

Response to the Law Commission's Third Consultation Paper on Automated Vehicles

This is a response provided by the British Insurance Law Association (BILA) with a view to providing some assistance in relation to certain questions posed by the Law Commission in its Third Consultation Paper on Automated Vehicles. The response has been circulated to the BILA Committee, but the answers given should not be taken as representing the views of the BILA membership as a whole or of all individual members of the BILA Committee

BILA is an independent non-profit making organisation. Its membership is drawn from insurers, insurance brokers and other intermediaries, academic lawyers, solicitors and barristers. We wish to acknowledge the assistance given to this response by academics who have been involved in researching this area of the law, in particular Dr Ozlem Gurses, Professor at King's College London. We would also like to thank Professor James Davey, Professor at the University of Southampton, Dr Kyriaki Noussia, Senior Lecturer at the University of Exeter Law School and Dr Matthew Channon, Lecturer at the University of Exeter Law School for their contributions.

Question 1

We provisionally propose that:

- (1) A vehicle should not be classified as self-driving if, with the ADS engaged, the user-in-charge needs to monitor the driving environment, the vehicle or the way it drives;
- (2) It is nevertheless compatible with self-driving to require the user-in-charge to response to a clear and timely transition demand which:
 - (a) Cuts out any non-driving related screen use;
 - (b) Provides clear visual, audio and haptic signals; and
 - (c) Gives sufficient time to gain situational awareness;
- (3) To be classified as self-driving, the vehicle must be safe enough even if the human user does not intervene in response to any event except a clear and timely transition demand.

Do you agree?

- (1) We agree. The provisional proposal in (1) appears to be compatible with the definition of a vehicle driving itself in s.8(1)(a) of the Automated and Electric Vehicles Act 2018 (a vehicle is "driving itself" if it is operating in a mode in which it is not being controlled, and does not need to be monitored, by an individual). This definition may need to be reconsidered in the light of vehicles being at different levels of automation over time and possible amendments to the AEV Act. We would suggest that the word "fully" should appear before "monitor". In our view a vehicle should not be classified as self driving if, with the ADS engaged, the user needs to fully monitor the vehicle;
- (2) We agree with the provisional proposal in (2);

- (3) We agree with the provisional proposal in (3) but would add after the word “demand” the words “or in cases where even partial human intervention is needed.”

Question 12

We invite observations on the appeal process in regulation 19 of the Road Vehicles (Approval) Regulations 2020, including: (1) how it works in practice; and (2) how well it is suited to the proposed national ADS approval scheme.

We do not have expertise as to how type approval process works in practice, so cannot say how well it is suited to the proposed national ADS approval scheme.

If the provisions were to be similar to those in regulation 19, we would suggest that the person aggrieved by the decision should have longer than 14 days to appeal after receipt of the notice. We favour a longer period due to the fact that the appeal notice in regulation 19 must be accompanied by such documents and further evidence as may be specified in the form and reasonably necessary to support the appeal.

Question 14

Law Commission provisionally proposes new legislative framework which should provide regulation making powers to specify

- (a) Who should assess whether a vehicle is capable of self-driving
- (b) The procedure for doing so; and
- (c) Criteria for doing so

We agree that there should be a new legislative framework which should provide regulation making powers to specify (a) (b) and (c).

We would observe generally that, although the Automated and Electric Vehicles Act 2018 may be seen as a first step so far as legislation for Automated Vehicles (“AVs”) is concerned, the Act has come in for criticism and fails to deal with many issues raised by AVs, including criminal responsibility and aspects of civil liability, including compensation for victims where AVs are not covered by insurance. The Law Commission may wish to consider possible proposals for a more comprehensive Act covering AVs in the future. It is important that there be transparency around the criteria for a vehicle being “self driving” and that such criteria are easily accessible for consumers of AVs.

Consultation Question 15

We seek views on whether the new legislation should include provisions for appeals against a categorisation decision. If so, should these be similar to those in regulation 19 of the Road Vehicles (Approval) Regulations 2020? See above (d)

We favour there being new provisions for challenging or appealing against a categorisation decision. We do not consider that we have sufficient expertise to respond as to whether they should be similar to those in regulation 19.

