

DEPARTMENT FOR TRANSPORT

Rules on safe use of automated vehicles on GB roads

Response on behalf of DAC Beachcroft LLP

ABOUT US

DAC Beachcroft LLP is a leading international legal business with offices across the UK, Europe, Asia Pacific and Latin America.

We partner with our clients to help them achieve sustainable growth and to defend their business and reputation. We do this by taking a tailored approach to providing commercial, transactional, claims, risk and advisory legal services.

We are recognised leaders in Insurance, Health and Real Estate and draw on the knowledge, industry experience and commercial expertise of our outstanding 2,200 lawyers and support colleagues in these sectors and beyond.

We are a forward-thinking business. We are committed to helping facilitate practical and beneficial legal reforms and technological innovation.

We have co-ordinated an Automated Vehicles team that draws from our strength as one of the UK's leading insurance law firms. Our AV team consists of 15 members from a wide range of specialist areas, including: motor claims and liability (civil and criminal), product liability and recall, data and cyber risk, technology, insurance regulatory, commercial, property and infrastructure and transport and logistics. Through Legalign, our global partnership of like-minded law firms, we also have access to legal experts in other jurisdictions, including Germany and the United States.

Our team has responded to every government, parliamentary and Law Commission consultation and call for evidence related to automated vehicles and the future of motor going back to 2016. We have hosted training sessions and multijurisdictional seminars, spoken at industry-wide events, published articles and been featured in many interview panels. Our expertise in this area has been relied upon by insurers, trade organisations and trade publications.

GENERAL OBSERVATIONS

1. Automated vehicles provide a tremendous opportunity for vehicle safety to move forward by potentially reducing the number of human-led accidents. They could save money for the government, the NHS, insurance policyholders and taxpayers. For this to happen, though, the technology needs to be adequately tested in real world scenarios, properly integrated onto British roads and legislated for and regulated accordingly.
2. A rush to define automated lane keeping systems (ALKS) as automated driving for the purposes of the Automated and Electric Vehicles Act 2018 (AEVA) runs numerous risks if not conducted responsibly. If untested and inadequately prepared systems are allowed to cause or make worse accidents, this will inevitably cause sectors of the media to question the safety of automated driving systems. This, in turn, risks undermining consumer confidence and setting mass scale adoption of the technology back years, rather than advancing it.
3. For these reasons, we are firmly against classifying ALKS as automated driving for the purposes of the AEVA.
4. Instead, we strongly encourage the government to classify ALKS, which uses a combination of existing Advanced Driver Assistance Systems (ADAS) technologies, as driver assistance. As the technology improves, and as real world data becomes available as to ALKS's strengths and weaknesses, the idea of classifying it as an automated driving system can be revisited, and consulted upon, at a later date.
5. Given the specific focus of the consultation paper on use of ALKS, we have restricted our remarks to issues arising from ALKS. However, we would observe that a number of the points made later in the response are of much wider application to use of automated vehicles generally.
6. It is vital that the Highway Code and the law in this area are brought up to date in tandem. Any new provisions in the Highway Code must not contradict the underlying principles within the Code itself. If the wider legal provisions applying to drivers are not brought up to date at the same time as these changes are made, drivers of automated vehicles could find themselves still subject to prosecution or other enforcement action when they should not legally be classed as driving their vehicles.

QUESTION 1

We ask whether respondents are satisfied that the proposed wording below achieves the outcomes articulated above for The Highway Code? And if not, why?

7. One of the difficulties with providing suggested wordings for describing the use of ALKS is the contradiction between the government's position that ALKS can be treated as automated driving and the reality that it is no more than a collection of ADAS technologies bundled together.
8. Wordings which seek to differentiate these two concepts (automated driving and use of ADAS) risk misleading motorists as to the capabilities of ALKS and endangering their safety. We have already indicated to the government in previous consultation responses that there are real safety concerns inherent in their approach and in our view, the proposed changes to the Highway Code do nothing to diminish those risks. The proposed instruction in paragraph two that drivers need not pay attention to the road not only runs contrary to the whole tenor of the Highway Code, but is also wrong in the light of established evidence and previous government concessions (see below paragraph 14).
9. We have done our best to propose alternative wording, but we would again urge the government to give very careful consideration to whether their understandable desire to make rapid technological progress in this field has caused them to downplay the obvious reasons for **not** designating ALKS-equipped vehicles as being listed as capable of automated driving at all.
10. Our revisions below should therefore be read against this important caveat.
11. The proposed changes (in italics) are deficient for the reasons set out below.

