

The diesel emission scandal has led to a flood of legal proceedings in Germany. The Eighth Panel of the German Federal Court of Justice (BGH), in Case VIII ZR 225/17, surprisingly indicated in a guidance order (issued despite the case having been settled out-of-court by the parties) that it may deem illegal defeat devices as a quality defect within the meaning of German contract of purchase law. With this decision, plaintiffs' prospects of bringing successful claims have improved slightly. What remains unclear, however, is how to deal with all the cases in which contractual **periods of limitation** have already expired and buyers might thus remain empty-handed despite the presence of an illegal defeat device or other violations of emission law. The issue of **limitation** under European Union law will keep the automotive industry busy for a long time even after the emission scandal proceedings will have come to an end – at least until there is a uniform European solution to the issue. This is mostly a consequence of the new European **type approval Regulation 2018/858**, which entered into force on July 5, 2018. It extends the existing duties of **market surveillance authorities** vis-à-vis testing vehicles in the field for their “in-service conformity” and provides a timeframe of five years, or possibly even longer, within which the tests of the vehicles' compliance with European type approval law are to be carried out. Market surveillance authorities have a number of powers, ranging from requiring that manufacturers present a plan of remedial measures to ordering the withdrawal of the vehicle from service. What the Regulation does not stipulate – because it is a matter of domestic contract of purchase law – is who will have to bear the costs for remedying the defect if, at the time the market surveillance authorities take corrective measures, the periods of limitation for warranty claims have already expired according to the contract of purchase. This blog entry will address this issue and also provide guidance on possible legal defenses.

**“Life” and “durability” on the road:  
Short periods of limitation contravene EU law**

**Periods of limitation versus market surveillance timeframes**

The German Federal Court of Justice (BGH) and the European Court of Justice have not yet handed down decisions regarding the manifold legal controversies over the rights buyers hold if they buy vehicles that do not conform with legal requirements. This lacuna in jurisprudence is clearly shown by the somewhat diffuse and varied judgments of Germany's state courts (*Landgerichte*) and higher state courts

(*Oberlandesgericht*).<sup>1</sup> Out-of-court settlements between the parties that were reached shortly before the oral hearings have so far prevented potential judgments by the German Federal Court of Justice (BGH).<sup>2</sup> Landmark decisions by the BGH, or even the Court of Justice of the European Union (CJEU), on the older cases stemming from the diesel emissions scandal or surrounding other environment and safety-related defects are not to be expected in the foreseeable future.

In any case, they would only deal with past cases, but provide little guidance on how to treat future cases, which are likely to occur in abundance: The periods of limitation under German contract of purchase law do not correspond with Union law timeframes for measures by the market surveillance authorities. European administrative law ensures protection against vehicular risks and lays down specific provisions to avoid or reduce harmful emissions. However, German jurisprudence on contracts of purchase at present does not offer reliable and effective complementary legal protection for the affected consumers, who may have bought harmful, faulty or defective vehicles without knowledge of those defects. After the contractual periods of limitation have expired, they will be left with the costs incurred in restoring the vehicle's conformity with the law and may not be allowed to use the vehicle in German Environmental Zones (*Umweltzone*). It is unlikely that German legislators will even consider aligning domestic provisions on contracts of purchase with Union law in the foreseeable future.

### **Basic example:**

Allow me to clarify with one simple example: A consumer buys a new vehicle from a dealer.<sup>3</sup> The contract of purchase contains a period of limitation of three years for warranty claims. The manufacturer has delivered a Certificate of Conformity according to Article 18 of Annex IX to Directive 2007/46/EC.<sup>4</sup> In this Certificate of Conformity, which the dealer hands over to the buyer together with the car, the vehicle manufacturer declares that this specific car meets all requirements set by EU law. Thus, the manufacturer declares that the car complies with all provisions regarding the vehicle's type approval: the statutory provisions for production according to the requirements of the approved type (conformity of production arrangements<sup>5</sup> according

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<sup>1</sup> See overview by Armbrüster, NJW 2018, 3481.

<sup>2</sup> [https://www.focus.de/auto/experten/rogert/vergleiche-statt-urteile-manipulierte-dieselautos-vw-blockierte-klarstellung-vor-gericht\\_id\\_10173717.html](https://www.focus.de/auto/experten/rogert/vergleiche-statt-urteile-manipulierte-dieselautos-vw-blockierte-klarstellung-vor-gericht_id_10173717.html) of 13.01.2019.

<sup>3</sup> The particularities of cases surrounding used cars cannot be dealt with in this discussion.

<sup>4</sup> Official Journal of the European Union L 263/1 of 9.10.2007.

