JFT 3/2022 s. 277–301

*Theis Klauberg, Rechtsanwalt, Tallinn/Riga/Vilnius/Hamburg*

*Malte Lebro, Rechtsanwalt, Cologne*

# Dieselgate in Finland and Estonia: A Comparative Study with References to Germany

## 1 Introduction

Dieselgate involves a number of different legal questions and responses, in both the public and private law spheres, concerning national and international private law, as well as European Union law. As di Rattalma et al. concluded in their all-embracing study,[1] the issues can in particular be found in civil law, consumer law, corporate and insurance law, as well as criminal law, environmental law and finally EU Law. This article will focus on tort law, or non-contractual liability, in regard to Estonia and Finland, at the same time referring to German tort law and court practice. All three countries are subject to EU emission performance standards for vehicles (cars and vans).

These national tort laws apply similar principles in so far as a right to compensation is granted for losses resulting from damage caused.[2] However, they differ in some aspects of their respective preconditions: whether to require the violation of a specifically protected individual right, the required level of intent or negligence, as well as in regulation by the statute of limitations and the legal transfer of tort claims. In addition to these statutory law differences, this article will look at some of the Dieselgate-specific court practice which has evolved in the German courts. German court practice is of particular relevance not only because a closer look at the tens of thousands of decisions by German courts[3] is no doubt helpful in determining issues and arguments; but it is also particularly relevant to take German court practice into account for possible claims in Germany, since − as will be discussed later − jurisdiction in Dieselgate proceedings will, for most claims, at least alternatively be in Germany.

---

[1] Marco Frigessi di Rattalma (ed.), The Dieselgate: A Legal Perspective. Springer 2017.

[2] With regard to Estonia, Finland and Germany see Ernst Karner − Ken Oliphant − Barbara C Steiniger (eds), European Tort Law Basic Texts. Second edition. Jan Sramek Press 2018.

[3] According to the German Federal Court (Bundesgerichtshof, BGH), as of December 2021, 1,200 proceedings were yet to be decided by this highest appeal court; many more are pending in the lower courts of Germany, in addition to decisions rendered already.

Since Dieselgate broke in September 2015, a great wealth of studies, articles, and technical information has been published, in particular in online documentaries and even a feature movie has recently been released,[4] expert publications and the popular media. The focus of the bulk of legal analysis is on Germany.[5] Dieselgate compensation claims based on tort are, however, of wider concern, first of all geographically touching all jurisdictions in which Dieselgate vehicles were or are being sold. It is suggested that almost all cars and vans with a diesel engine produced in Europe and beyond[6] during the period from approximately 2005 until 2015[7] are Dieselgate vehicles, that is, they are fitted with illegal defeat devices.[8] If it is presumed that Dieselgate vehicles were and are sold in almost every country worldwide from 2005 until today, Dieselgate tort claims are an ongoing worldwide phenomenon.[9] In Europe the only relevant form of legal redress to solve vehicle owners' problems are claims in tort for compensation.

[4] See e.g., the English language German State TV Broadcast "VW and Dieselgate – What really happened", DW Documentary 1 January 2022, available at <https://www.youtube.com/watch?v=AsPmJdlrBiI>, #Dieselgate: How the Car Industry Lied to Us All (2021 TV Movie), directed by Johann von Mirbach.

[5] The current state of German legal practice is the subject of the research project "Dieselskandal; Herstellerhaftung" (Diesel scandal: liability of the producer) by Michael Heese at Regensburg University, <https://www.uni-regensburg.de/rechtswissenschaft/buergerliches-recht/heese/projekt-Dieselskandal/index.html>.

[6] A non-exhaustive list of models and production years affected and very likely affected is available at www.Dieselgate.legal.

[7] Some producers continued to instal defeat devices well beyond 2015: According to the German vehicle association ADAC, Vito mini-vans with defeat devices made by Mercedes-Benz Group AG include 2018 models. ADAC 4 November 2021, <https://www.adac.de/verkehr/abgas-Diesel-fahrverbote/abgasskandal-rechte/rechte-verbraucher/daimler/>.

[8] Defeat devices are explicitly prohibited by EU legislation and Member States are required to police and enforce the ban. Defeat devices are defined in Regulation (EC) No. 715/2007, which sets the Euro 5 and Euro 6 emissions standards, as "any element of design which senses temperature, vehicle speed, engine speed (RPM), transmission gear, manifold vacuum or any other parameter for the purpose of activating, modulating, delaying or deactivating the operation of any part of the emission control system, that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use". The Court of Justice of the European Union confirmed in case 693/18 that a manufacturer may not instal a defeat device which systematically improves the performance of the vehicle emission control system during approval procedures and thus obtain approval for the vehicle; the court has also clarified the illegality of so-called thermal window/Thermofenster defeat devices, C-128/20, further below 2.1.1.

[9] The European Mobility Atlas, Heinrich-Böll-Stiftung (2021) concludes: "The Dieselgate Scandal has not been solved", <https://eu.boell.org/en/Dieselgate-the-scandal-has-not-been-solved>; Di Rattalma states "Dieselgate can for sure be defined as a global or worldwide scandal". Di Rattalma 2017, ix, para 4.

The technical and mostly software-based manipulations used in the defeat devices fitted to Diesel(gate) engines[10] in their various forms as developed by the various manufacturers,[11] and their effect on vehicle emission levels,[12] has been the subject of a number of studies. This article provides a comparative analysis of claims in tort by individual rightholders for compensation for losses resulting from Dieselgate. In our analysis we focus on German manufacturers, whereas the principles discussed are applicable to Dieselgate vehicles produced by other manufacturers as well. In addition, procedural aspects involving international private law, in particular the place of jurisdiction and the applicable law, are discussed. Other civil law aspects, in particular in relation to contractual claims or consumer protection, are beyond the scope of this article.

## 2 Tort-based claims for damages

The starting point for claims for damages based on tort for claimants from Estonia is a claim based on sections 1043 and 1045 of the Estonian Code of Obligations (VÕS), and in Finland on chapter 2, section 1 of the Tort Liability Act (412/1974). The Estonian regulations represent a structured system of general clauses, which in principle is similar to or even based on the liability system of the German Civil Code (Bürgerliches Gesetzbuch, BGB).[13]

These norms are not excluded due to competing contract or warranty law. According to section 1044, subsection 2 VÕS and chapter 1, section 1 Tort Liability Act, this would be the case if a contract were to be concluded between the manu-

[10] Moritz Contag − Vector Guo − Andre Lawlowski − Felix Domke − Kirill Levchenko − Thorsten Holz − Stefan Savage, How They Did It: An Analysis of Emission Defeat Devices in Modern Automobiles. Conference: 2017 IEEE Symposium on Security and Privacy (SP) 2017, 231−250, DOI Bookmark: 10.1109/SP.2017.66, <https://cseweb.ucsd.edu/~klevchen/Diesel-sp17.pdf>.

[11] The prevalence of defeat devices throughout the automotive industry is mostly due to their development and distribution of the respective components and systems by Robert Bosch GmbH, for vehicle production by most vehicle manufacturers in Europe, and as far as Japan.