Proposed amendment, paragraph one: Automated vehicles can perform all the tasks involved in driving, in at least some situations. They differ from vehicles fitted with assisted driving features (like cruise control and lane-keeping assistance), which carry out some tasks, but where the driver is still responsible for driving. If you are driving a vehicle with assisted driving features, you MUST stay in control of the vehicle.

12. There is nothing wrong with this proposed wording as far as it goes. However, when applied to ALKS in the manner proposed by the government, it is, in our view, misleading. Drivers need to be made aware that ALKS can require them to retake control at very short notice and that they must therefore remain alert to road conditions.
13. See paragraph 27A for the full version of our revised wording.

Proposed amendment, paragraph two: Automated vehicles are vehicles that are listed by the Secretary of State for Transport. While an automated vehicle is driving itself, you are not responsible for how it drives, and you do not need to pay attention to the road. But you must follow the manufacturer's instructions about when it is appropriate to engage the self-driving function.

14. We are **strongly** of the opinion that the final clause of the second sentence ('and you do not need to pay attention to the road'), needs to be omitted completely for the following reasons:

- A. 'Safe performance of other activities in conditionally automated vehicles: Automated Lane Keeping System', the TRL report that DfT released alongside this consultation paper, shows that even when ALKS is in control of the vehicle, the user-in-charge will need to stay engaged in the driving operation: *'Allowing vehicles to operate under conditional automation does not necessarily imply that human intervention is no longer required. Drivers will be required to take control in either planned or unplanned circumstances.'*¹ The TRL report concluded that the best responses to transition demands came from non-driving related tasks that allowed the user-in-charge to at least intermittently perceive the road environment, whilst the worst reactions came from those who engaged in immersive non-driving related tasks, such as watching a film.²
- B. The UN defined automated driving in 'Reference document with definitions of Automated Driving under WP.29 and the General Principles for developing a UN Regulation on automated vehicles' (ECE/TRANS/WP.29/1140). ALKS fits within the category of 'Monitor by System (Return to Driver Control on System Request)', which corresponds to SAE level 3. According to the reference document the driver: *'Shall remain sufficiently vigilant as to acknowledge the transition demand and, acknowledge vehicle warnings, mechanical failure or emergency vehicles.'* This requires that the driver monitor at least four separate aspects of the environment.
- C. The requirement that the driver remain in a monitoring position was acknowledged by Baroness Sugg during the Report Stage of AEVA. *'At [SAE] level 3 the driver needs to monitor and to be able to take control at any point.'*³
- D. The press release published by the United Nations in conjunction with the passing of UN ECE Regulation 157 states that *'the driver can be requested by the [ALKS] system to intervene, at any moment.'*⁴ If a driver needs to be able to intervene at any moment, that driver cannot cease monitoring the dynamic driving task without a risk to the safety of vehicle occupants and other road users.

¹ Kinnear et al, 'Safe performance of other activities in conditionally automated vehicles: Automated Lane Keeping System' (2020), p 8.

² Ibid, p 22.

³ <https://hansard.parliament.uk/lords/2018-06-05/debates/C7E8FE14-B881-423E-AC35-1FF9839A1852/AutomatedAndElectricVehiclesBill>

⁴ <https://unece.org/transport/press/un-regulation-automated-lane-keeping-systems-milestone-safe-introduction-automated>

- E. The Introduction to the Highway Code states: *'Knowing and applying the rules contained in The Highway Code could significantly reduce road casualties. Cutting the number of deaths and injuries that occur on our roads every day is a responsibility we all share.'*⁵ Expressly informing people in charge of vehicles that they do not need to pay attention to the road runs counter to the admirable principles the Highway Code sets out to achieve and could, in fact, increase the number and severity of accidents.
15. The paragraph would work better if the word 'but' was removed from the last sentence, and the sentence moved to become the second sentence.
16. The third sentence (as currently drafted) needs to be modified to state that the person responsible for the vehicle needs to follow 'the law and manufacturer's instructions about when it is appropriate to engage the self-driving function.'
17. See paragraph 27B for the full version of our revised wording.