<sup>5</sup> Article 12 of the Framework Directive 2007/46/EC. The European Court of Justice indicated in its judgment C-668/16 of October 4, 2018, that the Certificate of Conformity also serves to protect the

to the harmonized standards for quality management pursuant to EN ISO 9001:2015) and the required statutory minimum product lifetime of five years (in-service conformity<sup>6</sup>). After four years, and therefore one year after the contractual period of limitation has expired, the market surveillance authority – in Germany, the Federal Motor Transport Authority (*Kraftfahrtbundesamt*, KBA) – carries out field tests and finds that the vehicle does not comply with, for instance, statutory emissions standards or is equipped with an illegal defeat device<sup>7</sup>, thus infringing Article 5 of Regulation (EC) No 715/2007.<sup>8</sup> As a consequence, the manufacturer's Certificate of Conformity was false<sup>9</sup> and the vehicle is defective. The vehicle owner runs the risk of having to withdraw the vehicle from service.

At present, there is no effective legal basis that would provide guidance as to whether the consumer is entitled to any claims if public-law controls by the market surveillance authorities reveal a defect in the vehicle after the contractual period of limitation has expired and, if so, the extent of any such claims. It is very unlikely that vehicle manufacturers will align their contractual periods of limitation with the timeframes within which market surveillance authorities may reprimand defects and order and enforce their elimination.

If the market surveillance authorities choose to intervene, they may compel the manufacturer to implement corrective measures or to issue recalls.<sup>10</sup> The measures taken by the authorities against the manufacturer do not necessarily lead to a corollary

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purchaser of a vehicle (point 87) – a question that remains highly controversial in the varied Dieselgate jurisprudence of German courts. In my view, the Certificate of Conformity constitutes a warranty declaration; see Helmig, PHI 2016, 182, and NJW 2017, 10 (“Reader Forum” – *Leserforum*); Arzt/Harke, NJW 2017, 3409.

<sup>6</sup> See basic provisions of Articles 27 and 19 of Regulation 765/2008, Official Journal of the European Union L 218/30 of 13.08.2008. The five-year-timeframe is based on arbitrary assumptions and is to be understood as an expected minimum durability.

<sup>7</sup> Cases like this have reoccurred well until 2018, see e.g.:

[https://www.automobilwoche.de/article/20181015/AGENTURMELDUNGEN/310159942/1276/illegal-e-abschalteinrichtung-kba-will-rueckruf-bei-opel-anordnen?utm\\_source=mailchimp&utm\\_medium=newsletter&utm\\_campaign=eilmeldung](https://www.automobilwoche.de/article/20181015/AGENTURMELDUNGEN/310159942/1276/illegal-e-abschalteinrichtung-kba-will-rueckruf-bei-opel-anordnen?utm_source=mailchimp&utm_medium=newsletter&utm_campaign=eilmeldung)

<sup>8</sup> Official Journal of the European Union L 171/1 of 29.06.2007. This Regulation is a separate regulatory act in the context of the Community type approval procedure that was introduced by Directive 2007/46/EC. Regulation 2017/1151 (Official Journal of the European Union L 75 of 07.07.2017) sets out the specific technical requirements implementing Regulation 715/2007.

<sup>9</sup> In their criminal investigation against the former CEO of AUDI AG, the prosecution office “Munich II” deems a false Certificate of Conformity a criminal form of causing wrong entries to be made in public records (*mittelbare Falschbeurkundung*). However, the legal nature of these certificates remains controversial in current jurisprudence on the diesel scandal.

<sup>10</sup> The measures that the manufacturer intends to take on its own initiative are always given priority. Only where these measures are insufficient in the eyes of the market surveillance authority, will the authority order specific corrective measures (Section 26(3) of the German Product Safety Act, *Produktsicherheitsgesetz*).

claim for compensation on the part of the deceived and affected vehicle owner, particularly if the contractual periods of limitation have already expired.

### **Legislative response at EU level**

Since European type approval law for motor vehicles is becoming increasingly strict, legislative changes at the national level will be necessary: European legislators have learned their lesson from the diesel scandal and want to prevent further violations. Recital 14 of Commission Regulation (EU) 2018/1832<sup>11</sup> highlights the notable discrepancy between the high number of recalls and the low number of failures to comply with legal requirements that were reported to the authorities although such illegalities were often the underlying causes for recalls. This is why Regulation (EU) 2018/858, which was passed before Regulation 2018/1832, states very clearly: “This Regulation introduces a number of safeguards to prevent requirements imposed in the process of granting approval to vehicles, systems, components or separate technical units from being misapplied. In order to prevent abuse of the approval process in the future, it is important that those safeguards are effective.”

