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Centre for Connected and Autonomous Vehicles: Code of Practice: Automated vehicle trialling Comments provided by Mills & Reeve LLP

INTRODUCTION

This document is in response to the Invitation to Comment on the revised *Code of Practice: Automated vehicle trialling* issued by the Centre for Connected and Autonomous Vehicles in February 2019 (the “**2019 Code**”).

Mills & Reeve is a national UK law firm with 116 partners and a total strength of over 1,000 staff operating from six offices including London, Manchester, Birmingham and Cambridge. Mills & Reeve is one of the top performing law firms in the UK when it comes to client satisfaction, according to the latest editions of legal directories Chambers UK and The Legal 500, and has been named for a record sixteenth year running as one of the 100 Best Companies to Work For in The Sunday Times annual survey. Mills & Reeve acts for a range of clients who have an interest in the development of automated vehicles including automotive manufacturers and suppliers to automotive manufacturers, insurers as well as new entrants to the market that propose alternative automated transport solutions. We advise a range of clients on issues relating to automated transport and therefore have a close interest in seeing that a robust legal and regulatory framework is put in place.

We begin with general comments on the approach taken. We have also quoted selected headings from the 2019 Code followed by more specific comments.

GENERAL COMMENTS

The role of the “driver”

Overall, we welcome the explicit recognition that test vehicles without a safety driver present in the vehicle may be tested on the public roads. However, we consider that the overall approach in the 2019 Code is still overly constrained by considerations applicable to existing human-operated vehicles. Application to autonomous systems of rules designed for vehicles with human drivers leads to inconsistencies and difficulties for developers. Trying to adapt the rules currently applicable to drivers, and vehicle systems equipped to support and enable human drivers to carry out their task, does not lead, we believe, to the best outcome for developers of driverless technology.

We accept that active supervision of autonomous vehicles during their testing phase is appropriate, but designating an individual as “driver” and expecting compliance with existing rules applicable to in-vehicle drivers is not, in our view, the best approach.

A better approach would be to develop a new system of regulation specific to driverless technology to enable innovative developers to move away from basing their designs on existing road vehicles.

Further, moving on from the testing phase, we would strongly encourage the development of rules to promote systems that do not rely on human override in an emergency situation, but instead incorporate autonomous systems to ensure safety. Expecting ordinary human drivers to react in a timely and appropriate way to a sudden emergency situation when they have previously been “out of the loop” is, we believe, dangerous. We have explained these concerns in more detail elsewhere (most recently, in our response to the Law Commissions’ Joint Preliminary Consultation Paper on Automated Vehicles, available [here](#).)

Testing by consortia

In our experience, testing of autonomous vehicles and their component systems is often carried out by consortia of participants, each bringing a different type of capability and expertise to the project. These may include vehicle manufacturers, academic organisations and technology companies. It is unclear whether the 2019 Code envisages allocating overall responsibility to a single lead organisation, and the extent to which participating organisations may be deemed responsible for the overall project. Potential participants in a consortium may be deterred if they have concerns that they could incur responsibility for compliance in respect of the entire project. In our view it would be useful to set out in the 2019 Code the expectations on participants in a consortium.

CHAPTER 3: ENGAGEMENT

The new obligations on Engagement are extensive and wide-ranging. While this may be manageable for larger organisations, we query whether it is realistic to expect smaller organisations to fulfil all of these requirements. We have identified in our general comments above the potential for uncertainty as to where responsibility lies in situations involving a consortium of participating organisations. We would welcome greater clarity in respect of where the engagement obligations lie in the context of consortium testing.

The 2019 Code refers to a large number of potential stakeholders. We query whether all of these stakeholders will be sufficiently knowledgeable and appropriately resourced to enter into active engagement. Where multiple stakeholders may be potentially affected the possibility of conflicting advice and guidance arises. Transparency is, of course, appropriate where testing is to be carried out on public roads. However, stakeholders may prefer to receive notification but rely on a single entity to take the lead on advising on a particular trial.

Paragraph 3.13 suggests that local authorities may be able to block a proposed trial. We are concerned that the 2019 Code’s “encouragement” to propose possible alternatives where a proposed trial is considered unsuitable by a local authority would be easily ignored, leading to an unnecessarily restrictive approach.

In addition, where testing is planned to take place over a wide area (on motorways, for example), we query how appropriate engagement with local authorities, land owners and members of the public can be achieved. We consider that the open-ended requirements set out in this Chapter place an unclear and potentially onerous burden on testing organisations.

