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Empirical survey for the realisation of the ECJ judgement of 21 March 2023, Rs. C-100/21 in the German Civil justice until 31 May 2025 (Diesel emissions scandal)

Berlin, 13 June 2025

A. Introduction

The Wirtschaftsverband der Rechtsanwälte (WVR) e.V., has examined the economic results of the German jurisdiction for plaintiffs in the ***diesel*** case in the light of the implementation of the judgement of the European Court of Justice (ECJ) of 21 March 2023 (C-100/21 emissions scandal) and conducted a survey of the data of individual members from a total of 2,524 court proceedings in the period from 1 January 2024 to 31 May 2025.

The Wirtschaftsverband der Rechtsanwälte (WVR) e.V. is an association of currently 13 law firms that are active on the side of vehicle purchasers affected by the emissions scandal, among others, and cooperate in the areas of legal protection and litigation in order to create a counterweight to financially and structurally superior litigation opponents and their authorised representatives in the interests of equality of arms.

The result is the "**Empirical legal survey of German case law on the implementation of the ECJ judgement of 21 March 2023, C-100/21 (diesel emissions scandal)**" published on 13 June 2025. The empirical surveys are accompanied by a case-by-case reference **attached** as an **annex**, as well as comments from the Wirtschaftsverband der Rechtsanwälte (WVR) e.V. on the historical context of national case law and a legal categorisation:

Table of contents

B. Empirical evaluation of German case law on the implementation of the ECJ judgement of 21 March 2023, Case C-100/21

I. Previous history

At the beginning of 2023, several tens of thousands of individual lawsuits against car manufacturers were pending before German civil courts. At the same time, Deutsche Umwelthilfe e.V. was already taking legal action against the Federal Republic of Germany (Federal Motor Transport Authority) in numerous administrative court proceedings before the Administrative Court and Higher Administrative Court in Schleswig on the basis of notices issued for software updates and type approvals, while the criminal investigations against a whole series of high-ranking engineers, managers and board members who played a key role in the emissions manipulation were making slow progress. 1

In its judgement of 21 March 2023, case no. C-100/21, the ECJ ultimately found that the opinion of the Federal Court of Justice (BGH) was incompatible with the actual situation under EU law. Until the end, the BGH had taken the view that a claim for damages under Section 823 (2) BGB in conjunction with Article 5 (2) of Regulation (EC) No. 715/2007 due to the lack of protective law quality was so obviously ruled out that it rejected any referral to the European Court of Justice, citing the "acte clair" case law of the Court of Justice. 2

In its ruling of 26 June 2023, case no. VIa ZR 335/21, the BGH had to abandon its previous legal opinion in response to the ruling of the European Court of Justice. It confirmed that the relevant standards of EU law are "protective laws" serving the vehicle purchaser within the meaning of Section 823 (2) BGB. However, the BGH preserved the result of its original legal opinion, which was contrary to EU law, in another way: firstly, by granting manufacturers the possibility of exculpation via the legal concept of a so-called unavoidable error of prohibition if a vehicle manufacturer could assume that an unlawful defeat device would not be criticised by the Federal Motor Transport Authority, which would rule out a claim on the merits. On the other hand, it undermined the generally applicable principle of total reparation on the legal consequences side and thus undermined the effet utile. [1] 3

Through its case law on capping claims at 5% to 15%, on the equalisation of benefits for the use of a motor vehicle and on the distribution of procedural costs, it ensured that although the proceedings can now be legally won on the merits, the economic result for the plaintiffs in almost all proceedings pending at the time of its decision leads to considerable damage for the plaintiffs instead of an economically positive result and is structurally ineffective. 4

Since the emissions manipulation at Volkswagen AG was uncovered in 2015, the diesel proceedings in hundreds of thousands of individual cases have been challenging the German civil justice system. The legal processing of this complex in civil law, criminal law and administrative law is far from complete. Most recently, on 26 May 2020, the Braunschweig Regional Court sentenced four former Volkswagen executives to several years in prison after 170 days of hearings.[2] 5

