it is recommended that the in-use safety regulator should have responsibility for developing and encouraging best practice with regards to ongoing AV cybersecurity. Where a lack of security gives rise to a safety concern, the regulator's powers to deal with safety concerns should apply.

Marketing of driving automation

The Law Commissions also put forward recommendations concerning the marketing of both AVs and conventional vehicles, essentially restricting the use of certain terminology and how it may be used in commercial practice.

Media reports provide some evidence of misleading terminology causing confusion about the level of engagement and monitoring they are required to have in relation to some more advanced vehicles, owing to misleading terminology used in marketing. Although a vehicle must be authorised and listed as "self-driving" by the Secretary of State for Transport in order to qualify as an AV, the Law Commissions also felt the need to make recommendations to address head on poor and confusing marketing practices. The recommendations go as far as to create a criminal offence for the mis-use of certain terms (such as "self-driving", "drive itself", "driverless", and "automated vehicle") or for misleading marketing which may confuse drivers for vehicles which are not on the Secretary of State's approved list.

With the increasing number of advanced assistance features becoming available in conventional vehicles, this recommendation will go some way to ensure that drivers are made clearly aware of the capabilities - and limitations - of the vehicles and features that they are using.

User-in-charge and No user-in-charge categories

With the introduction of AVs, and with ADSs being able to take over the driving task, the role of those travelling inside AVs will change. At the authorisation stage, it is envisaged that ADS features will be categorised as being either authorised for use with a user-in-charge ("**UIC**") or authorised for use with no user-in-charge ("**NUIC**"). This categorisation will impact on who is responsible for the driving function of a vehicle, and the role and the responsibilities of those travelling in the vehicle.

UIC

A new role coming out of the recommendations is that of the UIC, a person in the vehicle who is not responsible for the driving function whilst ADS features are engaged, but who must be able to operate the driving controls when/if required.

The Report recommends that certain driving responsibilities should continue to fall on the UIC. Such responsibilities relate to the vehicle and other passengers, rather than to the actual driving task. For example, it is recommended that the UIC should still be responsible for ensuring that passengers are wearing seatbelts, that there is adequate insurance in place for the vehicle, and that the vehicle is safely loaded. The UIC would also retain responsibilities for reporting any incidents to the police.

The Report also places limitations on who is suitable to be a UIC: they must be a qualified driver, with a valid driving licence. As well as being qualified to drive, the UIC must also be and remain in a fit state to drive, and not be under the influence of drugs or alcohol. This is to ensure that the UIC will be able to respond to any transition or takeover demand from the ADS.

If a UIC fails to respond to a takeover demand, it is proposed that responsibility for the driving task should pass back to the UIC and the UIC would be liable for any traffic infractions or driving offences which occur after this time. The Report recommends a flexible approach is taken to this, with the failure to take over not itself being an offence, but focusing on the consequences of such situations.

When a vehicle is fully self-driving with no need for the UIC's engagement in any part of the driving task, it is proposed that the UIC should be allowed to engage in other activities. However, owing to the possibility of having to react to takeover demands from the AV, the UIC should not be treated the same as other passengers and should be limited in the activities that they are allowed to engage in. For example, the Report recommends that the UIC should be prohibited from certain activities, including sleeping and the use of mobile phones and any screen device not integrated into the vehicle's system.

No user-in-charge

Recognition is given to the fact that some AVs may be equipped with ADS features that are intended to perform the entire driving function without any UIC – these are likely to include freight and passenger services but may include private and other vehicles. The Commissions recommend that when NUIC features are engaged, the vehicle should be overseen by a licensed NUIC operator who can help to provide remote assistance with navigating obstructions and dealing with unexpected incidents that may arise during a journey. It would be an offence for a vehicle to be used on a road or other public place without a driver or UIC, unless the vehicle was equipped with an authorised NUIC feature and it was being overseen by a licensed NUIC operator. The NUIC operator would also have responsibility for maintenance, insurance and cyber-security. This role relates to the driving function and is distinct from the overall responsibility of ASDEs (although a single organisation may fulfil the roles of both ASDE and NUIC operator). To obtain a NUIC operator licence it is recommended that applicants should be able to show good repute and appropriate financial standing (as for ASDE registration) as well as establishment in Great Britain and professional competence, with the Secretary of State for Transport to provide guidance on these requirements.