### **The new type approval law under Regulation 2018/858**

Regulation (EU) 2018/858<sup>12</sup> has fundamentally transformed European type approval law, making it much stricter. It repeals the Framework Directive 2007/46/EC, which had been applicable so far. It also establishes a close-knit network of cooperation between type approval authorities and market surveillance authorities, leaving very few loopholes: Type approval law is part of administrative law and regulates the criteria for granting type approval of vehicles, but also for its withdrawal. Market surveillance law deals with monitoring in the field and ensuring that production vehicles are in fact produced according to the approved vehicle type and that they comply with the type approval and its specifications vis-à-vis the expected lifespan of the vehicle, its components, systems and separate technical units.

Both areas of law aim at protecting in particular the rights and interests enshrined in Article 169 TFEU, i.e. human life, health, the environment and public safety.

Recital 10 of Regulation 2018/858 states:

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<sup>11</sup> Official Journal of the European Union L 301 of 27.11.2018: Commission Regulation amending Directive 2007/46/EC of the European Parliament and of the Council, Commission Regulation (EC) No 692/2008 and Commission Regulation (EU) 2018/1151 for the purpose of improving the emission type approval tests and procedures for light passenger and commercial vehicles, including those for in-service conformity and real-driving emissions and introducing devices for monitoring the consumption of fuel and electric energy.

<sup>12</sup> Official Journal of the European Union L 151/1 of 14.06.2018.

“This Regulation should strengthen the current framework for EU type-approval, in particular through the introduction of provisions on market surveillance. Market surveillance in the automotive sector should be introduced by specifying the obligations of the economic operators in the supply chain<sup>13</sup>, the responsibilities of the enforcement authorities in the Member States, and the measures to be taken when automotive products are encountered on the market that represent serious safety or environmental risks, that undermine the protection of consumers, or that do not comply with the type-approval requirements.”

### **Cooperation between type approval authorities and market surveillance authorities**

Directive 2001/95 on general product safety sets out the basic provisions, applicable to all products, for the far-reaching competences of market surveillance authorities.<sup>14</sup> It has been transposed into German law by the revised German Product Safety Act of November 8, 2011.<sup>15</sup>

Regulation 2018/858 entered into force on July 5, 2018, and will be effective from September 1, 2020. It adopts and extends the existing powers of market surveillance authorities that have been established by the Product Safety Directive 2001/95/EC and Regulation 765/2008<sup>16</sup>. Regulation 2018/858 is already applicable with respect to these powers. It is at the market authorities' discretion whether they exercise their powers, and if so, to what extent. With respect to the “new rules”<sup>17</sup> effective as from September 1, 2020, Regulation 2018/858 therefore states clearly that, with its entering into force on July 5, 2018, it merely builds on the existing provisions for market surveillance without altering them and that these provisions will continue to form the basis for the “new rules” introduced by Regulation 2018/858.

Article 7(3) of Regulation 2018/858 links the cooperative endeavors of the type approval authorities and market surveillance authorities which work to complement each other: “For the purpose of enabling market surveillance authorities to carry out checks, approval authorities shall make available to market surveillance authorities the necessary information related to the type-approval of the vehicles, systems, components and separate technical units that are subject to compliance verification checks. That information shall include at least the information included in the EU type-

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<sup>13</sup> According to Recital 45 of Regulation 2018/858, this explicitly refers to any other economic operator in the supply chain.

<sup>14</sup> Official Journal of the European Union L 11/4 of 15.01.2002.

<sup>15</sup> See also the highly informative Commission Decision laying down guidelines for the notification of dangerous consumer products (Official Journal of the European Union L 831/63 of 28.12.2004).

<sup>16</sup> Official Journal of the European Union L 218/30 of 13.08.2008.

<sup>17</sup> Recital 63

approval certificate and its attachments referred to in Article 28(1). Approval authorities shall provide that information to the market surveillance authorities without undue delay.”

### **Mandatory tests and the market surveillance authorities’ discretion**

Pursuant to Article 8 of Regulation 2018/858, the market surveillance authorities shall carry out regular checks – which they already do at present – “to verify that vehicles, systems, components and separate technical units comply with the relevant requirements.” The competent market surveillance authority of each Member State must carry out a minimum number of tests on vehicles per year according to Article 8(2). This minimum number consists of “one for every 40 000 new motor vehicles registered in that Member State in the preceding year, but shall not be less than five.” In addition, market surveillance authorities have the right to initiate further checks at their own discretion, triggered among other things by manufacturer notifications but also by substantiated complaints from individual vehicle owners or consumer associations. The new provisions have obviously already had an effect: As cover-ups are now almost impossible, the number of precautionary reports to, for instance, the KBA about illegalities that were “unexpectedly” discovered during internal testing has risen.<sup>18</sup>