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[1] cf. ECJ, judgement of 19 November 1991, ref.: C-6/90 - Francovich, para. 31ff.
[2] see Regional Court of Braunschweig, judgement of 26 May 2025, ref.: 6 KLs 411 Js 49032/15 (23/19) https://www.lto.de/recht/kanzleien-unternehmen/k/dieselskandal-strafprozess-lg-braunschweig-manager-vw-6kls-411-js-49032/15-2319

When it comes to legal issues that are relevant for numerous individual cases or for an entire industry, the fear of landmark decisions has in the past regularly prompted financially strong litigants to prevent a referral to the Court of Justice by a national court or, if this was not successful, to prevent a decision by the Court of Justice. **In 2024 and 2025, Volkswagen AG and Mercedes Benz Group AG alone withdrew the proceedings C-251/23, C-308/23, C-592/23, C-667/23, C-668/23, C-751/24 known here from the Court of Justice by making exorbitant compensation payments to the plaintiffs, in some cases under the strictest confidentiality obligations.** With the request for a preliminary ruling from the Ravensburg Regional Court dated 27 October 2023 (Case C-666/23), the Court of Justice will now be called upon again in 2025 to rule on the interpretation of EU law in the case of diesel vehicles with unlawful defeat devices. In doing so, the Court will have the opportunity to further develop its previous case law (most recently Case C-100/21).

The suspicion of a cartel by German car manufacturers to thwart a new ECJ ruling is already the subject of a competition complaint submitted to the EU Commission by Austrian lawyer Mag. Poduschka, who represents numerous affected vehicle owners .[3] 6

II. Subject of the investigation

This empirical data collection focuses on the decisions and reasoning of the German civil courts following the judgement of the ECJ of 21 March 2023 and the BGH of 26 June 2023 with regard to 7

1. **the legal concept of the so-called unavoidable error of prohibition,**
2. **the economic outcome of the lawsuits for the plaintiffs by**

    a. **the limitation of the claim for damages to a maximum of 15% of the purchase price,**
    b. **the double equalisation of benefits through compensation for use,**
    c. **the allocation of legal costs to the detriment of the plaintiffs**

The case law of German civil courts in so-called diesel cases for violations of Union environmental law within the meaning of Art. 18 (1), Art. 26 (1) and Art. 46 of Directive 2007/46/EC in conjunction with Art. 5 (2) of Regulation (EC) No. 715/2007 was analysed. 8

A total of **2,524 court decisions** in so-called diesel cases were analysed. These decisions all fall within the so-called **evaluation period** from **1 January 2024 to 31 May 2025. 1,170** court decisions by German local and regional courts within the **first instance** were examined, as well as **1,354 appeal decisions** by regional courts and predominantly higher regional courts. The subject of the dispute in all cases was compensation under civil law for the damage actually suffered by the purchaser of a vehicle equipped with an unauthorised defeat device within the meaning of Art. 5 Para. 2 of Regulation No. 715/2007.[4] 9

[3] cf. https://poduschka.com/brisanter-kartellverdacht-im-abgasskandal/
[4] see **appendix** to this case study dated 31 May 2025 as PDF: Investigation results and case study

III. Empirical evaluation of the WVR

a. Predominant defeat in both instances

In the period under review, the courts of first instance dismissed the plaintiffs' claims in full in **1,025** of the **1,170** proceedings analysed. This corresponds to a rate of **88%** of the analysed first-instance decisions. 10

