Memo

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1 The facts

The introduction of a new refrigerant (HFO1234yf) used in mobile air conditioning systems brings about the need for new specifications and requirements for service stations and test equipment. Since these are not fully underpinned by EU law and not fully aligned for the multi-brand aftermarket, EGEA wishes to set up a new specification to ensure clear definitions for service equipment in the aftermarket.

The EGEA specification shall contain a recommendation to use refrigerant identifier to avoid contamination of the refrigerant and subsequent damages due to, *inter alia*, possible creation of explosive mixtures. This specification shall be provided on two levels, one of them including an identifier in the maintenance unit, the other recommending use of an identifier by service station when servicing mobile air conditioning systems with the new refrigerant without it being part of the maintenance unit.

We understand that EGEA's specification would provide guidance for maintenance equipment manufacturers as well as service stations.

In this context, EGEA has provided the following questions:

1. If a refrigerant identifier is used and creates an automatic 'OK to proceed' if no contamination is detected, what are the legal responsibilities of the equipment manufacturer if any subsequent contamination occurs? This is an issue of cost if the 'pure' refrigerant already in the unit/bottle is contaminated, but could be much more serious if the contamination creates a corrosive or explosive mixture. (not yet an issue for HFO 1234YF, but could be)

2. How would the manufacturer know that contamination had happened at that time and not previously/subsequently? I imagine that there must be a disclaimer clause even if an identifier is fitted as an integral part of the unit's specification, especially defining what refrigerants it can identify. This may also be a question to the refrigerant identifier manufacturer to understand their position and responsibilities.

3. What (if any) are the HFO 1234YF unit manufacturer's responsibilities if no identifier is fitted as standard? I imagine that this then must be clearly (and legally) defined in the 'code of practice' documentation. This could also be part of the unit's display at this point in the process e.g. 'Please confirm that you have identified that the refrigerant is not contaminated and understand section 'XYZ' of the operating manual'.

In addition, EGEA has asked us to provide general information as to the requirements that instructions and user manuals need to satisfy in b2b business.

Please find below the legal assessment of your questions, followed by some general remarks on warnings and user manuals, as well as, requirements the proposed recommendations should fulfil in order to avoid liability issues. We have also included some general remarks on standard setting procedures.

2 Legal assessment

The following assessment is based on EU law. Where there is no EU provision covering the respective situation, the analysis is based on the relevant German provisions.

2.1 General remarks on liability

Damages for breaches of contractual obligations can be claimed between the parties to the contract, whereas damages deriving from torts can be claimed by anyone having suffered loss due to any such fault. In addition, special liability rules apply for manufacturers placing defective products on the market.

In order to establish liability, any damage has to be causally linked to the fault, i.e. it must be directly resulting from it. If different faults lead to damages, all parties that had set one of the faults that led to damages are jointly and severally liable for any damages resulting from the faults. This means that the third party seeking damages can choose whom to address the claim to and demand full compensation from one of the parties being jointly and severally liable. If, and to what extent liability is shared *inter partes* between those parties would have to be assessed on a case-by-case basis.

The burden of proof is generally upon the claimant seeking damages. What exactly a party seeking damages has to prove is again a question to be assessed on a case-by-case basis and might vary depending on who is seeking damages and who is addressee of the damages claim.

2.2 Questions by EGEA

Applying these general rules on liability to EGEA's proposed specification, we answer the questions as follows:

1. If a refrigerant identifier is used and creates an automatic 'OK to proceed' if no contamination is detected, what are the legal responsibilities of the equipment manufacturer if any subsequent contamination occurs? This is an issue of cost if the 'pure' refrigerant already in the unit/bottle is contaminated, but could be much more serious if the contamination creates a corrosive or explosive mixture.

With regard to the use of an identifier during maintenance of refrigerant HFO 1234YF, liability issues might arise in relation to the identifier's manufacturer, the refrigerant's manufacturer as well as the service station and the maintenance unit manufacturer. In response to EGEA's question our answer will only comprise liability issues regarding the maintenance unit manufacturer. The assessment is based on the relevant German provisions, but would probably be similar in other EU member states.

Liability of maintenance unit manufacturer can be established in case an identifier is fitted as an integral part of the unit and purity of the refrigerant is tested during maintenance, but contamination is not discovered due to a failure of identifier and/or any other malfunction of maintenance unit. If identifier is not working properly due to the maintenance unit manufacturer placing a defective product on the market, he/she can be held liable for any damages caused by the defective identifier and/or the defective maintenance unit. This includes damages caused as a result of the contaminated refrigerant creating an explosive mixture. In addition, maintenance unit manufacturer is liable for any other damages, including those suffered by the service station, for example any damages to his/her equipment or premises and/or any claims brought by end customers against the service station that result from the latter not detecting contamination due to the non-working identifier.