The authorities’ cooperation and the initiation of conformity and market surveillance measures are coordinated according to the safeguard clauses set out in Chapter XI of Regulation 2018/858<sup>19</sup>, which cannot be addressed in detail within the scope of this

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<sup>18</sup> <http://www.spiegel.de/auto/aktuell/abgasskandal-schummelt-auch-das-software-update-von-vw-a-1247441.html> of 13.01.2019;  
[https://www.automobilwoche.de/article/20190201/AGENTURMELDUNGEN/302019955/1276/unreg-elmaessigkeiten-bei-verbrauchstests-porsche-meldet-fall-auch-den-us-behoerden?utm\\_source=mailchimp&utm\\_medium=newsletter&utm\\_campaign=nachrichten](https://www.automobilwoche.de/article/20190201/AGENTURMELDUNGEN/302019955/1276/unreg-elmaessigkeiten-bei-verbrauchstests-porsche-meldet-fall-auch-den-us-behoerden?utm_source=mailchimp&utm_medium=newsletter&utm_campaign=nachrichten) of 01.02.2019

<sup>19</sup> In addition, the link is established by Article 7(4): “Were an approval authority has been informed in accordance with Chapter XI that a vehicle, system, component or separate technical unit is suspected of presenting a serious risk or of being in non-compliance, it shall take all necessary measures to review the type-approval granted and, where appropriate, correct or withdraw the type-approval depending on the reasons and the seriousness of the deviations demonstrated.”

discussion. The “economic operators” and “distributors”<sup>20</sup> concerned always have a comprehensive duty to cooperate<sup>21</sup> when the authorities<sup>22</sup> decide to take action.

Regulation 2018/1832 of November 5, 2018, provides a clear overview of current European regulatory acts on emission control systems in order to clarify terms such as “durability” and “life”, as well as deadlines and other timeframes that will be relevant in the following section.<sup>23</sup>

### **Selection of in-service vehicles**

A vehicle’s lifespan begins with its entry into service. Entry into service means “the first use, for its intended purpose, in the Union, of a vehicle [...]”<sup>24</sup>, and thus the date of first registration with a particular owner. Thereafter, the requirements for in-service conformity checks are applicable “until 5 years after the last Certificate of Conformity or individual approval certificate is issued for vehicles of that in-service conformity family”<sup>25</sup>. As of the date of first registration, the authorities may check vehicles according to the criteria for verifying the vehicles’ conformity with the legal provisions applicable at the time of testing. The Certificate of Conformity’s dual function<sup>26</sup> is

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<sup>20</sup> According to Article 3(44) of Regulation 2018/858, “economic operator” means the manufacturer, the manufacturer’s representative, the importer or the distributor. “Distributor” means a dealer or “any other natural or legal person in the supply chain, other than the manufacturer or the importer, who makes available on the market a vehicle system, component, separate technical unit, part or equipment”.

<sup>21</sup> This duty to cooperate with the authorities is also established by Sections 6 and 26 ff. of the German Product Safety Act. The manufacturers have a duty to provide comprehensive information on the vehicles selected for the market surveillance checks. Point 9.2.3 of Regulation No 83 of the UN/ECE states in this respect: “As part of the information provided for the in-service conformity control, at the request of the Approval Authority, the manufacturer shall report to the type Approval Authority on warranty claims, warranty repair works and OBD faults recorded at servicing”, according to a specific format.

<sup>22</sup> According to Article 12 of Regulation 2018/858, the provisions on the Rapid Information System (RAPEX), established under Directive 2001/95/EC, and the Information and Communication System on Market Surveillance (ICSMS), established under Article 22 of Regulation (EC) No 765/2008, are applicable to the entire procedure.

<sup>23</sup> Commission Regulation (EU) 2018/1832 of 5 November 2018 amending Directive 2007/46/EC of the European Parliament and of the Council, Commission Regulation (EC) No 692/2008 and Commission Regulation (EU) 2017/1151 for the purpose of improving the emission type approval tests and procedures for light passenger and commercial vehicles, including those for in-service conformity and real-driving emissions and introducing devices for monitoring the consumption of fuel and electric energy; Official Journal of the European Union L 301/1 of 27.11.2018.

<sup>24</sup> Article 3(52) of Regulation 2018/858.