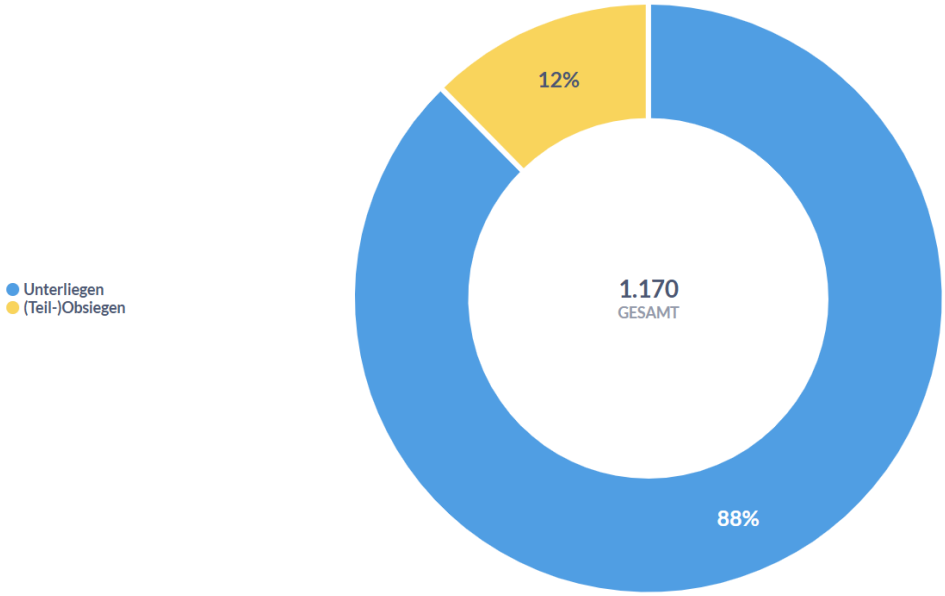

Figure 1: Ratio of full defeats and partial victories in the first instance

The decisions in the appeal instance were not significantly more favourable for the plaintiffs in the period under review. However, the claims of diesel buyers were also rejected in full in **891** of the **1,354** appeal proceedings analysed. This corresponds to a dismissal rate of **66%** of the appeal court decisions. In **463** cases (**34%**) of the analysed decisions, the court of appeal awarded the plaintiffs at least partial damages. 11

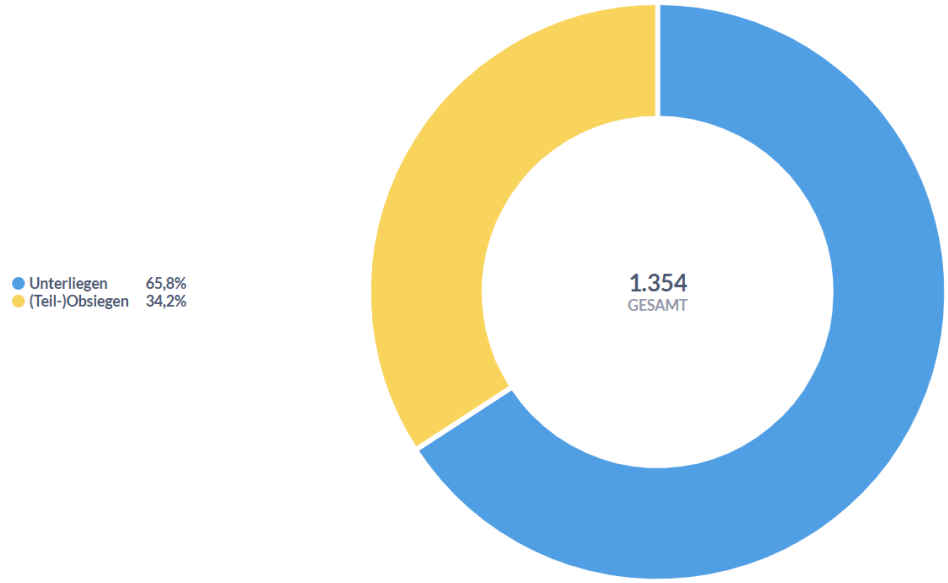

Figure 2: Ratio of full defeat to partial victory in the appeal instance

Thus, in a total of **1,916 of the 2,524 (76%)** court decisions analysed in both instances, in which action was taken against the defendant vehicle manufacturer due to a breach of Union law against

Article 18(1), Article 26(1) and Article 46 of Directive 2007/46/EC in conjunction with Article 5(2) of Regulation (EC) No 715/2007, the injured plaintiffs were not awarded any compensation at all.