[12] For an overview of the level of emissions of various models see: Deutsche Umwelthilfe e.V. Emissions-Kontroll-Institut, NOx- und CO2-Messungen im realen Fahrbetrieb, 12 January 2022, www.duh.de.

[13] Tambet Tampuu and Martin Käerdi in: Paul Varul − Irene Kull − Villu Kõve − Martin Käer − Martin Käerdi − Karin Sein, § 1045 VÕS, 641, in Võlaõigusseadus IV. Jurassic 2020; Janno Lahe, German Transplants in Estonian Tort Law: General Duties to Maintain Safety. Juridica International, 30/2021, 132–139; Irene Kull, Estonia, 248–263, in Helmut Koziol – Barbara C Steiniger (eds), Tort and Insurance Yearbook. De Gruyter 2005; Christian von Bar, Gemeineuropäisches Deliktsrecht (The Common European Law of Torts). C.H. Beck 1996, 258–261.

facturer and the buyer as a matter of priority. But this is not relevant in Dieselgate cases because most vehicles are purchased from dealers (whether new or used) or private sellers. Therefore, no contractual obligation arises as between the manufacturer and the buyer. In this respect, a breach-of-warranty claim against the dealer may of course be considered. However, these only play a small role in legal practice, not least since manufacturers are considered to be more solvent opponents than dealers.

### *2.1 Damage*

#### 2.1.1 Purchase based on false pretences – so-called Vertragseingehungsschaden (damage caused during formation of the contract)

Naturally, in both Estonian and Finnish law, the basis for a claim requires *damage* as a precondition (cf. section 1043 VÕS and chapter 2, section 1 of the Tort Liability Act). In German court practice, damage (within the scope of section 826 BGB) is constituted here by the fact that the buyer was deceived into a purchase contract by the manufacturer's fraudulent representation to both the buyer and the registration authorities; a buyer fully aware of all the facts would not have concluded the purchase. Whether a decrease in the market value of the vehicle at the time of purchase was objectively the case, or the lack of such decrease in a resale, is of no significance.[14]

The decision to systematically instal illegal defeat devices to conceal the actual exhaust emission values in the EC type approval procedures constitutes fraudulent misrepresentation vis-à-vis both the buyer and the approval authorities. As a result, the buyer has been exposed to a claim for payment of the purchase price under the purchase agreement with the dealer or seller and has had to comply and pay. The buyer has thus suffered damage in the amount of the purchase contract obligation. In this case, the damage arises even at the moment of concluding the contract, since the buyer's assets have already been diminished due to the obligation to pay under the purchase contract.

In Germany, this court practice on so-called Vertragsseingehungsschaden (damage caused during formation of the contract) was developed long ago by the

[14] Michael Heese, Nutzungsentschädigung zugunsten der Hersteller manipulierter Diesel-Kraftfahrzeuge? in: Verbraucher und Recht VuR 2019, 123–129, 123.

Imperial Supreme Court (Reichsgerichtshof).[15] The consequence of incurring such damage is rescission of the purchase contract concluded by the manufacturer with the dealer within the scope of realizing the claim for damages. Buyers may therefore return their vehicle to the manufacturer and will be reimbursed for the purchase price paid. In Germany, however, the courts generally reduce the quantum (claim amount) by way of a deduction for compensation for use[16].

The development and installation of so-called software updates by the manufacturer, with the stated − but it is suggested technically impossible – aim of making the emission control system compliant with the regulations, has no effect on the ratio for damages. Such software updates generally cannot solve the problem of large nitrogen oxide emissions or they simply postpone the problem.[17] This is because diesel vehicle emission control systems were not designed to operate in compliance with regulations, but from the standpoint of maximizing profits. Without proper exchange of hardware parts, a reduction in nitrogen oxides can only be achieved by reducing the combustion temperature in the engine. However, such a reduction leads to increased emissions of carbon monoxide and soot. And it is especially the latter that leads to clogging of the filters and valves at lower outside temperatures, whereby service life is reduced considerably.[18]

In order to circumvent this problem, new shutdown devices have often been installed in engines, so-called thermal windows (Thermofenster). Thermal windows are designed to ensure that low-combustion temperature only takes place at certain temperatures that are compatible with the engine. The temperature window for complete exhaust gas purification is between 15 °C and 33 °C. If the temperature is below or above this, the exhaust gas purification system again operates as faultily as originally planned by the manufacturer. However, the European Court of Justice (ECJ)

[15] Reichsgericht in Zivilsachen (RGZ) 63, 268, 269; RGZ 59, 155 ff.; Jürgen Oechsler, § 826, paras 227–230, in Jürgen Oechsler – Johannes Hager (eds), Staudinger Bürgerliches Gesetzbuch §§ 826−829. Otto Schmidt/De Gruyter 2021.

[16] Whether the practice of applying a deduction in the method of calculating compensation is in line with the principles of tort law and EU law is highly questionable, see Heese op. cit., and in particular the recent opinion rendered by Advocate General Rantos in the pending EU Court of Justice case 100/21 (Mercedes-Benz).

[17] The Commercial Court of Vienna, in its judgment of 26 November 2019, ref. 11 Cg 52/18m 35, found VW guilty of "creating the impression in commercial dealings in Austria [...] that by means of a software update" the limit values can be achieved "without any deterioration in terms of fuel consumption, CC2 emissions, engine power and torque, and noise emissions".

[18] <https://www.srf.ch/news/schweiz/motorschaden-nach-software-update-bei-vw>, last accessed 31 May 2022.

has recently made it clear that it regards this technology as illegal, and thus the so-called thermal window as a further illegal defeat device.[19]

If an AdBlue urea purification system is installed, the software update causes an immense increase in AdBlue consumption. This is because the vehicle manufacturers, in order to save space in the boot, deliberately refrained from fitting vehicles with AdBlue tanks of sufficient size to hold the required amount to allow for a continuous selective catalytic reduction (SCR) at all times. Before the software update, the chosen solution was to reduce the amount of AdBlue outside the test cycle (causing illegal emission levels), whereas in following the software update AdBlue amounts may be sufficient at all times to keep within legal emission levels. However, in order to reach this result consumption is increased manifold, requiring frequent refuelling.

Irrespective of this, as confirmed by the German Federal Court of Justice (Bundesgerichtshof, BGH), the damage also lies in the fact that the buyer has entered into a contract that they would not have entered into if they had known all relevant circumstances at the time the contract was concluded.[20] Subsequent installation of a software update is unable to redress the intended malfunction (defeat device), in particular buyers often report performance drops, higher engine wear, and an increase in AdBlue consumption.

#### 2.1.2 Vertragseingehungsschaden as pecuniary damage

At first glance, the fact that Vertragseingehungsschaden (damage caused during formation of the contract) is expressed as pecuniary damage stands in the way of manufacturer liability under Finnish and Estonian law. This is because neither Finnish nor Estonian law provide for compensation for every type of damage. Whereas under Finnish law the scope of damages is limited in principle to personal injury or property damage by chapter 5, section 1 Tort Liability Act, such a limitation of the scope of damages is not provided for under Estonian law (section 128, subsection 1 VÕS), where pecuniary damages are also compensated. That said, however, the scope of the claim for damages is limited in Estonian law by defining the legal rights whose infringement triggers the obligation to pay damages (cf. section 1045, sub-

[19] ECJ C-128/20 of 14 July 2022; in addition, an action has already been brought before the Schleswig Administrative Court in Germany against approval of a software update by the German Federal Motor Transport Authority (VG Schleswig, Ref. 3 A 113/18).