<sup>25</sup> The term “vehicle family” refers to several vehicle types that share common characteristics of design or functions, for instance according to the vehicle types used in emissions tests. Regulation 2017/1151 (Article 5(3)(g)) refers to Appendix 2 to Annex 11 to UN/ECE Regulation No 83 (Uniform provisions concerning the approval of vehicles with regard to the emission of pollutants according to engine fuel requirements), where the “OBD family” (vehicle on-board diagnostic) is defined (Official Journal of the European Union L 172/1 of 03.07.2015).

<sup>26</sup> Under contract law, the Certificate is a warranty declaration for the benefit of the buyer, see Helmig, PHI 2016, 192. Its legal nature has been controversial in the Dieselgate jurisprudence so far. A  
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crucial in this context because (i) the manufacturer must deliver the Certificate to every individual buyer and (ii) this legal declaration, which serves as an assurance about the vehicle's quality and is submitted to the competent registration authority, may only be made if the vehicle does in fact comply with all legal provisions under type approval law.

Any in-service test vehicle must be "properly maintained and used"<sup>27</sup>. In order to check in-service conformity, the authorities use vehicles that have between 15,000 km (or are six months old) and 100,000 km (or are five years old). For testing evaporative emissions<sup>28</sup>, the vehicle must have between 30 000 km (or be 12 months old) and 100 000 km (or be five years old).

### **Uncertainties about determining a vehicle's age**

The relevant regulatory acts of the European Union, however, also contain a number of vague time-related terms regarding in-service vehicles.

According to Article 4(2) of Regulation 715/2007, the vehicle manufacturer must ensure "that type approval procedures for verifying conformity of production, **durability** of pollution control devices and in-service conformity are met." In addition, subparagraph 2 of this provision stipulates that the manufacturer must ensure "that the tailpipe and evaporative emissions are effectively limited, pursuant to this Regulation, throughout the normal **life** of the vehicles **under normal conditions of use**."<sup>29</sup>

In view of the principle that EU law provisions are to be interpreted primarily according to their underlying aims and less according to their wording<sup>30</sup>, the term **life** of the vehicle probably refers to the actual average life of the vehicle. In most cases, vehicle manufacturers require of their suppliers that the average life of a vehicle be around 300,000 km or 15 years.<sup>31</sup> Since notably the rights and interests that the market

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decision by the highest courts is still missing. In my opinion, the exclusive competence to hear a case on this issue lies with the European Court of Justice.

<sup>27</sup> In this respect, Article 2(17) of Regulation 2017/1151 defines "that such a vehicle satisfies the criteria for acceptance of a selected vehicle laid down in section 2 of Appendix 3 to UN/ECE Regulation No 83".

<sup>28</sup> According to Article 3(7) of Regulation 715/2007 the term "evaporative emissions" refers to "the hydrocarbon vapors emitted from the fuel system of a vehicle other than those from tailpipe emissions".

<sup>29</sup> See footnote 7.

<sup>30</sup> CJEU, C-621/18 (Brexit) of 10.12.2018, at point 47; EuZW 2019, p. 31

<sup>31</sup> Article 4(2) of Regulation 2017/1151 uses the same wording vis-à-vis on-board diagnostic systems and speaks of the "entire life of the vehicle", which indicates that the provisions are applicable to the entire actual life of the vehicle. These systems' function is to monitor and identify any malfunction of emission control systems in order to protect the environment and public health. In Germany, the average age of vehicles is 9,4 years.



surveillance authorities protect do not expire, the authorities' power to intervene is not subject to time constraints either.

The term **durability** of pollution control devices does not define any time limits, either, that could be distinguished from the **life** of the vehicle. **Durability** can thus only mean that if the **durability** of pollution control devices is verified within the time frames or mileage according to Article 9 of Regulation 2017/1151, durability is assumed to be ensured throughout the vehicle's entire life.<sup>32</sup> Yet, there is no technical evidence that would support such an assumption. In fact, a number of considerations argue against it. As not all of them can be discussed in detail within the scope of this article, let me name but two practical examples:

1. The lifespan of electronic components in control devices is limited. They are neither durable throughout the assumed lifetime of the vehicle, nor will their functions be available throughout all repair and maintenance intervals. It cannot be ensured that new electronic components or software will be compatible. Statutory requirements calling for features to deter unauthorized modifications of the emission control computer<sup>33</sup> – in other words: protection against hacking attacks – are therefore unrealistic. There are no protection standards at present. Even the 2011 international standard on functional safety, ISO 26262, which is currently the most important valid basis regarding electric and electronic systems, does not specify reliable processes to determine the age of electronic components.<sup>34</sup>