Paragraphs 3.14 and 3.15 deal with the possibility of disclosure under the Freedom of Information Act 2000, and acknowledges the difficulty this presents for organisations sharing information with public authorities as part of the engagement process. Testing organisations will have to take a cautious approach to information sharing for this reason. Reliance on the exemptions to FOIA is, of course, possible, but this can be challenged and lead to contested proceedings. In our view, the 2019 Code should respect the wish of the testing organisation to protect information about the proposed trial and accept that disclosure to public authority will necessarily be limited for this reason.

CHAPTER 4: SAFETY DRIVER AND OPERATOR REQUIREMENTS

Chapter 4 addresses expected behaviour and competence of safety drivers and operators. We have some concerns about the responsibility imposed on individuals undertaking this role. Clearly, responsible and risk-averse driving behaviour is appropriate. Insurance of the test vehicle will be necessary to meet any civil liability for damage or injury cause. However, there may be instances where personal liability for failure to intervene in a situation where damage is caused, or even criminal liability, is in prospect. The individual may be acting in accordance with instructions but presented with a situation where the equipment does not operate as expected. We consider it inappropriate to expose individuals in this situation to personal civil or criminal liability, and would like to see greater clarity on this point.

Paragraph 4.2 expressly acknowledges the possibility that the driver or operator in charge of the vehicle may be outside of the vehicle during its operation. Such remote-controlled testing will involve additional responsibilities such as handling communication or control latency, and mitigating and responding to any network problems.

We welcome the express recognition that remote-controlled operation is permissible. However, we consider that the 2019 Code currently places too much emphasis on the role of the safety driver or operator to be fully consistent with this mode of operation. In particular, paragraphs 4.19-4.22 deal with driver behaviour, and seem to assume that the driver will be present in the vehicle. Drivers are to comply with all existing laws concerning driver behaviour, and this may be difficult to apply to a remote driver or operator. Paragraph 4.22 requires drivers to “be conscious of their appearance to other road users, for example continuing to maintain gaze directions appropriate for normal driving”. The 2019 Code recognises the difficulty inherent in this when the vehicle is under remote operation and calls on testing organisations to “consider the potential negative impact on other road users”. This vague obligation does not assist organisations to be confident that they have achieved compliance. Further thought is needed to deal with the appearance to other road users of automated vehicles, with or without a safety driver present. A consistent approach to this issue should be taken so that other road users are not distracted by a variety of marked and unmarked vehicles sharing public road space with them. Furthermore, if the intention is that a vehicle under test is to be marked as such then this may alter the behaviour of users around the vehicle from what would ordinarily happen. This then hinders the testing process as the vehicle is not then operating in a “real world” situation.

Similarly, the obligation to drive with both hands on the wheel (highlighted in Annex C, point 15) is not consistent with remote operation.

CHAPTER 5: VEHICLE REQUIREMENTS

The 2019 Code requires organisations that wish to trial automated vehicle technologies on public roads to meet all applicable laws for road vehicles, including the Construction and Use Regulations.

In our view, this requirement puts a straightjacket on the types of vehicles that can be tested. It means that only adaptations of existing vehicle types may be trialled on public roads. The innovative nature of automated vehicle technology means that completely new kinds of vehicle are being explored. Any such innovative technology that falls outside the existing requirements for a human-operated vehicle may be excluded from testing on public roads. The requirements relating to equipment to enable visibility for a driver, for example, are inappropriate where no driver is present in the vehicle.

Paragraph 5.3 of the 2019 Code invites organisations to seek guidance from the Department for Transport, where they do not comply with these requirements. However, in our experience it has proved difficult to obtain a timely and supportive response to such requests. Before an organisation can confidently invest in developing novel systems that fall outside the normal construction and mode of operation of an ordinary, human-operated vehicle, it needs a greater degree of certainty on the types of vehicles that will be acceptable and the procedures for gaining approval.

Paragraph 1.4 “acknowledges the desire to conduct advanced trials on public roads” that will not be compliant with current legislation and envisages a new process to support this. As far as we are aware, this process is currently unavailable. Organisations are asked to liaise with CCAV in advance of preparing for any such trial. The 2019 Code is unsuitable for the most innovative systems and so encourages less ambitious technology based on adaptation of existing vehicles.

Paragraphs 5.17-5.21 of the 2019 Code recognise the particular risks involved in transition between automated and driver control. These recommend steps that organisations should take to mitigate these risks. However, this is in the context of testing under the control of a skilled safety driver. Clearly, these risks will be considerably greater where ordinary vehicle users are expected to take control of the vehicle. We reiterate the concerns expressed in our general comments above as to the circumstances under which a human driver should be expected to resume control of the vehicle.

Should you require more information on these responses please contact Stephen Hamilton or Ruth Andrew at Mills & Reeve LLP using the details below.



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