[20] BGH 25 May 2020 - VI ZR 252/19.

section 1 VÕS), so that, unlike in Finnish law, there must first be an infringement of a legal right.[21]

The fundamental limitation in Finnish law to personal injury or property damage does not mean, however, that pecuniary damage cannot also be compensated. On the contrary, Finnish law has a specific rule, very similar to German law, on the compensability of damages in the case of violations of legal property, violations of the law and particularly serious (gross) violations such as breaches of morality. According to this rule, pecuniary loss is compensable, for example, if the wrongdoer commits a criminal act or if there are particularly weighty reasons for the pecuniary loss (chapter 5, section 1 Tort Liability Act). In Estonian law, this specific rule is laid down in the same way in section 1045, subsection 1 VÕS, which firstly lists the protected legal interests, in order to mention the moral and legal offence at the end in section 1045, subsection 1 nos. 7 and 8 VÕS. Thus, while Finnish tort law sets out the requirements primarily on the legal consequences side, Estonian tort law follows the German approach in tort law, whereby the requirements of a claim for damages are set out primarily in the facts that constitute liability.

This means that the tort liability systems of Finland and Estonia with regard to pecuniary loss are very similar to the German legal system, which also requires a violation of the law (section 823, subsection 2 BGB) or an immoral act of damage (section 826 BGB) in order to establish pecuniary damage (without a preceding violation of a legal interest according to section 823, subsection 1 BGB) in tort law. German court practice in Dieselgate cases is based in particular on the immoral act of harm.[22] Up until recently, pecuniary loss has been awarded only in individual cases for violation of an express legal provision.[23] However, since Advocate General Rantos stated explicitly in his opinion of 2 June 2022 in pending case C-100/21 that the EU emissions rules protect the interests of the individual purchaser of a vehicle equipped with an unlawful defeat device,[24] it is expected that the ECJ in its decision will confirm that opinion, thus eventually deeming the violation of emissions rules as sufficient to claim for damages.

---

[21] Whereby it is disputed whether the list of protected legal interests in section 1045, subsection 1 VÕS is exhaustive or not, Tambet Tampuu − Martin Käerdi in Varul et al. 2020, § 1045 VÕS, 642; von Bar 1996, 258–261.

[22] The BGH decision of 25 May 2020 - VI ZR 252/19) pointed the way in this regard.

[23] Landgericht Stuttgart 20 May 2021 - 20 O 553/20.

[24] Opinion of Advocate General Rantos in case C-100/21 (Mercedes-Benz), 50.

*2.2 Especially weighty reasons/immoral act*

Following established case practice as mentioned above, the buyer may initially base a claim for damages on immoral conduct (section 1045, subsection 1, no. 8 VÕS) or on conduct by the manufacturer which is particularly gross or weighty (chapter 5, section 1 Tort Liability Act).

However, the immorality of conduct under section 1045, subsection 1, no. 8 VÕS should also imply the "especially weighty reasons" under Finnish law as a modern version of an "immoral act".[25] It is suggested that thus turning to the German courts would be advantageous in order to make use of the differentiated criteria of immorality that they developed in the course of deciding many tens of thousands of Dieselgate tort cases.

Meanwhile, applying this differentiated case law in the context of Estonian law should be problem-free, as Estonian private law is closely related to and based on the codified law of Germany. For Finnish law, though, as a representative of the Nordic legal system, the picture is not quite so straightforward. However, this should not deter the legal practitioner from comparing laws and drawing conclusions. In the Nordic legal systems, national court practice plays a greater role than in continental European codified law, but − unlike in English common law − a commitment to the wording of the law is always maintained,[26] which is why this does not stand in the way of subsumption in the context of comparative law.

In Estonia, an immoral act is committed if contrary to good morals, though what is meant by the concept of morality is unclear there. In Germany, an act is immoral if it offends the sense of decency of all those who think fairly and justly. But, in order to be applied in individual cases, this (rather empty) formula requires further interpretation. In order to spell this out it is not necessary to determine in each individual case the customs, practices and moral views that are customary for legal transactions of this kind.[27] "Immoral customs" have already been codified in most legal systems. For example, fraudulent behaviour in conclusion or execution of legal transactions is presumably punishable in all countries worldwide.

[25] Sampo Mielityinen, Vahingonkorvausoikeuden periaatteet (Principles of the Law of Damages). Edita Publishing Oy 2006, 242; von Bar, 1996, 317–319.

[26] Wilhelm Brauneder, Skandinavischer Rechtskreis (Scandinavian Jurisdiction), para. 8, in Irene Dingel − Johannes Paulmann (eds), Europäische Geschichte Online (EGO), Leibniz-Institut für Europäische Geschichte (IEG), Mainz 2017-02-14.

[27] Jürgen Ellenberger, § 138, paras. 138–157, in Christian Grüneberg (ed.), Bürgerliches Gesetzbuch. 81st edition. Beck 2022.

In addition, non-statutory regulations may be used to reach a determination. These include, for example, the ICC Advertising and Marketing Communications Code, which sets out fundamental rules for marketing and communications in business transactions worldwide. According to Article 5 of the ICC Code, marketing should be truthful and not misleading. This "duty of truth" includes in particular that no representations are omitted which are essential for the value of a product as well as for its environmental impact (cf. also Article D1 of the ICC Code) and are thus likely to influence the consumer's decision to buy.

That said, it is clearly immoral to systematically deceive vehicle buyers by way of installing defeat devices in order to maximize profits. This has been confirmed by the BGH, which considers the fundamental strategic decision to insert these impermissible defeat devices into vehicles in order to deceive the approval authorities in their own profit interests to constitute immoral conduct.[28] It is furthermore supported by the fact that the manufacturers circumvented the central approval regulation legal framework (EC Regulation 715/2007) with great technical effort, and thus brought millions of vehicles onto the market that do not comply with legal environmental requirements pertaining to road traffic. They thus deliberately accepted that the environment would be damaged beyond measure and that in particular residents of busy roads would suffer even more damage to their health than they already did from the usual traffic emissions.

In addition, the Dieselgate vehicle manufacturers have not only deceived millions of customers and the registration authorities about lack of compliance with environmental regulations, but have also distorted the market for diesel vehicles.[29] Their avoidance of development and production costs for engines that complied with environmental regulations enabled them to consolidate their market position in the diesel segment and gain market advantage over manufacturers who attempted to design their diesel engines in accordance with environmental regulations (cf. also section 2 of the Finnish Unfair Business Act and section 50 of the Estonian Competition Act).

Finally, buyers also bear the consequences of these systematic deceptions. They face considerable damage in the form of decommissioning of the vehicles they purchased (once the type approval of the respective vehicle type is withdrawn due to

[28] Decision of the BGH 25 May 2020 – VI ZR 252/19.

[29] Cf. decision of the appeal court Oberlandesgericht Koblenz 5 June 2020 - 8 U 1803/19.

the defeat devices or if no such approval is granted in the first place[30]) and/or considerable loss of value due to potential decommissioning of the vehicle. These aspects will play a more significant role, especially in view of the coming shift in traffic towards e-mobility.