In case an identifier is not fitted as an integral part of a maintenance unit, but an external identifier is used, equipment manufacturer could not be held liable for any damages causally linked only to the identifier not detecting contamination, i.e. the identifier being defective.

Liability issues may also arise in case where the identifier is falsely detecting contamination, although refrigerant is actually pure. If identifier is fitted as an integral part of the maintenance unit, again the maintenance unit manufacturer's liability could also be established. Possible damages to think of could be the cost for the service provider exchanging the refrigerant and cleaning the air conditioning system without this being necessary.

2.

a) How would the manufacturer know that contamination had happened at that time and not previously/subsequently?

As explained above, the burden of proof is generally upon the claimant seeking damages. This generally includes the question of when contamination had occurred.

If an identifier is used but not working properly, the burden of proof for such error is generally upon the claimant - irrespective of whether it is fitted as integral part of the unit or not. If therefore a service station seeks damages from equipment manufacturer for any harm suffered as a result of the incorporated identifier not working properly, the burden of proof for such error as well as the fact that refrigerant was not pure before identification is generally upon the claimant, i.e. the service station.

If maintenance unit with an incorporated identifier recorded identification of refrigerant, it could be easier for service station and possibly for maintenance unit manufacturer to show when contamination did occur.

b) I imagine that there must be a disclaimer clause even if an identifier is fitted as an integral part of the unit's specification, especially defining what refrigerants it can identify. This may also be a question to the refrigerant identifier manufacturer to understand their position and responsibilities.

If an identifier is fitted as an integral part of the maintenance unit, the specification should clearly explain that only those identifiers are suitable that are technically capable of identifying the refrigerant in question. EGEA should point out that any identifier used as integral part of the maintenance unit should be tested by maintenance unit manufacturer as to its capability of identifying the particular refrigerant. If an identifier is incorporated in a servicing unit that can be used with different refrigerants, the user manual should clearly explain which particular refrigerants can be identified. This is also important for the maintenance unit manufacturer to avoid liability issues and also to make sure his user manual is compliant with the applicable rules (see below for details).

3.

a) What (if any) are the HFO 1234YF unit manufacturer's responsibilities if no identifier is fitted as standard?

If no identifier is fitted as standard to the maintenance unit, maintenance unit manufacturer cannot be held liable for any damage causally linked to not detecting contamination of refrigerant. The refrigerant's manufacturer as well as the seller can be held liable for any damages causally linked to contamination if the refrigerant is contaminated already in the bottle.

In addition, the service station can be held liable for any damages to the end customer that is causally linked to the service station using the contaminated refrigerant and not detecting contamination. If identifying the refrigerant before using it corresponds to the state of the art in the area of mobile air conditioning/refrigerant maintenance, not using any identifier at all would mean that the service station did not apply the necessary technical standard for such maintenance services. This could have an impact on the burden of proof, meaning that it could be easier for the end customer to show service station's fault.

b) I imagine that this then must be clearly (and legally) defined in the 'code of practice' documentation. This could also be part of the unit's display at this point in the process e.g. 'Please confirm that you have identified that the refrigerant is not contaminated and understand section 'XYZ' of the operating manual'.

If the "code of practice" and/or the unit's display explicitly stipulates for the refrigerant to be identified before using it, service station could be held liable for any damages that result from the refrigerant not being identified as required. This especially applies if maintenance's unit's display explicitly asks for confirmation of refrigerant having been identified and service station untruthfully confirms such identification despite not having identified refrigerant.

If refrigerant was identified as required, but contamination is not detected due to a failure of external identifier, equipment manufacturer could not be held liable for any damages causally linked to the identifier not detecting contamination, i.e. the identifier being defective.

3 Liability of EGEA

As explained above, damages need to be causally linked to the fault in order to establish liability. The risk of such damages being causally linked to EGEA's recommendation in the specification is very limited.

In case an identifier is fitted as an integral part of the maintenance unit, as recommended by EGEA, damages causally linked to the refrigerant being already contaminated in the bottle are more likely to be discovered given that refrigerant is identified during maintenance.