2. Manufacturers are continuously using new materials and raw materials for which there are no reliable methods to determine their aging process under actual in-service conditions. Statutory requirements are thus clashing with technical realities. According to Article 3(5) of Regulation 2017/1151, the manufacturer “shall take technical measures so as to ensure that the tailpipe and evaporative emissions are effectively limited, in accordance with this Regulation, **throughout the normal life of the vehicle and under normal conditions of use.**” These measures, states subparagraph 2 of said provision, “shall include that the security of hoses, joints and connections, used within the emission control systems, are constructed so as to conform with the original design intent.”<sup>35</sup> For passive components like these, empirical data and approximation

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<sup>32</sup> The relevant provisions of UN/ECE Resolution No 83, too, suffer from these vague assumptions. In the context of the Type V Test, the whole vehicle durability test represents an aging test of 160,000 km and this test is to be performed driven on a test track, on the road or on a chassis dynamometer.

<sup>33</sup> Article 5(7) of Regulation 2017/1151; Point 5.1.5.1 of UN/ECE Regulation No 83; Point 2.3.1 of Annex I to Regulation 692/2008.

<sup>34</sup> Regulation 2018/1832 seeks to improve this situation.

<sup>35</sup> Incidentally, this passage's wording is different – whether intentionally or not is hard to say –, which may lead to serious consequences in practice: While Article 3(5) of Regulation 2017/1151  
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methods might exist, but there is no sound and reliable method to assess their aging process.

### **Who will bear the costs after expiry of the limitation period?**

Where the in-service conformity tests reveal failures, the measures required for remediation will need to be enacted on vehicles in the field – in most cases through recall campaigns. This also means that, pursuant to Regulation 692/2008<sup>36</sup> and UN/ECE Regulation No 83<sup>37</sup>, the manufacturer must present a plan of remedial measures to the type approval authority and correct the affected vehicles' non-conformity according to this plan.

It is at this point at the latest that the vehicle's owner will gain knowledge of the defect.<sup>38</sup> In many cases, the period of limitation according to the contract of purchase between the owner and the distributor will have expired already. Market surveillance measures may very well also extend to even older vehicles because the duties and competences of the type approval and market surveillance authorities are not time-limited in respect to the required testing of in-service vehicles. The authorities' duty to protect rights and interests does not expire.

### **BGB uncertainties**

The current legal situation according to the German Civil Code (BGB) is and will remain unclear in the foreseeable future, as German jurisprudence clearly demonstrates. It is remarkable, in my opinion, that to my knowledge none of the German courts has so far considered the possibility of making a preliminary reference to the European Court of Justice. Considering the authoritative relevance of European type approval law and its impact on liability issues in these cases, the question of a preliminary reference to the CJEU begs itself. The exclusive competence to hear cases on the relevant

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speaks of “throughout the normal life of the vehicle **and** under normal conditions of use”, the original wording of the second subparagraph of Article 4(2) of Regulation 715/2007 and the identical wording of Article 9(2) of Regulation 2017/1151 speak of “throughout the normal life of the vehicles under normal conditions of use”. Therefore, the word “**and**”, indicating cumulative criteria, is missing in the latter two provisions. And yet Article 3(11) of Regulation 2017/1151 simply speaks of “throughout the normal life of a vehicle”. Whether the criteria “throughout the normal life” **and** “under normal conditions of use” are looked at together or separately makes a considerable difference in the legal assessment of cases.

<sup>36</sup> Commission Regulation implementing and amending Regulation (EC) No 715/2007 of the European Parliament and of the Council on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information, Official Journal of the European Union L 199 of 28.07.2008. According to Article 19 of Regulation 2017/1151, Regulation (EC) No 692/2008 is repealed as from January 1, 2022.

<sup>37</sup> Official Journal of the European Union L 172/1 of 03.07.2016; point 6 of Appendix 3 to UN/ECE Regulation No 83.

<sup>38</sup> Points 6.5.5 and 6.5.6 of Appendix 3 to UN/ECE Regulation No 83.

questions lies with the CJEU, including the thorny issue in German jurisprudence of whether the Certificate of Conformity merely serves public-law purposes or is also relevant in private-law cases.<sup>39</sup>

It would also be for the CJEU to rule on the legal significance of EN ISO 9001:2015 as a benchmark for conformity of production – the latter, in turn, being a precondition for issuing correct Certificates of Conformity – and on the consequences if manufacturers and suppliers violate their obligations set out by this standard.<sup>40</sup> All defects and faults that the type approval and market surveillance authorities discover, and the elimination of which they require, are caused by errors in design and/or production. They should have been prevented by an effective quality management system according to the normative requirements of ISO 9001:2015 and its predecessors.<sup>41</sup> Consequently, all economic operators involved in manufacturing the vehicle will be directly liable for breach of duty in violating EN ISO 9001:2015 requirements, according to the degree of their contributory responsibility. An in-depth discussion of this issue is beyond the scope of this article.