Proposed amendment, paragraph three: *If the vehicle is designed to require you to resume driving after being prompted to, while the vehicle is driving itself, you MUST remain in a position to be able to take control. For example, you should not move out of the driving seat. You should not be so distracted that you cannot take back control when prompted by the vehicle.*

18. This paragraph is contradicted by the proposed paragraph two in its present form. In particular, whilst paragraph three requires the user-in-charge to remain in a position to be able to take control, paragraph two states that the user-in-charge does not need to pay attention to the road. A user-in-charge cannot take control without an awareness of road conditions. In a situation where the vehicle no longer feels capable of driving itself (inclement weather, changes to the road, an emergency), the user-in-charge cannot adequately acquire awareness in the time necessary without having had some awareness prior to the transition demand.
19. For paragraph three to work at all, the revisions we suggest to paragraph two must therefore be made first.
20. Due to the requirement for the user-in-charge to remain in a position to be able to take control, the wording of the example needs to be mandatory. The second sentence needs to read 'For example, you MUST not move out of the driving seat...' and the final sentence needs to read 'You MUST not be so distracted...'
21. See paragraph 27C for the full version of our revised wording.
22. We feel it is important to re-emphasise several of the points we have made above, namely:
- A. It is widely acknowledged that people using ALKS-equipped vehicles could be required to re-engage with driving related tasks at very short notice.

⁵ <https://www.gov.uk/guidance/the-highway-code/introduction>
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- B. TRL's report shows that drivers who remain somewhat perceptive of the driving experience whilst ALKS is engaged are able to re-engage in driving tasks more quickly and more safely.
 - C. Regardless of ALKS capabilities, the Highway Code's guiding principles means the document ought to discourage distraction and unsafe activities whenever possible.
23. A further point, and one that any changes to the Highway Code need to expressly state, is that users-in-charge will become legally responsible drivers after a transition event occurs, whether or not they retake control in a timely manner (barring a justifiable reason such as a medical emergency). This means they become liable in both civil and criminal law for any incident that occurs once they retake control or because of their refusal to resume responsibility.
24. This is so important that we propose it be the subject of a standalone paragraph – see paragraph 27D.

Proposed amendment, paragraph four: *You are still responsible for the vehicle being in a roadworthy condition, having a current MOT test certificate if applicable, and being taxed and insured.*

25. It should also be made clear that any unauthorised software alterations or failures to install safety-critical software updates to the ALKS system will put the insured person in breach of section 4 of the Automated and Electric Vehicles Act 2018 and will allow the insurer to exclude or limit liability for damage suffered by an insured person arising from an accident occurring as a direct result of either.
26. See paragraph 27E for the full version of our revised wording.

Our suggested revised wording

27. Given the points raised above, we suggest that the addition to the Highway Code now read as below. We have included our suggested changes in red.
- A. *Automated vehicles can perform all the tasks involved in driving, in at least some situations. They differ from vehicles fitted with assisted driving features (like cruise control and lane-keeping assistance), which carry out some tasks, but where the driver is still responsible for driving. If you are driving a vehicle with assisted driving features, you MUST stay in control of the vehicle. If you are driving a vehicle equipped with an automated lane keeping system, you are not responsible for driving while the system is engaged, but you MUST remain alert to road conditions so that you can retake control at short notice.*
 - B. *Automated vehicles are vehicles that are listed by the Secretary of State for Transport. You MUST obey the law and follow manufacturer's instructions about when it is appropriate to engage the self-driving function. While an automated vehicle is driving itself, you are not responsible for how it drives.*

- C. *If the vehicle is designed to require you to resume driving after being prompted to, while the vehicle is driving itself, you MUST remain in a position to be able to take control. For example, you **MUST** not move out of the driving seat. You **MUST** not be so distracted that you cannot take back control when prompted by the vehicle.*
- D. *After the automation system requires that you retake control of driving, you become responsible for driving whether you retake control or not, unless you have a good reason for not retaking control, for example you are suffering a medical emergency.*
- E. *You are responsible for the vehicle being in a roadworthy condition, having a current MOT test certificate if applicable, and being taxed and insured. You are responsible for ensuring that all automation system software stays up to date and that all safety critical updates are installed. You **MUST** not make or allow unauthorised alterations to your vehicle's automation software that can change the system's performance.*

QUESTION 2

Do you have concerns about the impacts of the proposed changes to The Highway Code? Why?