Finally, the Commissions considered whether additional regulation was required for the use of AVs for passenger services. The conclusion reached was that where the services are provided in an AV with a UIC, the present regulations will continue to be fit for purpose as they allow for a responsible person being in the vehicle – something older and disabled users particularly rely on. However, the Commissions felt that more evidence was required about how to provide safe and accessible passenger services without a driver or responsible person on board before a permanent regulatory framework was proposed. They therefore proposed a system for interim passenger permits, to be set up between the Secretary of State and the devolved administrations, to enable the trialling and collection of evidence about responding to the challenges of NUIC passenger services.

Duty of Candour – criminal liability

Rather than replicating the sort of criminal sanctions that apply to human drivers of conventional vehicles, the Commissions recommend a system of regulatory sanctions. This reflects their wish to “*promote a no-blame safety culture that learns from mistakes*”³. However, the Commissions also recognised that regulatory approvals and safety assurance will rely on pre-deployment and in-use regulators being provided with accurate information by ASDEs and NUIC operators, and duties of candour will therefore apply to those fulfilling these roles and to senior managers in those organisations.

Specifically, a duty of candour will arise where an ASDE applies for authorisation of a vehicle, or where an NUIC operator applies for a licence, or where these organisations respond to a regulator’s request for information. If the organisation fails to provide the regulator with information relevant to the evaluation of the vehicle’s safety, or provides false or misleading information, it will have committed a criminal offence. To the extent that the in-use regulator is likely to make periodic requests for information, the duty may be considered an on-going one, but is not intended to place a positive obligation on ASDEs/NUIC operators to come forward with safety critical information in between requests, this having been considered too onerous.

It is not only the company who may be prosecuted for a breach of the duty of candour. In order to drive the creation of a culture of transparency within organisations, the proposed AV Act will place personal responsibility on certain individuals within an ASDE/NUIC operator in the event that the organisation breaches its duty of candour, and those individuals may face criminal prosecution:

- The person who signs a company’s safety case or its response to the regulator’s information request (“*the nominated person*”) will also be open to prosecution, where the company is in breach of its duty of candour. This reflects the fact the nominated person will be under a general duty to ensure the accuracy of a company’s safety statement, including signing and confirming that they have taken steps to ensure that the information is correct and complete when an ASDE or NUIC operator submits a safety case or other safety critical information. Prosecutions against the nominated person and/or the company would not need proof of knowledge of the lack of candour, but the company/nominated person would have a defence if they could show they had taken all reasonable precautions and exercised all due diligence to prevent wrongdoing.
- In order to promote an open and transparent culture of safety-first, senior managers may also be prosecuted for a company’s breach of the duty of candour, if the breach took place with their consent or connivance (i.e. the senior manager must have known of the lack of candour). After considerable debate over the definition of a “senior manager”, and whether the traditional understanding of this role covered those people with the relevant technical knowledge about safety, a senior manager is to be defined as “*a person who plays a significant role in: (1) the making of decisions about how the ASDE/NUIC operator is managed or organised, or (2) the management of the safety assurance process.*”⁴.

Finally, in line with aggravated offences related to conventional vehicles (e.g. death by dangerous driving), where a company or individual commits a duty of candour offence, that offence should be prosecuted as an aggravated offence where the misrepresentation or non-disclosure increased the risk of an adverse incident, and such an incident occurred causing a death or serious injury. The Commissions felt it was important for the public to see

that where the consequence of a regulatory offence was the death or serious injury of a person, the severity of that should be reflected in the prosecution and trial of the offence (and so making the victim central to the proceedings), “*rather than being relegated to the sentencing decision*”⁵.

³ Joint report, para 11.1.