### **Relaxation of the plaintiff's burden of proof**

Union law offers plaintiffs a way to considerably facilitate their burden of proof: Article 53(8) of Regulation 2018/858 provides individual registration holders with the authorities' entire knowledge about the infringement they discovered: This possibility and the initiation of corrective measures on the part of the authorities not only demonstrate that the Certificate of Conformity is false, but also why it is false. The corrective measures themselves as well as the necessary remedial plan, the latter requiring the authority's approval, relieve the plaintiff of the onerous burden of proving the defect.

Plaintiffs are not the only ones holding this right to request comprehensive access and information. A court can request of its own motion these documents and pieces of evidence as well because pursuant to Article 14(4) of Regulation 2018/858, manufacturers must provide a "national authority" with a copy of the EU type approval

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<sup>39</sup> See footnote 5; the German courts apparently only assess Section 6 of the German Vehicle Approval Regulation (Fahrzeuggenehmigungsverordnung – EG-FGV as amended by BGBl. p. 522).

<sup>40</sup> According to Recital 42 of Regulation 2018/858, conformity of production and thus compliance with all EN ISO 9001:2015 requirements (as currently applicable under Regulation 2007/46/EC) is "one of the cornerstones of the EU type-approval system." Since the entering into force of Regulation 371/2010, if not even earlier, EN ISO 9001 has had normative relevance, meaning it is applicable law.

<sup>41</sup> Within the automotive industry, it is common practice to include the standard as integral part in all contracts and, as regards the supplier industry, the stricter requirements of ISO/TS 16949 have been included, followed by the currently applicable IATF 16949. Under the heading "product integrity", the German Association of the Automotive Industry (VDA) recommends adherence to this standard within the context of product safety and conformity (first issue of November 2018).

certificate upon request and this authority may very well be a court of law (Section 429 ff. of the German Code of Civil Procedure [ZPO]). The motion to request these documents is the most important measure of enquiry and request to take evidence.

In the same vein, the plaintiff may also request the disclosure of any further documents from the authorities, including the reasons manufacturers put forward – as happened with the illegal defeat devices – to justify the infringement that was proven by the corrective measures. Regulation 2018/858 renders the defense more difficult:

In my view, the most dangerous provision of Regulation 2018/858 for manufacturers is the de facto reversal of the burden of proof laid down in Article 5(2)(c) (emphasis added): “Vehicles, systems, components and separate technical units shall be **considered not to comply** with this Regulation in the following cases **in particular**. [...] (c) if any information given by the manufacturer in the information document is not **reproducible** under all the conditions set out in the relevant regulatory act by approval authorities, market surveillance authorities or the Commission”<sup>42</sup>. Reproducible means that the information conclusively enables plausibility based on facts and replicable results. The required degree of reproducibility is determined by the authorities and flexible.

### **Need for legislative measures**

Where European legislation opens up these possibilities of proving a case, German legislation only has to provide the corresponding statutory bases for legal claims – which are necessary according to Union law and must not be waived through contractual agreements – insofar as they do not arise from legal interpretation in line with Union law. This would also serve to protect public order and individual drivers: ultimately, every driver who drives a car that does not conform with statutory emission regulations is at the same time a perpetrator of illegal pollution<sup>43</sup>.

It is only under these conditions that recourse claims pursued through an action in a model proceeding (*Musterfeststellungsklage*), a possibility introduced in Germany at the end of 2018, could be more than a mere procedural placebo. It makes no sense at

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<sup>42</sup> Recital 59 of Regulation 2018/858 specifies: “In order to ensure that the vehicles, systems, components and separate technical units comply with this Regulation in all cases, they should be deemed not to comply with the relevant requirements where test results cannot be empirically verified by the relevant authority even though all testing parameters have been replicated or taken into account. It is necessary to impose penalties on economic operators and technical services who falsify test results or submit false declarations or incorrect data for type-approval.”

<sup>43</sup> Compliance verification tests by the authorities may also be carried out at the request of individual registration holders (general right to lodge complaints, for instance according to Article 8(1) of Regulation 2018/858) because, as Recital 35 of Regulation 2018/858 states, it is “also important to take into account the implications for the holder of the vehicle registration certificate”.

all to enable associations to file an action in a model proceeding under current law without creating the substantive legal basis to enforce rights which may arise by law more than ten years after contractual periods of limitation have expired.<sup>44</sup>

Indeed, national law is applicable to liability issues and the CJEU lacks jurisdiction to make final decisions on them. It can hold, however, that German liability law must be interpreted in a manner consistent with Union law and that, for instance, invoking expired periods of limitation is an abuse of rights and contrary to good faith in light of Directive 1999/44/EC<sup>45</sup> on the sale of consumer goods and associated guarantees and Directive 2005/29/EC<sup>46</sup> concerning unfair business-to-consumer commercial practices.