If the provisions were to be similar to those in regulation 19, we would suggest that the person appealing a categorisation decision should have longer than 14 days to appeal after receipt of the notice. We favour a longer period due to the fact that the appeal notice in regulation 19 must be accompanied by such documents and further evidence as may be specified in the form and reasonably necessary to support the appeal.

Consultation Question 17

We provisionally propose that legislation should establish a scheme to assure the safety of automated driving systems following deployment, giving scheme regulators enhanced responsibilities and powers. Do you agree?

We agree. We would suggest that, apart from establishing a scheme to assure the safety of automated driving systems following deployment (which would give scheme regulators enhanced responsibilities and powers), provision should also be made for establishing an independent authority to revisit these safety standards periodically and advise the scheme regulators.

Consultation Question 18

We provisionally propose that the enhanced scheme should give regulators the following responsibilities and powers:

- (1) scheme regulators should be responsible for comparing the safety of automated and conventional vehicles using a range of measures;
- (2) to do this the regulator should have power to collect information on:
 - (a) leading measures (instances of bad driving which could have led to harm) and
 - (b) lagging measures (outcomes which led to actual harm);
- (3) regulators should have power to require an ADSE:
 - (a) to update software where an update is needed to ensure safety and continued compliance with the law;
 - (b) to keep maps up to date, where an AV relies on maps to ensure safety and compliance with the law;
 - (c) to communicate information about an ADS to users in a clear and effective way, including where necessary through training.

Do you agree?

We agree.

We consider that regulators should be in a position to demand that software be updated where an update is needed to ensure safety and continued compliance with the law. This proposal is important in relation to s. 4(1)(b) of the Automated and Electric Vehicles Act 2018, which permits insurers of an automated vehicle to exclude or limit insurer's liability for damage suffered by an insured person arising from an accident occurring as a direct result of a failure to install safety critical software updates that the insured person knows, or ought reasonably to know, are safety-critical. Insurers are likely to rely on evidence that regulators required updates under the power envisaged in (3) (a) when insurers seek to deny liability due to a failure to update. It will be important to know where reference may

be found to the criteria the standards regulators are applying to updates and their frequency.

We also see it as important for an ADSE to communicate information about an ADS clearly and effectively to consumers.

Consultation Question 20

Should the authority administering the scheme to assure safety while automated vehicles are in use be kept separate from type approval authorities (as is already the case)? Alternatively, should both functions be combined in a single body?

We consider that the authority administering the scheme should be completely independent of Government and industry, whether it is one body or two separate bodies. Our preference would be for the two functions not to be combined in a single body. There should be collaboration between the two bodies so that any type approval authorities are periodically assessed by the authority administering the scheme to assure safety and to ensure that the safety standards are well implemented.

Consultation Question 25

We provisionally propose that a specialist incident investigation unit should be established: (1) to analyse data on collisions involving automated vehicles; (2) to investigate the most serious, complex or high-profile collisions and (3) to make recommendations to improve safety without allocating blame. Do you agree?

We agree that a specialist investigation unit should be established to carry out functions (1) (2) and (3). Function (3) should be clearly stated as an additional power and not a limit on (1) and (2). We consider that in view of the unit's involvement in analysis of data on collisions and investigation of the gravest collisions, it would be helpful to use the results of such analyses and investigations. The unit's findings are likely to be of assistance when considering ss 3, 4 and 5 of the Automated and Electric Vehicles Act 2018 and whether insurers have rights of recourse against other persons or institutions that may bear responsibility for accidents.

Consultation Question 28

We provisionally propose that that the user-in-charge: (1) should be defined as an individual in position to operate the controls of a vehicle while an ADS is engaged and who is either in the vehicle or in direct sight of the vehicle; and (2) is not a driver while the ADS is engaged, and would not be liable for any criminal offence or civil penalty (such as a parking ticket) which arises out of dynamic driving. Do you agree?

We agree.