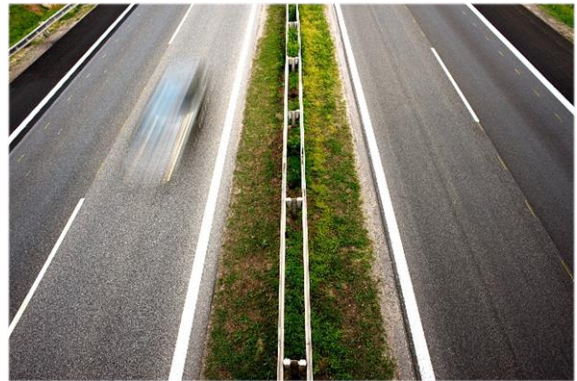
⁴ Joint Report, para 11.86 (Recommendation 65).

⁵ Joint Report, para 11.72.

Civil liability

Direct liability of insurers

The introduction of AVs requires a very different system of civil liability to that which applies to conventional vehicles. Liability for accidents caused by conventional cars (with conventional drivers) typically falls on the driver, who is required to have third party motor insurance for any liability the driver may incur as a result of the use of the vehicle. The insurer will then indemnify the driver. With AVs, “[t]he human driver can no longer be the principal focus of accountability for road safety”⁶, since by definition AVs do not require a human driver for at least part of the journey.



Civil liability for injuries and damage caused by AVs has already been the subject of recent legislative consideration. The AEV Act 2018 introduced a markedly different system of civil liability for AVs, imposing direct liability on insurers of AVs⁷: where an accident is caused by an AV in self-driving mode, the insurer is directly liable for any damage or injury caused to a person, whether the human driver/UIC or a third party. To avoid issues about who was driving at the time of the accident (the human driver or the ADS), a single insurance policy must cover both the driver's liability and the insurer's direct liability (where an AV is self-insured by a public body, liability falls on the owner).

The Commissions found on-going support for the new provisions of the AEV Act 2018 setting out the new scheme of civil liability, and therefore proposes only limited changes to the AEV Act provisions. Although not strictly new, it is worth spelling out the key features of those provisions as they are not yet well known but will sit alongside the Commissions' other recommendations in the automated sector in due course.

The process set out in the AEV Act 2018 for listing a vehicle as an AV will be replaced by the Commissions' recommended authorisation process.

As explained above, a vehicle authorised as an AV will require to be insured for both driver's liability and for insurer's direct liability. If an accident occurs while an AV is in self-driving mode, the insurer will be directly liable for any damage or injury caused, including for death, personal injury and most types of property damage (but not damage to the AV itself or pure economic loss). In a change to the rules applying to conventional vehicles, AV insurance also covers injury to the person in charge of the vehicle (the “**insured person**”), unless the insured person was negligent in allowing the AV to start driving itself when it was inappropriate to do so.

Uninsured vehicles

An area of ongoing uncertainty is that of liability for accidents involving uninsured AVs. Liability under the AEV Act 2018 provisions arises where the AV is insured at the time of the accident. If an uninsured conventional vehicle is involved in an accident, the Motor Insurers' Bureau (“**MIB**”) steps in as the insurer of last resort to ensure the victim is compensated for their injuries. However, that system relies on the injured person making a claim against an uninsured driver, a process which will not occur under a system of direct liability of the AV insurer. For the time being, a discrepancy therefore exists between victims of accidents caused by uninsured conventional vehicles, and victims of accidents caused by uninsured AVs. In order to ensure the equal treatment of both categories of victim, the UK Government is understood to be in discussion with the MIB about expanding the current scheme to address this discrepancy.

⁶ Joint Report Overview document, para 3.

⁷ AEV Act 2018, Section 2.

Secondary claims

Under the AEV Act 2018, an insurer who has settled a claim for which they are directly liable, may bring a secondary claim against any other person considered responsible for the accident, in order to recover all or part of the damages from that person. This may include drivers of other vehicles involved in the accident, or indeed vehicle manufacturers if the accident occurred because of a fault with the vehicle itself or an ADS.