These deceptive acts thus reprehensibly disregarded expectations and customs in legal transactions on several levels at the same time. This becomes even clearer when one considers that a number of employees and board members of the vehicle manufacturers have been convicted or charged with fraud.[31] In addition, marketing directed at the vehicles in question was untruthful in that it conveyed compliance with legal requirements despite the contrary, and therefore violated Article 5 of the ICC Code.

The fact that the manufacturers only in rare cases sold the vehicles directly themselves bears no consequences in this context. This is because immoral acts of deception continue to have an effect even if a seller (without knowledge of the defeat device) is interposed. In this respect, buyers may rely on the fact that the vehicle they have purchased has been designed by the manufacturer to comply with all necessary legal requirements. The manufacturer has a corresponding duty to inform potential buyers prior to purchase about the use of illegal defeat devices and the resulting consequences.[32] This also includes used vehicles, unless the buyer received a warning that the vehicle is fitted with a defeat device. Furthermore, it is not necessary for the buyer to continue as the owner of the vehicle, because even if they have previously sold the vehicle, the original Vertragseingehungsschaden (damage caused during formation of the contract) remains and entitles the former owner to a claim for damages. However, when calculating the quantum, the proceeds of sale must be deducted from the original purchase price (calculation of damages will be discussed in more detail below 2.6).

It is therefore not surprising that German court practice holds manufacturers liable for immoral acts for almost all vehicles fitted with defeat devices.

[30] It is as yet unclear whether vehicles affected by Dieselgate possess effective (EU-wide) type approval, which firstly must be revoked in order for a decommissioning order to be issued, or whether the vehicles were in fact never effectively approved for circulation in the first place due to the defeat devices (cf. in this regard German Bundestag, Department for Europe (PE 6 - 3000), Paper: Sanction options due to defeat devices, 13 March 2017).

[31] <https://www.stern.de/wirtschaft/diese-prozesse-um-volkswagen-laufen-noch--auf-der-ganzen-welt--30746542.html>, last accessed 10 May 2022.

[32] Heese 2019, 123−130.

*2.3 Intentional act*

Section 1045, subsection 1, no. 8 VÕS requires not only that an act be immoral, but also that it be committed intentionally. In this respect, therefore, it runs in parallel to the respective provision in German law (section 826 BGB). For a Finnish claim under chapter 2, section 1 in conjunction with chapter 5, section 1 Tort Liability Act, intention is not required in order to constitute particularly serious grounds, but should make it easier to establish particularly serious grounds if the conduct was intentional. In addition, the defendant manufacturer cannot then assert an unreasonable amount in terms of the claim for damages (chapter 2, section 2 Tort Liability Act). It should not be difficult to plead intention. This is because development of software for impermissible defeat devices is so extensive and complicated in conjunction with the exhaust gas purification system that it cannot be assumed from the outset that such software was programmed and installed in the vehicle's system by mistake.

*2.4 Claim for damages on the basis of violation of a law?*

While substantiating an immoral act should not cause any major problems, the situation is different if substantiation of the claim for damages is based on violation of a law (section 1045, subsection 1, no. 7 VÕS and chapter 5, section 1 Tort Liability Act).

Violation of the elements of fraud in both Finland (chapter 36, section 1 Criminal Code) and Estonia (section 209 KarS) encounter different difficulties, in terms of both substantive law and fact. The triangular relationship between producer, seller and end customer makes a legal reappraisal complicated and beyond the scope of this essay, in particular since it will not be possible in most cases to prove direct deception on the part of the manufacturer vis-à-vis the end customer. For this reason, we will refrain from a detailed presentation of the facts of fraud in the context of Dieselgate, especially since other bases for claims are far easier to substantiate.

In particular a violation of Article 5(2) EC [Regulation] 715/2007, which prohibits the use of impermissible defeat devices, may be considered. The Finnish legal situation is clearer than that in Estonia. Chapter 5, section 1 of the Tort Liability Act requires commission of a criminal act. Therefore a claim for damages under the Tort Liability Act in conjunction with Article 5(2) EC [Regulation] 715/2007 is ruled out from the outset, because the regulation itself does not contain any elements of a criminal offence. Although this is compensated for by the fact that violation of Article 5(2) is at the same time a violation of section 189, subsection 1, paragraph 5 Vehicles Act

82/2021, also the latter provision is not a criminal provision within the meaning of chapter 5, section 1 Tort Liability Act. The purpose of the provision is merely to comply with the regulation laid down in Article 46 of Directive 2007/46, according to which Member States are to impose sanctions on a wrongdoing market participant in order to ensure compliance with environmental regulations for vehicles.

In Estonian law, no such provision which corresponds to section 189, subsection 1, paragraph 5 Vehicles Act 82/2021 exists, and under section 1045, subsection 1, no. 7 VÕS, a claim for damages arises if the manufacturers have engaged merely in conduct that violates a statutory duty. Thus, Estonian tort law is generally more open with regard to statutory violations than Finnish tort law, which, as already pointed out, requires a criminal act. There is no question that such a statutory duty exists in the prohibition of unauthorized defeat devices. However, conduct under section 1045, subsection 3 of VÕS is only unlawful and fulfils the criteria for the offence if the purpose of the provision is to protect the injured party from such damage. As already mentioned, that is highly disputed with regard to Article 5(2) EC [Regulation] 715/2007 (or Article 27 EG-FGV in connection with Article 26 RL 2007/46/EC). The German courts largely reject such a protective effect of the regulation (with the same legal prerequisites),[33] but it is also assumed in some cases, as well as in the legal literature.[34] The legal question is already part of several preliminary ruling proceedings before the ECJ,[35] so that clarity on this is to be expected in the near future, should the manufacturers not terminate the proceedings by settlements in order to avoid a decision that is disadvantageous for them (as indeed has already happened several times).

In any case, this should only be relevant if the conduct of the vehicle manufacturers is not classified as intentional within the meaning of section 1045, subsection 1, no. 8 VÕS, since negligence would then be sufficient to justify a claim under section 1045, subsection 1, no. 7 VÕS in conjunction with Article 5(2) EC [Regulation] 715/2007. This may be particularly relevant in the case of defeat devices where an obvious deception of the authorities and buyers cannot be sufficiently proven because the defeat device is not obviously intended only to bypass the tests in the approval procedure (e.g., in the case of thermal windows).

[33] The Federal Court of Justice BGB decision of 25 May 2020 - VI ZR 252/19 was particularly influential in this regard.

[34] Heese 2019, 123−130, Cf. Landgericht Stuttgart decision of 20 May 2021 - 20 O 553/20.

[35] See pending cases ECJ: C-506/21, C-388/21, C -240/21, C-178/21, C-440/20, and the recent Advocate General opinion in C-100/21, above footnote 32.

*2.5 Unawareness that the purchased vehicle is affected as a prerequisite for a claim?*

German court practice has not yet definitively clarified how the manufacturer's liability is affected if the buyer was aware of use of inadmissible defeat devices in the purchased vehicle when the contract was concluded.[36] It is clear that a claim for damages is then excluded. However, it is unclear on what grounds the claim would then have to be rejected.