In the remaining **608 (24%)** decisions, the court awarded the plaintiffs a claim for compensation. However, it should be noted that in all of these cases, the plaintiffs were awarded a proportionate share of the procedural costs, which either exceeded the claim for compensation, reduced it to zero or reduced it so significantly that the claim for compensation was ultimately marginalised. 12

b. Unavoidable prohibition error

(1) Explanations

In its judgement of 26 June 2023, the Federal Court of Justice opened up the possibility of exculpation, which is intended to exempt the vehicle manufacturer from liability for a sophisticated defeat device if he only believed firmly enough that his defeat device was approvable, regardless of whether it was actually approved (so-called "unavoidable prohibition error"). Numerous national specialist courts still make excessive use of this type of exclusion of liability (in favour of the party causing the damage with misconceptions). 13

This can be clearly demonstrated using the following examples: 14

1) OLG Brandenburg, order within the meaning of Section 522 (2) ZPO of 22 February 2024, Ref. 11 U 291/23:

   "If, in particular, the KBA as the competent type approval authority itself assumes the permissibility of the "thermal window" after its own examination, the defendant cannot be required to make a different assessment. Rather, in such a case there is an unavoidable prohibition error."

2) OLG Stuttgart, order within the meaning of Section 522 (2) ZPO of 13 May 2024, 16a U 2293/21:

   "A stay of proceedings pursuant to Section 148 ZPO is out of the question. (...) The same applies to the question of whether an unavoidable error of prohibition cancels out the accusation of fault. In its judgement of 26 June 2023 - VIa ZR 335/21 - para. 36ff, the BGH expressly stated that liability for issuing an incorrect certificate of conformity requires fault, whereby negligence is sufficient. The BGH expressly states: 'However, the law of the Federal Republic of Germany, which is the only law in question here for the justification of the claim for damages demanded by the European Court of Justice, does not provide a legal basis for liability for damages independent of the vehicle manufacturer's fault, regardless of the lack of a special legal relationship between the parties'. It cannot be assumed that the ECJ will object to the implementation of its judgement of 21 March 2023 - C-100/21 - by the BGH. Moreover, the ECJ has clarified all legal issues."

(2) Empirical evaluation

Of the **1,170** first-instance court decisions analysed, 1,025 (88%) denied the plaintiff's claim for compensation by the national district and regional courts. **Of these 1,025 judgements dismissing claims at first instance, the claim was rejected on the merits in a total of 278 cases (27%) due to a so-called unavoidable error of prohibition on the part of the vehicle manufacturer**. 15