### **Union law approach regarding costs**

The European Union, within its limited competences, has touched upon the problem at Union level by passing Regulation 2018/858, which will be effective as from January 1, 2020. Article 53 determines the procedure for the corrective and restrictive measures that the authorities may take when infringements of type approval law occur. Article 53(8) contains – somewhat inconsistently – a cost regulation that works to the benefit of individual registration holders and facilitates the enforcement of their rights (emphasis added): “Where a corrective measure is considered to be justified in accordance with this Article or is subject to the implementing acts as referred to in paragraph 5 or 6, **that measure shall be available free of charge to holders of registrations for the affected vehicles**<sup>47</sup>. Where repairs have been carried out at the registration holder’s expense before the adoption of the corrective measure<sup>48</sup>, the manufacturer shall reimburse the cost of such repairs up to the cost of the repairs required by that corrective measure<sup>49</sup>.”

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<sup>44</sup> The more than 200,000 plaintiffs against Volkswagen AG will probably not get much out of the current model proceeding after a very long trial duration and the following proceedings to assess individual damages; see: [https://www.focus.de/finanzen/boerse/zorn-der-masse-mehr-als-200-000-dieselfahrer-schliessen-sich-musterklage-gegen-vw-an\\_id\\_10101455.html](https://www.focus.de/finanzen/boerse/zorn-der-masse-mehr-als-200-000-dieselfahrer-schliessen-sich-musterklage-gegen-vw-an_id_10101455.html), accessed on December 21, 2018.

<sup>45</sup> Official Journal of the European Union L 171/12 of 07.07.1999.

<sup>46</sup> Official Journal of the European Union L 149/22 of 11.06.2005.

<sup>47</sup> This corresponds to how the NHTSA handles recalls in the US: it explicitly makes available to affected vehicle owners all evidence it gathered during its investigation in order to help them enforce their rights against manufacturers. Moreover, manufacturers are prohibited from destroying such evidence or refusing to disclose it to potential plaintiffs.

<sup>48</sup> According to point 9.2.3 of UN/ECE Regulation No 83, the manufacturer must report to the type approval authority on warranty claims, warranty repair works and OBD faults recorded at servicing. This information will then be taken into account for the reimbursement of the costs.

<sup>49</sup> Recital 46 of Regulation 2018/858 states: “Where corrective measures are applied, holders of registrations for affected vehicles should not bear the cost of the repairs to their vehicles, including cases where repairs have been carried out at the registration holder’s expense before the adoption of

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## Conclusions:

1.

The legal provisions for in-service conformity tests of vehicles do not contain time limits. In most cases, the measures taken by type approval and market surveillance authorities affect vehicle owners only after their contractual periods of limitation have expired. The legal consequences of this remain largely unclear. It remains just as unclear if and when relevant cases will be brought before the German Federal Court of Justice (BGH) and the European Court of Justice for final decisions, and what these decisions will look like. The quality of future judgments, however, will depend on the quality of the plaintiff's or applicant's arguments regarding technical aspects, standards (e.g. the legal relevance of harmonized standards for quality management systems) and the interpretation of EU law – because this is what is subject to judicial review.<sup>50</sup>

2.

The issue of periods of limitation cannot be the decisive factor when it comes to the rights of individual vehicle owners against manufacturers and dealers where defects in vehicles are discovered by type approval or market surveillance authorities after contractual periods of limitation have expired, but the defects must still be corrected by virtue of higher ranking rights and interests. The relevant Union law provisions serve to ensure that only vehicles that are safe throughout their life are on European roads. This should be reason enough for German legislators to create balanced national regulatory acts.

3.

The effectiveness of actions in model proceedings is contingent on bringing German liability and limitation law in line with Union law. This adjustment of domestic law could be informed by the cost regulation of Article 53(8) of Regulation 2018/858.

Translated from German into English by Dr. Charlotte P. Kieslich

charlotte.kieslich@web.de

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the corrective measure. This should not prevent consumers relying on remedies based on contract law, as applicable under Union or national law.”

<sup>50</sup> In the German breast-implant-case (BGH, judgment of 22.06.2017, VII ZR 36/14 [NJW 2017, 2617]), the BGH did not dismiss the action because there were no grounds of action but because the plaintiff failed to substantiate its claims (point 33).