Firstly, a claim for damages under section 1045, subsection 1, no. 7 VÕS in conjunction with section 209 KarS and, in Finnish law, compensation for pecuniary damage due to violation of chapter 36, section 1 Criminal Code, would no longer be possible because the buyer did not suffer from any error which is required for fraud, if they had prior knowledge of use of impermissible defeat devices.

On the other hand, for the remaining claim basis under section 1045, subsection 1, no. 8 VÕS as well as in a Finnish claim under chapter 2, section 1 Tort Liability Act (with particularly serious reasons from chapter 4, section 1, subsection 1), several (dogmatic) reasons come into consideration through which a tort claim for damages could be excluded. German jurisprudence and practice do not agree on the location of this problem. Several positions are advocated, such as exclusion of a claim for damages by (1) justification of a tortious act (civil wrongdoing) by consent to the occurrence of the damage (volenti non fit iniuria)[37] and also that knowledge interrupts the (2) causal course of the act towards the damage[38] as well as (3) eliminates intentional immoral act by the producer (and thus also a particularly serious reason under Finnish law).[39] Finally, it could also be argued that someone who buys a vehicle

[36] For the effect of the statute of limitations on claims see below 2.7.

[37] See appeal court Oberlandesgericht Braunschweig decision of 20 June 2019 - 7 U 185/18, appeal court Oberlandesgericht Frankfurt decision of 24 February 2021 – 4 U 257/19; Michael Heese, Herstellerhaftung für manipulierte Diesel-Kraftfahrzeuge [Liability of manufacturers of manipulated diesel vehicles]. Neue Juristische Wochenschrift (NJW) 2019, 257−263; in Estonian law, justifiable consent finds its basis in section 1045, subsection 2, no. 2 VÕS.

[38] Jürgen Oechsler, § 826, para. 180, in Oechsler − Hager 2021; Renate Schaub, Die Abgasproblematik – Möglichkeiten und Grenzen von § 826 BGB [The issue of emissions – possible approaches and limits in § 826 BGB]. NJW 2020, 1028–1033.

[39] Cf. decision of the BGH of 30 July 2020 - VI ZR 5/20; the court held that immorality is no longer a factor with regard to vehicles purchased after the manufacturer has conceded its wrongdoing publicly (in this case concerning EA 189 engines in an ad-hoc statement), as the manufacturer did change its external behaviour. This line of argument is highly questionable, since the immoral behaviour already existed well before any change of behaviour and had therefore already been committed. Furthermore, it is doubtful whether this argument may also be applied to (Eastern and Northern) European countries, where neither was relevant information distributed, nor was behaviour changed at all.

knowing that it is affected cannot suffer Vertragseingehungsschaden (damage caused during formation of the contract) because they knowingly entered into a disadvantageous contract.

The fact that German literature and case law are not unanimous in locating the problem is primarily due to the design of the basis of claim under section 826 BGB which, like section 1043, 1045, subsection 1, no. 8 VÕS, is designed as a "general clause" in a very open manner. With justification of damage by way of the Vertragseingehungsschaden (damage caused during formation of the contract) construct in German court practice, an attempt was made to transfer the basic systematics of the criminal law element of fraud (section 263 StGB) into civil law without being subject to its stricter requirements.[40] However, while the objective element of the crime of fraud expressly requires deception, that requirement cannot be found in the open element of the crime of section 826 BGB or in section 1045, subsection 1, no. 8 VÕS. The consequence is that the courts and literature try to locate the fraud-specific characteristic of error (without naming it as such) either in the intentional immoral act, causality, damage or else in justification. In which claim prerequisite knowledge (i.e., lack of error) is to be located is usually irrelevant. Only should (1) justification by consent of the buyer be excluded. This is because, without an error, criminal fraud is already excluded, without justification. This must apply all the more to so-called Vertragseingehungsschaden (damage caused during formation of the contract) in the case of section 1045, subsection 1, no. 8 VÕS, where the prerequisites of fraud are based on the immoral act. In such a case, justification is no longer possible from a purely logical point of view.

Similar problems arise in this respect in applying chapter 2, section 1, subsection 1 Tort Liability Act. There, however, knowledge should at least exclude particularly weighty reasons under chapter 4, section 1, subsection 1 Tort Liability Act so that pecuniary damage is non-compensable.

### *2.6 Liability of executive bodies/ questions of attribution*

Finally, the question arises as to whether tortious acts (civil wrongdoing) must be attributed to the manufacturers within the framework of vicarious liability. After all, manufacturers are almost exclusively stock corporations with a complex internal hierarchy and structure. However, attribution only has to be made if the acts are not already considered acts of the manufacturers themselves in any event. According to

[40] As well as the offence of extortion, cf. Gerhard Wagner, § 826, para. 70, in Franz Jürgen Sacker − Roland Rixecker − Hartmut Oetker − Bettina Limperg, (eds), Münchener Kommentar. BGB. 8th edition. Beck 2020.

the organ theory prevailing in Germany as well as in Finland and Estonia, acts of the organs of a legal entity are deemed to be acts of the legal entity itself. This is laid down in Estonian law via section 31, subsection 5 TsÜS, while in German law it applies via corresponding application of section 31 BGB.[41] Finnish law, on the other hand, has no statutory equivalent, but there the principle applies directly.[42]

However, according to general principles, the burden of proof lies with the claimant. As a rule, a claimant will find it very difficult to prove knowledge on the part of the manufacturers' management boards. Being unable to see into the complex hierarchy and structure of companies, it is factually impossible for a claimant to even present in court any knowledge or act on the part of the board members. German court practice[43] helps this lack of evidence by significantly reducing the burden of proof and imposing a so-called secondary burden of presentation on the manufacturers. In this secondary burden of presentation, the manufacturers must present in a qualified manner, after a substantiated submission by the claimant, precisely why this submission is not correct. If they are unable to do so, the claimant's submission is deemed to be admitted, section 138, subsection 3 ZPO. This means that it is regularly sufficient for claimants to use newspaper articles and other publications to at least present knowledge on the part of the executive bodies and thus show connivance with systematic deceptions in court.

Furthermore, under Estonian and Finnish law it is also possible to attribute the actions of employees to the manufacturers. Under section 1054 VÕS, there is a comprehensive attribution norm in Estonian tort law. The Finnish Tort Liability Act chapter 3 also provides for attribution to employees. Such attribution is not possible under German law in this way, which is much criticized.[44]

These standards are also relevant in the present cases. Section 1054, subsection 1 VÕS requires that the manufacturer employ the person whose act is to be attributed on a regular basis for economic or professional activities, irrespective of the existence of an employment contract. These requirements are likely to be met in the case of the manufacturers' employees. The employees who either developed the illegal defeat devices themselves or commissioned them from third parties thereby created the

[41] Ellenberger 2022, § 31 para. 1; Andreas Schwennicke, § 31, para. 4, in Julius Staudinger − Theodor Loewenfeld (eds). Staudinger, BGB. Wentworth Press 2019; von Bar 1996, 181–183.

[42] von Bar 1996, 338–340.

[43] Cf. in this respect by way of example: BGH decision of 25 May 2020 – VI ZR 252/19, para. 36 ff.