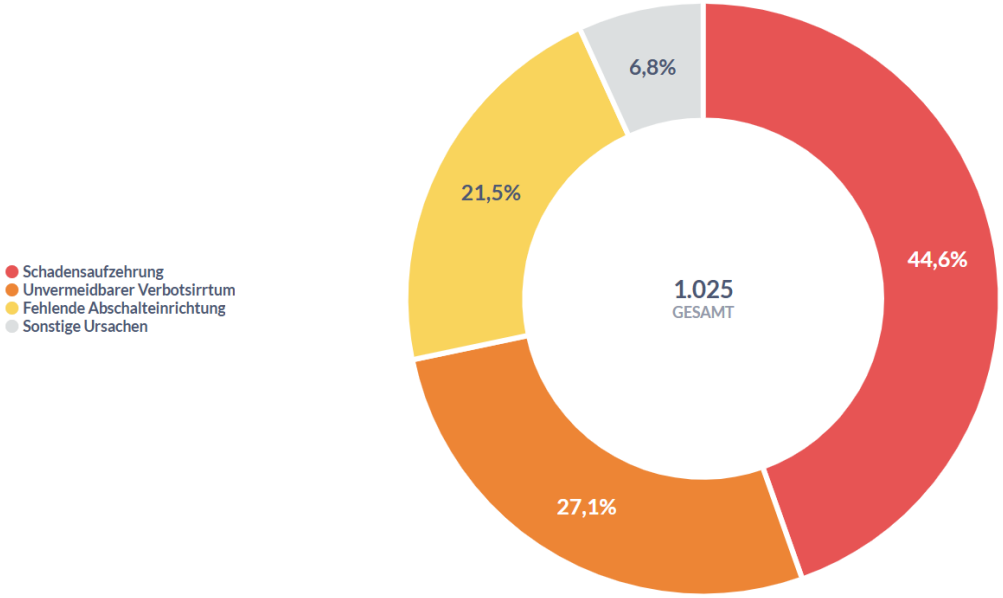

Figure 3: Reasons for losing in the 1st instance

Of the total of 1,354 appeal decisions analysed, the national appeal courts rejected the plaintiff's claim for compensation in 891 cases (66%). **Of these 891 appeal decisions dismissing the claim, the claim was rejected on the merits in a total of 214 cases (24%) due to a so-called unavoidable error on the part of the vehicle manufacturer.** 16

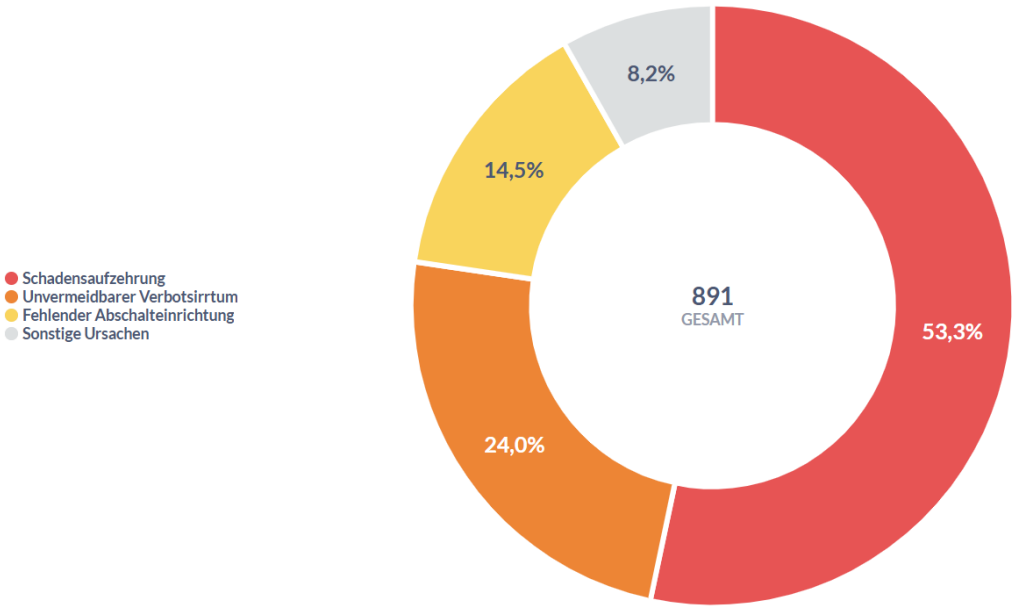

Figure 4: Reasons for losing the appeal (2nd instance)

(3) Legal categorisation

In its judgement of 26 June 2023, case no. VIa ZR 335/21, para. 64, the BGH justifies the "unavoidable prohibition error" as follows: 17

> *"The vehicle manufacturer can prove the unavoidability of a (...) prohibition error on the one hand by means of an EC type-approval actually granted if this EC type-approval covers the unauthorised defeat device used in all its relevant details in accordance with Article 5(2) of Regulation (EC) No 715/2007. However, the EC type-approval must then cover the defeat device in its specific design and also take into account any combinations of defeat devices that have been identified. cc) If proof cannot be provided in this way, the vehicle manufacturer may, on the other hand, demonstrate and, if necessary, prove that its legal interpretation of Article 5(2) of Regulation (EC) 64 65 - 36 - No. 715/2007 would have been confirmed by the authority responsible for the EC type-approval or for subsequent measures if it had made the appropriate enquiry (hypothetical approval). If it is certain that sufficient enquiry by the tortfeasor subject to a prohibition error would have confirmed his misconception, liability under Section 823 (2) BGB as a result of an unavoidable prohibition error is excluded even if the tortfeasor has not made such an enquiry (BGH, judgment of 27 June 2017 - VI ZR 424/16, NJW-RR 2017, 1004 marginal no. 16)."*