28. It is worth restating that the Highway Code has no force in law, but that it interlinks with many other legal requirements imposed on cars and drivers. The limited proposed changes do not deal with that complex interlinking. As a result, drivers of ALKS-equipped vehicles may be left in the thoroughly unsatisfactory position of contravening other parts of the Code, as well as certain legal requirements. We list these below.
29. These will need to be tackled by the government before any listing of ALKS-equipped vehicles takes place. The Highway Code changes themselves may not be as important as the changes needed to legislation: many of the rules contained within the Code have legal effect but this is because they are found in various statutes, the most important of which is the Road Traffic Act 1988.

Inconsistencies with the current Highway Code

- Rules relating to being required to stop by officers and signals: see 105, 106, 107, 108, 109
- Rules around safe braking and stopping distances: see 117, 118, 120, 126
- Speed limit rules: see 124, 125
- Safe driving and avoiding distractions: see 144, 146, 148, 149, 150
- Rules about dealing with other users requiring extra care: see 216, 217
- Dealing with emergency and incident support vehicles: see 219
- Rules about motorway signals: see 256, 257, 258
- Rules against stopping or causing an obstruction: see 123, 240, 242, 270
- Requirements after an incident: see 286, 287

Inconsistencies with RTA

30. The following sections will need to be amended before ALKS can be used legally with the user-in-charge able to engage in non-driving related tasks:
- s22 Leaving vehicles in dangerous positions
 - s35 Drivers to comply with traffic directions
 - s36 Drivers to comply with traffic signs
 - s67 Testing of condition of vehicles on roads
 - s163 Power of police to stop vehicles
 - s170 Duty of driver to stop, report accident and give information or documents

31. Under UN ECE Regulation 157, a user-in-charge who does not retake control following a transition demand becomes a driver for the purposes of the RTA, re-imposing on the driver the potential criminal culpabilities under sections 1-3ZA. A driver of an ALKS-equipped vehicle, facing a potentially stressful external factor serious enough to trigger a transition demand, will have as little as ten seconds to retake control or risk criminal liability for failing to act.
32. As is explained above, the RTA needs updating regardless of whether ALKS is listed. The RTA regularly states that a person who drives (or some variation of this phrase) is guilty of an offence.
33. Section 163 is a good example of the problems created if this approach is not adopted. Under section 163, a person driving a mechanically propelled vehicle on a road must stop the vehicle on being required to do so by a constable in uniform or a traffic officer. If a person fails to comply with this section, they are guilty of an offence.
34. It is clear that section 163 was not written to cover automated driving and so needs to be revised to account for modern technology. If ALKS-equipped vehicles are added to the AEVA list, when ALKS is engaged the person in the driver's seat will not be driving or propelling the vehicle, so cannot be guilty of a s163 offence. An officer exercising the right to stop under s163 also has no way of knowing that the vehicle is self-driving, creating a thoroughly unsatisfactory situation. Logically, the user-in charge ought still to be expected to respond to an instruction to stop, not least for the benefit of other road users.
35. We are happy to propose appropriate changes to section 163, but it is just one instance of where the law needs to be brought up to date.

Inconsistencies with other legislation

36. Apart from the RTA, there are several Acts and Regulations that a driver could be in breach of by contravening the Highway Code. These include:
 - Road Traffic Regulation Act 1984, ss 5, 6, 8, 89
 - Police Reform Act 2002, sch 5
 - Traffic Management Act 2004, ss 6, 72
 - The Motorways Traffic (England and Wales) Regulations 1982, regs 5A, 6, 7, 9, 10, 16
 - The Road Vehicles (Construction and Use) Regulations 1986, regs 103, 104, 110
 - The Motorways Traffic (Scotland) Regulations 1995, regs 6, 8, 9, 14
 - The Traffic Signs Regulations and General Directions 2016 (numerous)
37. In conclusion, if ALKS is going to be placed on the Secretary of State's AEVA list, a lot more needs to be changed than simply adding a few paragraphs to the Highway Code. Otherwise users of ALKS could find themselves facing prosecution for a variety of offences, with the obvious knock-on consequences in criminal convictions, penalties and insurance costs.

FOR FURTHER INFORMATION:

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