[44] Cf. Falk Bernau in Staudinger, BGB, 2020, § 831 para. 187.

foundation for the subsequent deception vis-à-vis the approval authorities and buyers. In particular, they did so in order to drive the manufacturer's economic activities.

The Finnish "attribution standard" of chapter 3, section 1, subsection 1 of the Tort Liability Act applies under the conditions that 1) an employee caused the damage and 2) the damage was caused by that employee's fault or negligence.[45] These conditions are also likely to be met here without further ado. If it is not already sufficiently demonstrated − by the principles of the secondary burden of presentation discussed above − that the organs of the manufacturers themselves committed the deception, this should be demonstrated without any problems under these principles with regard to their employees.

*2.7 Scope of claim for damages*

If the requirements for claims for damages are met, the question arises as to how the above-mentioned "damage caused during formation of the contract" is to be compensated to the claimant. Since the damage lies in conclusion of the contract, the buyer would have to be placed in such a position as if the contract had not been concluded. This means first and foremost that the contract with the vehicle manufacturer must be rescinded. In other words, the buyer returns the vehicle and is reimbursed for the purchase price paid.

2.7.1 Deduction for benefit of use

However, during the time when the buyer was able to use the vehicle for their own purposes, they benefited from this to a certain extent. They did not have to buy another vehicle, which would also have lost value through wear and tear, but were able to use the vehicle affected by Dieselgate. Therefore, at least according to uniform German court practice, which is currently under review by the ECJ in case 100/21, it is in line with the principles of damages law to deduct these advantages from the purchase price when calculating quantum.

These principles can also be applied to Estonian and Finnish law. Thus, section 127, subsection 5 of the Estonian VÕS expressly provides for a deduction for benefit of use. This is based on the (continental European) assumption that the injured party is to be put in a position by the wrongdoer under tort law as if the damaging act had never taken place and the associated damage had never occurred (restitutio in

[45] Ari Saarnilehto, Vahingonkorvauslaki: Käytännön kommentaari, (Damages Act: A practical Commentary), Edita Publishing Oy 2007, 75.

integrum or in German doctrine referred to as the difference hypothesis).[46] If the injured party obtains advantages as a result of the damaging act, it would at least contradict the prohibition of enrichment under tort law and/or good faith if these were not taken into account in calculating damages.

In this respect, the question naturally arises as to what such a deduction should look like, since it is difficult to determine the benefit of use of a purchased vehicle at first glance. The German courts have mainly used an artifice here and established a formula for determining benefit of use.

In this process, the court estimates the expected mileage (and thus the service life) of the vehicle and sets it in relation to the purchase price and the kilometres already driven by the buyer (until the end of the court proceedings). This results in application of the following formula:

$$Benefit\ of\ use\ = \frac{gross\ or\ net\ purchase\ price\ x\ distance\ driven\ since\ purchase}{expected\ remaining\ mileage\ at\ the\ time\ of\ purchase}$$

The gross purchase price for consumers is used and the net purchase price for entrepreneurs, insofar as they are entitled to deduct input tax. The expected mileage is regularly set between 250,000 km (for 2.0 L engines) and 350,000 (especially for 3.0 L engines).

An alternative concept is reached by calculating the time the vehicle was available for use to the buyer in relation to its expected overall operational life.[47] This practice, however, has so far not been tested in the appeal courts, and the available cases concern a specific vehicle, namely mobile homes.

### 2.7.2 Criticism of deduction for benefit of use

Application of this formula has now been confirmed by the highest courts in many cases in Germany and criticism of it has been rejected. Deduction of benefit of use has, however, been discussed quite controversially in jurisprudence and in the legal

[46] Varul et al. 2020, § 127 VÕS, 440. It is disputed whether this principle actually results from applying the difference hypothesis or rather from the principle of good faith or the prohibition of enrichment under tort law. In any case, the BGH does not assume application of the difference hypothesis, cf. Heese 2019, 123−130.

[47] In case 5 O 28/21 Landgericht Görlitz presumed a 25-year (= 9125 days) overall operational life of a Fiat mobile home Challenger 389 XLB Special Edition, and as the claimant's use period was 306 days, the deduction was calculated based in relation to the purchase price of EUR 55,890.00 as follows: EUR 55,890 / 9125 days x 306 days = EUR 1,874.23.

profession. There is also still the possibility that court practice will have to be adapted following corresponding case law of the ECJ.[48] As already mentioned, in his opinion Advocate General Rantos rejects a method of compensation that potentially results in a substantial reduction of the claim (potentially to 0) and is thus denied sufficient protection as foreseen by EU law. In legal literature,[49] the statutory purpose of tort law is brought forward to require not only sufficient protection of the buyer's property, but also to prevent future illegal conduct. It is rightly argued that deduction for use of the vehicle establishes an undue advantage for the manufacturer, who consequently benefits, in contravention of tort principles.

Indeed, the current practice of the rather random estimation of the expected mileage of a vehicle and accordingly consistent deduction of benefit of use from damages reduces the effectiveness of tort law as such. This in turn is related to the fact that manufacturers profit not inconsiderably from deduction of benefit of use.

Since every kilometre driven by the buyer reduces the buyer's claim for damages, manufacturers have a vested interest in artificially prolonging court proceedings so that the buyer continues to drive the vehicle and at the same time reduces their own claim for damages until the end of the proceedings. In other words, the manufacturers are forcing a benefit on the buyer that they no longer want so that their own claim for damages is reduced. In this way, the injustice shown by manufacturers to the injured parties deepens even further, while the damage to the manufacturer is mitigated. This alone constitutes an unfair advantage for manufacturers and an unreasonable burden on buyers, so that deduction of benefit of use can be rejected on normative grounds.[50] At the very least, however, it would be appropriate to no longer take into account an increase in the benefit of use on the part of the buyer as of lis pendens or default of the action.[51] This interpretation would also be required by the principle of good faith in view of the practice of vehicle manufacturers.

In addition, it also contradicts the prohibition under damages law of unjust enrichment on the part of the damaging party. This is because the latter receives compensation for use of a vehicle that was actually unsaleable and can, on the other hand,

[48] See pending cases ECJ: C-240/21, C-178/21, C-440/21, C-276/20.

[49] Heese 2019, 123−130.

[50] Heese 2019, 123−130.

[51] As has also happened in occasional cases in court practice: Landgericht Ellwangen, decision of 20 December 2019 – 2 O 178/19; appeal court Oberlandesgericht Hamburg, order of Hinweisbeschluss of 13 January 2020 – 15 U 190/19.

resell it on markets outside the EU economic zone with less stringent environmental requirements.[52]

At the same time, in applying a deduction for use that reduces a claim potentially to 0, the preventive function underlying tort law cannot be fully developed. It is true that tort law usually serves primarily to compensate for disadvantages suffered unlawfully. However, civil liability is also intended to prevent tortious conduct (civil wrongdoing) by removing the incentive for the civil wrongdoer to act.[53] However, a tort law that completely loses its preventive function is no longer able to meet the modern requirements of a complex industrial state.[54]

Indeed, such is the case here. Deducting benefit of use unilaterally favours the manufacturers, at least in terms of time, and leads to a situation in which economic operators no longer invest in reasonable compliance, but merely disguise their tortious acts (civil wrongdoing) in such a way that either compensation for use has completely eaten up the value of the claim for damages or the claim itself has become time-barred. This also corresponds to the behaviour of the manufacturers, who have often developed software updates to further conceal and downplay the scandal, but which are nothing more than further (illegal) defeat devices.[55]

Incidentally, a tendency has been discernible for some time now to assign greater importance to the preventive function of tort law in relation to its compensatory function.[56] In the Estonian VÕS, too, this has already been expressly included as a criterion for determining the wrong suffered in section 134, subsection 6 of the VÕS. However, a trend in this direction also appears desirable. The emissions scandal in particular has once again shown that, depending on the size, importance and degree of integration with key industries, the state no longer enforces rights but prevents

[52] Heese 2019, 123−130.