Significant doubts as to the compatibility with Union law of a so-called prohibition error that completely excludes the liability of the vehicle manufacturer result from the fact that such a prohibition error - as shown here - no longer represents a rare exceptional case, but is schematically assumed in a considerable number of cases. By definition, type approval covers a vehicle type, i.e. vehicles of a vehicle class that do not differ with regard to certain essential characteristics, Art. 2 (1), Art. 3 No. 3, 17 of Directive 2007/46, so that there can no longer be any talk of a permissible exception, as otherwise the principle of effectiveness would be unduly undermined. 18

It appears insufficient to justify an exclusion of damages on the basis of a hypothetical official decision without establishing what knowledge the tortfeasor itself had of the possible infringement. If the vehicle manufacturer had knowledge from other sources that the use of the defeat device used could violate the legal provisions applicable in the context of type approval, the manufacturer is not so worthy of protection that an official authorisation could exceptionally exempt him from liability. The principle of effectiveness also speaks against the consideration of a hypothetical authorisation. If a Member State were to largely grant vehicle manufacturers an unavoidable prohibition error in this way, the injured parties concerned would not receive any compensation. The appropriateness of the compensation amounts and also a deterrent effect of the penalties for offences, as deemed necessary by the Court of Justice, would no longer be guaranteed.[5] In addition, there is no hypothetical type authorisation in Union law. Rather, an authorisation requirement applies in principle. The exclusion of a claim for damages due to the use of unauthorised defeat devices on the basis of a "hypothetical" type approval would therefore violate the principle of effectiveness all the more. 19

c. Economic failure with a system

The Court is clear in its case-law to the effect **that national legislation which makes it practically impossible or excessively difficult for the purchaser of a motor vehicle** to obtain adequate compensation for the damage suffered as a result of the manufacturer of that vehicle 20

[5] see ECJ, judgement of 21 March 2023, Mercedes-Benz Group, Case C-100/21, para. 90 and 96.

infringing the prohibition laid down in Article 5(2) of Regulation No 715/2007 **is incompatible with higher-ranking EU law**.[6]

Furthermore, Article 13 of Regulation 715/2007/EC stipulates that sanctions against violations of this regulation must be "effective, proportionate and dissuasive".[7] In practice, however, this is not the case. 21

If the courts reach a judgement, the cumulative effect of the cap on damages at 5% to 15%, the de facto double counting of benefits of use and the distribution of legal costs under German national law in accordance with the German Code of Civil Procedure of 1879 (Section 92) leads to the result that the economic success of the proceedings lies with the tortfeasor and not with the injured party. 22

(1) Limitation of the claim for damages to a maximum of 15% of the purchase price
(a) Explanations

According to the BGH, the trial judge must estimate the amount of the differential damage, taking into account all the circumstances, according to their own judgement (Section 287 ZPO). It should be noted that the estimated damages must be at least 5% of the purchase price paid for reasons of effectiveness under EU law, but may not exceed 15% of the purchase price paid.[8] The BGH justifies the limitation to 15% as follows: 23

> *"Conversely, damages owed solely under Section 823 (2) BGB in conjunction with Section 6 (1), Section 27 (1) EC-CCT and not also under Sections 826, 31 BGB cannot be higher than 15% of the purchase price paid for reasons of proportionality. (...) This is because liability pursuant to Section 823 (2) BGB also applies to the vehicle manufacturer in cases other than those of immoral intentional damage, not only in relation to the new car buyer, but also in relation to any subsequent buyer of the motor vehicle as a used car."*

(b) Empirical evaluation

The specific amount of damages awarded to the plaintiffs in the event of a (partial) victory in the evaluation period from 1 January 2024 to 31 May 2025 was also examined; this was the case in **a total of 608 of 2524 cases (24%)** across all instances. 24