If such contamination is not detected due to a fault of identifier, one could think of EGEA being liable for such damages due to the fact that EGEA recommended the use of an identifier in the specification. On the other hand, to establish EGEA's liability, damages must be causally linked to EGEA's recommendation, i.e. they must be resulting directly from the recommendation itself. This could be the case, for example, if EGEA recommended use of a particular identifier which then proves unsuitable for the identification in question, i.e. the recommendation as such would prove inappropriate. Thus, it is important for EGEA to apply state of the art knowledge regarding maintenance of the refrigerant when drafting the specification and to ensure that the specification covers all necessary steps and measures to safely and successfully maintain the refrigerant in question. Otherwise EGEA might be subject to liability, if the specification turns out to be incomplete or insufficient. In that case damages could be causally linked directly to the incorrect specification and EGEA's liability could be established.

EGEA should therefore only recommend use of an identifier in general and explain that the choice of identifier is solely upon the maintenance unit manufacturer (or the service station in case identifier is not fitted as integral part of the unit). In that case, damages would be causally linked to maintenance unit manufacturer's choice of a non-suitable identifier rather than to EGEA's recommendation. In addition, EGEA should point out that the identifier must be technically capable of identifying the particular refrigerant in question.

4 Warnings and instructions

User manuals/instructions are supposed to provide information about the product in order to minimize risks during operation as well as to avoid risks due to wrongful operation. To achieve these aims, instructions need to be easy to understand and complete, i.e. they need to contain all relevant information necessary to minimize the risks deriving from the use of the product and to make sure the user can undertake all measures necessary as to safely operate the unit. Given that German law is based on the relevant EU provisions, the requirements would be similar - if not identical - in other EU member states.

Manuals need to contain, *inter alia*, instructions on how to prepare the product before first using it as well as information as to special measures to take to ensure safe operation. With regard to

the use of an (external) identifier, for example, this could be the warning to identify refrigerant before applying it to the maintenance unit if no identifier is fitted as integral part. In addition, user manual should clearly explain the range of possible maintenance service which the equipment can provide, especially including the information which particular refrigerants the incorporated identifier can identify as well as a warning not to proceed if such identification of purity had not been carried out.

Not providing instructions and/or a user manual that fulfils the above criteria can constitute a breach of seller's and/or manufacturer's obligations. If maintenance unit manufacturer provides instructions for the maintenance equipment unit, he/she could be held liable for any damages resulting from providing incorrect or insufficient information in the user manual. The level of detail required depends on the know-how that one can expect of the intended user and needs to be assessed on a case-by-case basis.

With regard to the need of personnel to be qualified when using the maintenance unit, maintenance unit manufacturer should include in the instructions and/ or the code of practice not only reference to such requirement of qualification, but also indude a definition of what constitutes "qualified personnel" with regard to the maintenance unit in question, for example attendance of special training if required.

In addition, unit manufacturer could include a disclaimer clause, stipulating that he/she cannot be held liable for any damages due to the personnel not being qualified as defined in the code of practice and/or the user manual, but nonetheless using the maintenance unit and any damages resulting from wrongful operation of the unit.

Requirements and guidelines on drafting instructions and user manuals for complex products are laid down, for example, in standard EN 62079. The standard generally applies to all products and provides guidance on how to draft instructions as well as detailed specifications on the necessary content of such instructions.

In addition, stricter rules apply for products that are used by (private) consumers.

5 Requirements for recommendation

Generally speaking, the recommendation in the specification should be such as to clearly explain that it is non-binding and that there is no obligation to comply with the specification. I.e. if an identifier is fitted as an integral part of the maintenance unit, any such decision would be made at the maintenance unit manufacturer's own risk. In addition, EGEA should point out that using an identifier corresponds to the state of the art regarding maintenance of refrigerants and/or mobile air conditioning systems as of today.

If identifier is fitted as integral part of the maintenance unit, it should be clearly explained that it is the maintenance unit manufacturer's obligation to ensure that the identifier fitted to the maintenance unit according to EGEA's specification is suitable and fulfils all technical criteria necessary in order to detect contamination of the particular refrigerant in question and to explain in the user manual which particular refrigerants can be identified.

If identifier is not an integral part of maintenance equipment unit, recommendation of using an identifier when maintaining and servicing mobile air conditioning systems using refrigerant HFO 1234YF should be such as to clearly explain that recommendation does not cover the question of whether a particular identifier is suitable for identifying the refrigerant in question. The recommendation should also point out that it is the service station's obligation to ensure that the identifier used according to EGEA's specification is suitable and fulfils all technical criteria necessary in order to detect contamination of the refrigerant in question.

If no identifier is fitted as integral part of the maintenance unit, the user manual and - if possible - the unit's display should clearly stipulate the user's obligation to identify the refrigerant before using it. In case the service station would not have identified refrigerant before using it despite clear instructions to do so in the user manual, any damages would be causally linked to the service station not having identified the refrigerant and not to any fault of the maintenance unit and/or EGEA's specification.