[53] Hartwig Sprau, Einf. 823 para. 1, in Jürgen Ellenberger − Christian Grüneberg − Isabell Götz − Sebastian Herrler (eds), Bürgerliches Gesetzbuch. 81st edition 2022; Sampo Mielityinen, Vahingonkorvausoikeuden periaatteet (Principles of the Right to Damages), Edita Publishing Oy 2006, 249.

[54] Heese 2019, 123–130.

[55] At any rate this is the view of the ECJ in the recent judgement in cases C-128/20 (Volkswagen) and C-145/20 (Volkswagen and Porsche). With regard to software updates, here a new defeat device in the form of a thermal window was installed, causing emission purification to pause during certain outside temperatures.

[56] Heese 2019, 123; BGH 15.11.1994 NRW 1995 S.861 (Caroline von Monaco); especially in the field of infringement of personal rights.

them.[57] Trust in the state and in its enforcement of criminal and regulatory laws is then likely to erode even further. Civil lawsuits brought by buyers to remind manufacturers of their legal obligations are then a viable way to regain or rebuild trust in the rule of law.

Furthermore, it has not yet been clarified what influence EU law can have on implementing compensation for use in Dieselgate. This is because the principle of effet utile (Article 4(3) TEU) basically dictates that the interpretation that best and most effectively enforces EU law is to be preferred. Such an interpretation could result in the calculation of damages also having to take into account the objectives of the regulation in such a way that benefit of use is no longer deducted (especially taking into account Article 5(2) EU [Regulation] 715/2007 and/or Articles 18 and 26 Directive 2007/46/EC).

An interpretation of this kind is also warranted precisely because the administrative authorities of the Member States have completely failed to monitor compliance with these provisions on account of their competing automotive industries. With lax controls, the approval authorities have additionally inflamed undercutting competition by the vehicle manufacturers with the defeat devices,[58] and it is also not evident that they will stop their preferential treatment of the automotive industry any time soon. This is also reflected in the fact that Germany has not sufficiently implemented the national sanctioning provisions required under Article 13(2)(d) EU Regulation 715/2007, which are intended to sanction the conduct of vehicle manufacturers in the Dieselgate case.[59] This does not ensure effective enforcement of the regulation, which could open the door for the civil courts. Various proceedings to answer this legal question are currently pending before the ECJ,[60] whereby the Advocate General has affirmed that the principle of effectiveness is of the essence when calculating compensation amounts.[61]

---

[57] The German Federal Motor Transport Authority (Kraftfahrtbundesamt KBA), for example, is anything but independent due to its many entanglements with the automotive industry, cf. <https://www.spiegel.de/auto/aktuell/Diesel-affaere-kba-wirbt-fuer-umtauschpraemien-von-bmw-daimler-und-vw-a 1237029 .html>, last accessed 16 May 2022; see also <https://www.handelsblatt.com/unternehmen/industrie/der-vw-konzern-im-Dieselskandal-warum-das-kba-bei-audi-so-lange-weggesehen-hat/24505576.html?ticket=ST-1770173-lPp92MqrrwIgOzqG5JJ2-ap5>, last accessed 16 May 2022.

[58] <https://www.wiwo.de/unternehmen/auto/abgasaffaere-audi-will-autos-kuenftig-in-deutschland-genehmigen-lassen/22660480.html/>, last accessed 16 May 2022.

[59] Deutscher Bundestag, Fachbereich Europa (PE 6 – 3000), Ausarbeitung: Sanktionsmöglichkeiten aufgrund von Abschalteinrichtungen (Paper: Sanction options due to defeat devices) 13 March 2017.

[60] ECJ: C-240/21, C-178/21, C-440/21, C-276/20.

[61] Opinion of Advocate General Rantos of 2 June 2022 in case 100/21.

*2.8 Statute of limitations issues*

Use of illegal defeat devices and associated systematic fraud involving millions of vehicles became known worldwide at the end of 2015 as a result of investigations by the US regulatory authorities. In fact, vehicle manufacturers used defeat devices much earlier in order to embellish the exhaust emission values of their vehicles under test conditions. However, claims for damages relating to vehicle purchases made more than ten years ago are already time-barred under both Finnish and Estonian law (section 149 TsÜS (Estonia) and section 7, subsection 2 Act on the Limitation of Debts (Finland)). Furthermore, the limitation period of three years from knowledge or negligent non-knowledge is of great importance. If the buyer becomes aware that illegal defeat devices have been installed in their vehicle or if they have negligently failed to become aware, the regular limitation period of three years starts to run from that time (section 150 TsÜS (Estonia) and section 4 Act on the Limitation of Debts (Finland).

This raises the question as to when the buyer knew or should have known of the existence of inadmissible defeat devices in their vehicle. There are various starting points for this. First of all, the buyer becomes aware of the use of illegal defeat devices without further ado if the Federal Motor Transport Authority KBA or other competent authorities have informed them of this in a recall notice. Independently of this, there are also recalls by the vehicle manufacturers themselves, in which they admit the use of impermissible defeat devices.

In practice, however, vehicle manufacturers often counter this with the argument that use of impermissible defeat devices has been extensively reported in the media and that the claimant thereby acquired knowledge of the tortious act (civil wrongdoing) or failed to acquire such knowledge due to gross negligence. Such reporting can theoretically cause the three-year limitation period to start running. For this to happen, however, it is at least necessary that the reporting and the media coverage were so weighty (with regard to a particular model or engine) that the buyer could not avoid taking note thereof. Since the reporting on Dieselgate in Estonia and Finland was not as extensive as in Germany, the manufacturers are unlikely to rely on such an argument to justify an early start to the limitation period − at least, not for models that were successively added without much media attention after the scandal first became known, and where manufacturers continue to disclaim the illegality of defeat devices used (Mercedes-Benz). This applies all the more as the burden of proof for this lies with the manufacturers, applying the basic rules of evidence.

## 3 Procedural peculiarities

### *3.1 Determining the place of jurisdiction*

The place of jurisdiction for tortious acts (civil wrongdoing) generally results from EU Regulation No. 1215/2012 (the Brussels Ia Regulation). According to the general jurisdiction standard of Article 4 (in conjunction with Article 63(1) No. 1 Brussels Ia Regulation, the international jurisdiction of German courts for German vehicle manufacturers results from the registered office (seat) of stock corporations. These are all domiciled in Germany, so that German courts are in principle competent for Dieselgate damages actions in tort.