If a secondary claim were taken against a manufacturer, it could do so on the basis of either common law or product liability law. The attraction to relying on product liability law is that it imposes a regime of strict liability and so avoids the need under common law for the claimant to prove fault on the part of the manufacturer. However, product liability law is contained in the Consumer Protection Act 1987 (“**CPA 1987**”, which implemented the EU Product Liability Directive of 1985) and a number of difficulties could be encountered if trying to rely on the CPA 1987 to establish product liability in an AV or a component of it. Essentially, the CPA 1987 was not designed to deal with modern technology – in 1987 there was no real need for it to deal with software and AI. The Act defines a “product” as “*any goods or electricity*” and includes products that are “*comprised in another product*” such as component parts⁸. Whether software is a “good” has still not been tested, and accordingly the suitability of the current product liability regime for dealing with issues arising from AVs and the modern technology in their ADS components, is in considerable doubt (and according to the European Commission’s review of liability for emerging technologies, the current pan-European system is “*an inadequate match for the potential risks of emerging digital technologies*”⁹).

Despite this, the Commissions did not recommend any changes to product liability laws to enable reliance on product liability law in the context of AVs. It was felt that cost, complexity and poor success rates made it unlikely many litigants would try to rely on product liability law in relation to AVs, and so it was not a priority for review. The Commissions did, however, recommend the UK Government review how product liability law applies across all sectors to emerging technologies (including software), with a view to a general overhaul.

Conclusion

The Law Commissions’ recommendations mark the end of the consultation and review phase of this journey to a more automated future. We must now wait to see the extent to which the UK Government, and the devolved administrations, implement those recommendations. What is certain is that the Report is likely to be of interest to everyone involved in and around the automotive sector, whether as manufacturers, software developers, regulators, safety consultants, insurers, or consumers.



⁸ Consumer Protection Act 1987, Section 1(2)(c).

⁹ Joint Report, para 13.26.

Key Contacts



Graeme MacLeod
Partner

T +44 131 200 7686
E graeme.macleod@cms-cmno.com



Catriona Garcia-Alis
Senior Associate

T +44 131 200 7524
E catriona.garcia-alis@cms-cmno.com



Caroline Cooper
Senior Associate

T +44 20 7367 3605
E caroline.cooper@cms-cmno.com



Laurence Kalman
Partner

T +44 20 7067 3078
E laurence.kalman@cms-cmno.com



Alison Hetherington
Trainee Solicitor

T +44 141 304 6110
E alison.hetherington@cms-cmno.com



Your free online legal information service.

A subscription service for legal articles on a variety of topics delivered by email.

cms-lawnow.com

The information held in this publication is for general purposes and guidance only and does not purport to constitute legal or professional advice.

CMS Legal Services EEIG (CMS EEIG) is a European Economic Interest Grouping that coordinates an organisation of independent law firms. CMS EEIG provides no client services. Such services are solely provided by CMS EEIG's member firms in their respective jurisdictions. CMS EEIG and each of its member firms are separate and legally distinct entities, and no such entity has any authority to bind any other. CMS EEIG and each member firm are liable only for their own acts or omissions and not those of each other. The brand name "CMS" and the term "firm" are used to refer to some or all of the member firms or their offices.

CMS Locations: Aberdeen, Abu Dhabi, Algiers, Amsterdam, Antwerp, Barcelona, Beijing, Beirut, Belgrade, Bergen, Berlin, Bogotá, Bratislava, Bristol, Brussels, Bucharest, Budapest, Casablanca, Cologne, Dubai, Duesseldorf, Edinburgh, Frankfurt, Funchal, Geneva, Glasgow, Hamburg, Hong Kong, Istanbul, Johannesburg, Kyiv, Leipzig, Lima, Lisbon, Liverpool, Ljubljana, London, Luanda, Luxembourg, Lyon, Madrid, Manchester, Mexico City, Milan, Mombasa, Monaco, Moscow, Munich, Muscat, Nairobi, Oslo, Paris, Podgorica, Poznan, Prague, Reading, Rio de Janeiro, Rome, Santiago de Chile, Sarajevo, Shanghai, Sheffield, Singapore, Skopje, Sofia, Stavanger, Strasbourg, Stuttgart, Tel Aviv, Tirana, Utrecht, Vienna, Warsaw, Zagreb and Zurich.

cms.law