Consultation Question 29

We provisionally propose that following the end of the transition demand period: (1) the user-in-charge should re-acquire the legal obligations of a driver, whether or not they have taken control of the vehicle; and (2) if, following a failure to respond to a transition demand,

the vehicle stops in a manner which constitutes a criminal offence, the user-in-charge should be considered a driver and should therefore be liable for that offence. Do you agree? We agree.

We appreciate why the Law Commission has proposed that at the end of the transition demand period the UIC should re-acquire the legal obligations of a driver and assume any civil and criminal liability. We wonder whether some provision should be made for a situation where it is obvious to the UIC that he/she should take back control before the end of the transition demand period and does so, should he/she then re-acquire the legal obligations of a driver? We would then regard it as appropriate to treat that person as the driver for civil liability purposes when he/she takes back control.

Consultation Question 31

We provisionally propose that legislation should create new offences of:

- (1) using an automated vehicle as an unfit or unqualified user-in-charge; and
- (2) causing or permitting the use of an automated vehicle by an unfit or unqualified user-in-charge. Do you agree?

We agree with the creation of these new offences. It should be made clear that being “unfit” through drink or drugs is separate from the offence of being over the prescribed limit so far as levels of alcohol and drugs are concerned. We suggest that the Law Commission should consider creating a new offence of using or causing or permitting the use without insurance of an automated vehicle in its fully automated form. This offence would be aimed at owners and registered keepers of fully automated vehicles.

Consultation Question 32

We provisionally propose that persons carried without a user-in-charge should be guilty of a criminal offence. Do you agree?

We agree that there should be an offence of being carried without a user-in-charge. We consider that some occupants of the vehicle may bear more responsibility than others. This may be reflected by the proposed test in Question 33 and in any sentencing of those convicted.

Consultation Question 33

We seek views on whether the new proposed offence of being carried without a user in-charge should only apply if the person: (1) knew that the vehicle did not have a user-in-charge; and (2) knew or ought to have known that a user-in-charge was required.

We agree. The prosecution should have to prove both (1) and (2)

Consultation Question 34

We provisionally propose that a user-in-charge who takes over control of the vehicle: (1) should be considered a driver; but (2) should have a specific defence to a criminal offence if,

given the actions of the ADS, a competent and careful driver could not have avoided the offence. Do you agree? If not, we welcome views on alternative legal tests.

We agree that a user-in-charge who takes over control of the vehicle may be considered a driver but wonder whether the burden on the defence has been put too high. If the user-in-charge is to be considered a driver, then we would favour there being a specific defence to a criminal offence in terms of “given the actions of the ADS a reasonably careful driver could not have avoided the offence”. We would suggest that someone should only be criminally liable if he/she would have been convicted of reckless or careless driving when driving a vehicle which is not an automated vehicle.

We consider, however, that it might be more appropriate not to use the terminology of a “driver” in this context. It has frequently been discussed in relation to the Road Traffic Act 1988 that the word “drive” is narrower than “use” of a vehicle. A vehicle may be involved or contribute to an accident when it is not actively being driven. We propose that the terminology should be reconsidered and, if what is meant to be addressed by this proposal is a broader “use” of the vehicle than simply “active driving”, then this should be expressed as precisely as possible. We refer to judicial dicta favouring the broad interpretation of “use” of a vehicle in the civil context, in particular, in the recent decision of the Supreme Court decision in *R&S Pilling (t/a Phoenix Engineering) v UK Insurance Ltd* [2019] UKSC 16 (sometimes referred to as *Holden*). Lord Hodge (with whom the other Supreme Justices agreed) stated at paragraph 34 of the judgment that “The good sense of having a broad interpretation of “use” in the requirement for compulsory third party insurance is clear as leaving an immobilised car on a public road may create a hazard for other road users, for example if the vehicle was left close to a blind corner”.

Consultation Question 35

We provisionally propose that the user-in-charge should be liable for criminal offences which do not arise from the dynamic driving task, including those related to: (1) insurance; (2) maintaining the vehicle in a roadworthy condition (including installing safety critical software updates); (3) parking; (4) duties following accidents to provide information and report accidents to the police; and (5) ensuring child passengers wear seatbelts. Do you agree?

We agree. Please see our response to question 34. The terminology should be considered carefully to see how to express the wording of these offences as precisely as possible so that they address circumstances which do not arise from the dynamic driving task.