However, according to Article 7 No. 2 Brussels Ia Regulation, it is also possible to sue the manufacturers in the jurisdiction where the buyer purchased the vehicle. After all, the damage has manifested itself in the conclusion of a disadvantageous purchase contract. This is also the view of the ECJ in Dieselgate cases (ECJ C-343/19). On the other hand, exclusive jurisdiction under Article 24 Brussels I Regulation cannot be considered. Finally, the Brussels Ia Regulation is directly applicable in the Member States without the need for further implementing acts (Article 288 TFEU).[62]

The buyers therefore have the choice between bringing an action in Germany or in the country in which they purchased the vehicle.

### *3.2 Applicable law*

If legal action is taken by Finnish or Estonian vehicle owners in Germany, the applicable law results from the rules of private international law. These are found − for non-contractual obligations − in the EU's Rome II Regulation (No. 864/2007) and are applicable even before national regulations (cf. Article 3 No. 1 a) Einführungsgesetz zum Bürgerlichen Gesetzbuche (Introductory Act to the Civil Code) (EGBGB) for this in Germany and Article 288 TFEU).

The Rome II Regulation is also applicable here according to its Article 1(1) in factual terms, since with claims in tort only non-contractual obligations (cf. also Article 2(1) Rome II Regulation) are dealt with. This is because in most cases no contractual obligation has come into existence between the client and the manufacturers. Since given the occurrence of damage in Finland or Estonia, but with the

[62] Rainer Hüßtege, Vorbemerkung Art. 1 EuGVVO para. 1, in: Heinz Thomas − Hans Putzo − Klaus Reichold − Rainer Hüßtege − Christian Seiler. Zivilprozessordnung (Code of Civil Procedure). 42nd edition. Beck 2021.

deceptive act originating in Germany, there is also a connection to the law of different countries, the Rome II Regulation also applies in a territorial respect. Exceptions under Article 1(2) Rome II Regulation do not come into consideration.

From a temporal point of view, the Rome II Regulation has been in force since 2009 and, according to its Articles 31, 32, applies to events giving rise to damage which occurred after its entry into force. For cases before that date, the applicable law in Germany is derived from Article 40 EGBGB. In Dieselgate cases, however, the Rome II Regulation alone is likely to be invoked due to the statute of limitations for claims for damages, as cases from before 2009 are generally already time-barred.

If there is no (permissible) choice of law pursuant to Article 14 Rome II Regulation, the applicable law is derived from Article 4(1) Rome II Regulation. This is because more specific provisions covering the case at issue (the tort) are not apparent from Article 5 et seq. of the Rome II Regulation. Furthermore, the priority rule of Article 4(2) of the Rome II Regulation does not apply either, since the buyer and the manufacturer do not have their habitual residence or their registered office in the same Member State.

However, an application of the priority conflict-of-law rule from Article 4(3) Rome II Regulation is possible. According to this provision, the law of the country to which it is clear from the circumstances as a whole that the tortious act (civil wrongdoing) has an obviously closer connection applies (other than those designated in Articles 4(1) and 4(2) Rome II Regulation). Such a close connection to Germany is not completely excluded, at least with regard to development of the defective software on German territory. On the other hand, the fact that the German type approval authorities themselves have to work with the European regulatory framework in the approval procedure speaks against it. This in itself brings the level of scrutiny by the authorities to an intergovernmental level, especially since the criterion of obviousness must meet high standards. Initial practical experience with lawsuits from Italy has already shown that the courts do not see such an obvious connection in these cases.[63]

Thus, the general conflict rule of Article 4(1) Rome II Regulation, according to which the law of the country in which the damage occurred is applicable, is likely to be decisive. Since the buyer's damage occurred in Finland or Estonia at the time of conclusion of the contract, Finnish or Estonian law is to be applied. The reference according to Article 4(1) Rome II Regulation is a reference to a substantive standard

[63] Cf. the ongoing model declaratory judgment proceedings against Volkswagen AG (OLG Braunschweig - 4 MK 1/20).

and therefore mandatory, since a referral back according to Article 24 of the Rome II Regulation is not possible.

## 4 Conclusion

Claims for compensation in Dieselgate proceedings are valid in Finland and Estonia as they are in Germany, based on the conduct of the manufacturer and the resulting damage caused. In Dieselgate cases the illegally caused payment obligation for the vehicle constitutes damage. However, this legal definition, referred to as Vertragseingehungsschaden (damage caused during formation of the contract), is not yet defined as a distinct type of damage in Finnish and Estonian legal doctrine. It is suggested that Dieselgate court practice in these countries will be instrumental to provide the scope and content of such claims based on fraudulent conclusion of contracts.

The forum of jurisdiction is alternatively at the place of purchase of the vehicle or at the registered seat of the manufacturer company.[64] However, German case law is doubtful with regard to deducting benefit of use and in view of recent EJC practice. The German court practice is highly dogmatic and only deals with the principles of unjust enrichment (and strict application of the difference hypothesis) in a schematic and oversimplified fashion. At the same time, it does not take into account the preventive function of tort law nor does it allow the principle of good faith to be considered in the calculation. Both principles indeed play just as important a role in tort law as the principle of unjust enrichment. In addition, EU law is also not taken into account when calculating damages and respectively compensation. In the authors' view, there are therefore many convincing arguments why German court practice on calculation of damages for use should not be applied to Finnish and Estonian cases at all, in line with the recent opinion of the ECJ Advocate General[65].

Finally it is submitted that the enormous and on-going damage created by Dieselgate also highlights two more general questions: Firstly, the tort law considered here at all able to adequately protect consumers against manufacturers of products who intentionally cause harm to pecuniary assets of the former, or is there

[64] To be precise, the relevant defendant is in principle the engine manufacturer company, since it should be taken into account that vehicles may be sold by one manufacturer with engines made by another manufacturer, and it is sometimes more difficult to prove that the end manufacturer had knowledge of installation of defeat devices. This concerns, for example, vehicles sold by Volkswagen AG with a 3-litre engine EA-897 made by Audi AG.

[65] Opinion of Advocate General Rantos of 2 June 2022 in case 100/21; the ECJ is expected to follow this opinion in its eventual judgment.

a need for further protective regulation? After all, the already advantageous product liability regulations are not applicable in addition to tort law, at least not in these cases.

Secondly, with regard to the courts, which are completely overburdened by countless Dieselgate lawsuits, especially in Germany,[66] it has become apparent that there is a lack of effective possibilities for class actions in continental European procedural law. Since the facts of the Dieselgate cases are in many respects completely the same, the resources of the courts have been disproportionately wasted in countless individual lawsuits, without the advantages of the classic individual lawsuit with its justice in individual cases being able to come into play in any case. EU Directive 2020/1828 on collective actions, the provisions of which are to be transposed into national law at the end of 2022, promises innovations in this area. According to this Directive, (a) the right to file class actions is to be granted to so-called qualified entities and (b) the status of a qualified entity is to be granted in particular to consumer organizations. Member States may decide between opt-in and opt-out mechanisms for the inclusion of claimants. However, it is questionable whether these innovations will be sufficient to create strong class action options.

[66] The German *Musterfeststellungsklage* [model declaratory action], created as a new type of class action specifically due to Dieselgate, has proven to be largely useless.