If EGEA provides guidance on the technical requirements an identifier must fulfil, they need to be complete, i.e. EGEA must ensure that all technical requirements necessary to identify the new refrigerant and to ensure its purity are explicitly named in the specification. Otherwise, liability issues might arise in case an identifier is used that fulfils all the requirements according to the specification but is not able to detect contamination due to lack of one or more technical requirements that are not mentioned in the specification. In that case EGEA would establish a specification which was not suitable for identifying the refrigerant and could thus be held liable not only by end customers and service stations, but also by identifier's manufacturers relying on EGEA's specification and producing an identifier according to that specification. The same applies if maintenance unit manufacturer includes an identifier in its maintenance unit that is not suitable although it is in accordance with EGEA's specification.

Definition of requirements, on the other hand, should not lead to EGEA recommending one (or several) particular identifiers. With regard to liability issues, the occurrence of damages being causally linked to EGEA's recommendation is more likely in case of a particular recommendation. If a particular identifier included in EGEA's specification proves inappropriate for the particular test in question, EGEA might be held liable for any damages that occur as a consequence of the use of such unsuitable identifier. Thus, EGEA should limit the recommendation as to the use of any identifier at all instead of explicitly suggesting use of particular identifier(s).

In addition, any further information as to the safe operation of maintenance equipment unit should be included in the user manual by manufacturer as explained above. As explained befo-

re, EGEA should only recommend use of an identifier in general and explicitly explain that any identifier fitted as integral part need to be tested as to its suitability of identifying the refrigerant in question. If the choice of which particular identifier will be used is solely upon the maintenance unit manufacturer (or the service station in case identifier is not fitted as integral part of the unit), EGEA's liability could hardly be established.

In addition, EGEA recommending one (or several) particular identifier(s) might also raise competition law issues. According to the German provisions on the prohibition of calling for boycott, undertakings as well as their associations are not allowed to request other companies to refrain from purchasing and/or supplying third companies' products. This could be relevant in case EGEA's specification does not generally recommend use of any identifier at all, but instead proposes use of particular identifier(s). This could be interpreted as calling for a boycott against those manufacturers, whose identifiers are not recommended in the specification, but which are generally suitable for the test in question. Thus, the recommendation should not exclude any appropriate identifier(s).

EGEA might also have loyalty duties towards its members and sub-members. This means that, by recommending one or several particular identifiers to be used and thereby excluding others from the specification, EGEA might breach its loyalty obligations towards those members who manufacture identifiers appropriate for the test in question but which are not recommended as part of the specification.

6 Standard setting procedures

We would also like to make some general remarks as to standard setting procedures.

EGEA specification might be subject to EU rules on standard setting. Standards can restrict competition, if they are not available to all interested parties. Those competitors not being able to produce their products or provide their services in accordance with the standard might be excluded from the market. As a consequence, standard setting procedures are covered by the EU Commission guidelines on the assessment of horizontal co-operations.

According to the guidelines, a standard is unlikely to restrict competition if the following conditions are met:

- Participation in the standard-setting process is unrestricted and the procedure for adopting the standard in question is transparent:

  The standard setting body needs to comply with different provisions when setting a new standard. It has to ensure that all competitors in the market affected by the standard can participate in the setting process. Thus, EGEA might also need to allow affected parties that are not members of EGEA to participate in

the standard setting process in order to ensure that they also have a chance to influence the specification.

- No obligation to comply with the standard:

  A given standard is further unlikely to restrict competition if there is no obligation to apply the standard. Thus, if companies are free to choose whether or not to comply with the standard, restrictions of competition are unlikely to occur.

- Access to the standard on fair, reasonable and non-discriminatory terms:

  Thirdly, the standard has to be available to all interested parties on fair, reasonable and non-discriminatory terms. This means that - for example - any service station that uses the refrigerant in question needs to get access to the standard if requested. In addition, also any identifier's manufacturer who wishes to apply the specification when developing and/or producing an identifier needs to get access to the standard if requested.

  The above applies regardless of whether the companies seeking access to the specification are members of EGEA (or one of its members) or not. This does not, however, prevent EGEA or its members from claiming remuneration for providing the specification to third parties. Such remuneration as well as the general terms and conditions applying to such access need to be fair, reasonable and non-discriminatory, i.e. EGEA members shall not have privileged access compared to non-members.

In addition, a standard is unlikely to restrict competition if there is effective competition between different voluntary standards. Thus, if service stations can choose between different maintenance equipment specifications, it is unlikely that a given specification that is transparent and available to all interested parties, will restrict competition.

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