Consultation Question 37

We provisionally propose that: (1) where an individual is exercising latitudinal and longitudinal control (steering and braking) over a vehicle remotely, that should not be regarded as a form of “self-driving”; and (2) where lateral and longitudinal control are exercised by an ADS, all other forms of remote operation should be regulated as “self-driving”. Do you agree?

We agree

We welcome views on whether the current definition of when a vehicle “drives itself” under the Automated and Electric Vehicles Act 2018 should be amended to deal with some forms of remote operation which may involve a degree of “monitoring”.

We consider that thought should be given to amending the Act to deal with different types of non user-in-charge vehicles (“NUICs”) which are likely to develop over time. The current definition of when a vehicle “drives itself” under the Act is unlikely to cover all of these. It may be necessary to enact separate regulations which apply to different types of NUICs as they are invented or developed.

Consultation Question 40

We provisionally propose that, irrespective of the nature of the vehicle, a licensed operator should be under a duty to: (1) supervise the vehicle; (2) maintain the vehicle; (3) insure the vehicle; (4) install safety-critical updates and maintain cybersecurity; and (5) report accidents and untoward events (as defined by the regulator). Do you agree?

We agree. The insurance obligation on the licensed operator should be clearly set out and it should be made clear whether the insurance is intended to cover the use of the vehicle or is wider, for example, whether it is intended to cover the manufacturing of an ADS.

Consultation Question 41

We provisionally propose that legislation should include a regulation-making power by which some or all of these duties could be transferred to the registered keeper or owner, if it was shown that it was appropriate to do so. Do you agree?

We agree. It seems sensible to require the operator initially to have the responsibility to provide insurance. It may be that at some point it would be appropriate to transfer such responsibility to the registered keeper or owner. For insurance purposes it is important to identify who has the obligation to ensure that the vehicle is not used without insurance.

Consultation Question 52

We provisionally propose that the way the Automated and Electric Vehicles Act 2018 deals with contributory negligence and causation is: (1) adequate at this stage; and (2) should be reviewed by the UK Government in the light of practical experience. Do you agree?

We consider that the way that the Act has dealt with contributory negligence and causation is not particularly satisfactory. We suggest that it should be seen how the courts manage to deal with matters of contributory negligence and causation in practice before the UK Government embarks on any review.

Consultation Question 53

We provisionally propose that measures should be put in place to compensate the victims of accidents caused by uninsured AVs. Do you agree?

We agree. Measures should be put in place to compensate the victims of accidents caused by uninsured AVs. We would favour involving the MIB in discussions in relation to such measures. We also consider that further thought should be given to hacking potentially

causing significant damage and whether such measures for uninsured vehicles should also include compensation for significant loss caused by hacking.

Question 55

We provisionally propose that:

- (1) For a vehicle to be classified as self-driving, it needs to record the location as well as the time at which the ADS is activated and deactivated;
- (2) The Government should work within the UNECE to ensure data storage systems for automated driving record these data; and
- (3) Any national system to approve an ADS should require these data to be collected, subject to safeguards? Do you agree?

We agree

Question 56

We provisionally propose that legislation should impose a duty on those controlling AC data to disclose data to insurers, where the data is necessary to decide claims fairly and accurately. Do you agree?

We agree. The legislation should set out which data is to be disclosed and the requirements to be abided with so as to protect the users' data. There is a need to ensure transparency.

Question 57

We provisionally propose that:

- (1) Initially, DSSAD data from self-driving vehicles should be stored for three years; and
- (2) The issue should be reviewed in the light of experience. Do you agree?

We agree. We would favour storage of data for three years as that is the usual limitation period for personal injury claims. We appreciate that there may be practical problems in storing data for long periods but this may be overcome in the future.

Question 58

We provisionally propose that:

- (1) When an ADSE applies for categorisation of its vehicle type as self-driving, it should present the regulator with details on how data will be recorded, stored, accessed and protected;
- (2) The regulator should only categorise a system as self-driving if it is satisfied that the ADSE has systems to abide by its obligations under the GDPR. Do you agree?

We agree.

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