In the first instance, the plaintiffs received an average compensation amount of **EUR 3,701.13** (**median: EUR 3,319.50**) in a total of 145 out of 1,170 (partially) successful proceedings. However, these proceeds are offset by an average purchase price of EUR 39,913.43 (median: EUR 36,141.55). As a result, the plaintiffs were **only** awarded an **average and median of approx. 9.2%** of the purchase price as compensation in the cases that were successful from their perspective. 25

[6] cf. ECJ, judgement of 21 March 2023, Mercedes-Benz Group, Case C-100/21, para. 93.
[7] cf. also the same wording in Art 13 Directive on Unfair Commercial Practices 2005/29/EC and ECJ, judgement loc. cit., para. 90.
[8] see BGH, judgement of 26 June 2023, ref. VIa ZR 335/21, para. 71 et seq.

In the appeal instance, an average of EUR 3,764.27 (median: EUR 3,052.20) was awarded as compensation in the event of a so-called (partial) victory (in 463 of the 1,354 decisions analysed). In the cases underlying these decisions, the vehicles had an average purchase price of EUR 40,013.23 (median: EUR 37,674.96). On average, the plaintiffs were therefore awarded 9.4% of the purchase price (median: 8.1%) as compensation in the appeal proceedings, which were successful on the merits and in terms of amount. 26

However, the predominant legal costs to be borne by the injured vehicle purchaser and plaintiff in accordance with national civil procedure law (Section 92 ZPO) subsequently reduced the previously awarded compensation amount again, or even exceeded it (see **section B.III.c.(3)(b)** below). 27

(c) Legal categorisation

Some of the literature doubts that the requirements of the BGH are compatible with the principle of effectiveness under EU law. This is because it cannot be assumed that a "fee" of up to 15% of the purchase price would prevent vehicle manufacturers from using unauthorised defeat devices (Horacek, VuR 2023, 337 [345]). 28

It is also surprising that, when setting the rigid 15% limit, the BGH does not say a word about the decision of the Schleswig Administrative Court of 20 February 2023 on temperature-dependent defeat devices, which was issued a few months before the ruling of 26 June 2023 and which made the decommissioning (or costly hardware retrofitting) of the vehicles concerned much more likely.[9] Accordingly, it is doubted whether "in view of the most recent administrative court rulings", the important aspect of the probability of decommissioning "is fully covered by the upper limit of 15 %".[10] 29

(2) Double equalisation of benefits

(a) Explanations

According to the BGH decision of 26 June 2023, case no. VIa ZR 335/21, the injured plaintiff must also have the benefits offset to reduce the damage (so-called benefit equalisation). The benefits to be offset initially include the residual value of the vehicle at the time of the court decision. This also applies if the vehicle was not sold and therefore no residual value was capitalised, but remains a fictitious figure. In addition, a monetary value is taken into account according to the following formula, which should correspond to the share of the vehicle's consumption (so-called linear compensation for use): 30

$$(Kaufpreis\ x\ gefahreneKilometer) \div (erwartete\ Gesamtlaufleistung - Kilometer\ bei\ Kauf)$$

[9] see VG Schleswig, judgement of 20/02/2023, 3 A 113/18, ECLI:DE:VGSH:2023:0220.3A113.18.00
[10] cf. Schaub, NJW 2023, 2236, 2238 there para. 7.

If the sum of the residual value and compensation for use exceeds the value of the vehicle at the time of purchase, the compensation is reduced by the excess amount. If the reduction exceeds the amount of the entire claim, the claim is fully utilised. 31
The amount of the expected total mileage and the residual value is freely estimated by the courts as part of a discretionary judgement granted under national civil procedure law (Section 287 ZPO) and generally varies between 250tkm and 350tkm for diesel vehicles. In addition, special calculations for so-called "infrequent drivers" or a "residential value" of a vehicle to be taken into account are occasionally assumed and have a claim-reducing effect.

(b) Empirical analysis

Of the **1,025** court decisions dismissing claims in the first instance, a claim for compensation was denied in a total of **457 cases (45%)** despite a breach of Union law by the vehicle manufacturer that gave rise to liability (due to the use of an unauthorised defeat device) based on the assumption that the damage had been fully absorbed. 32

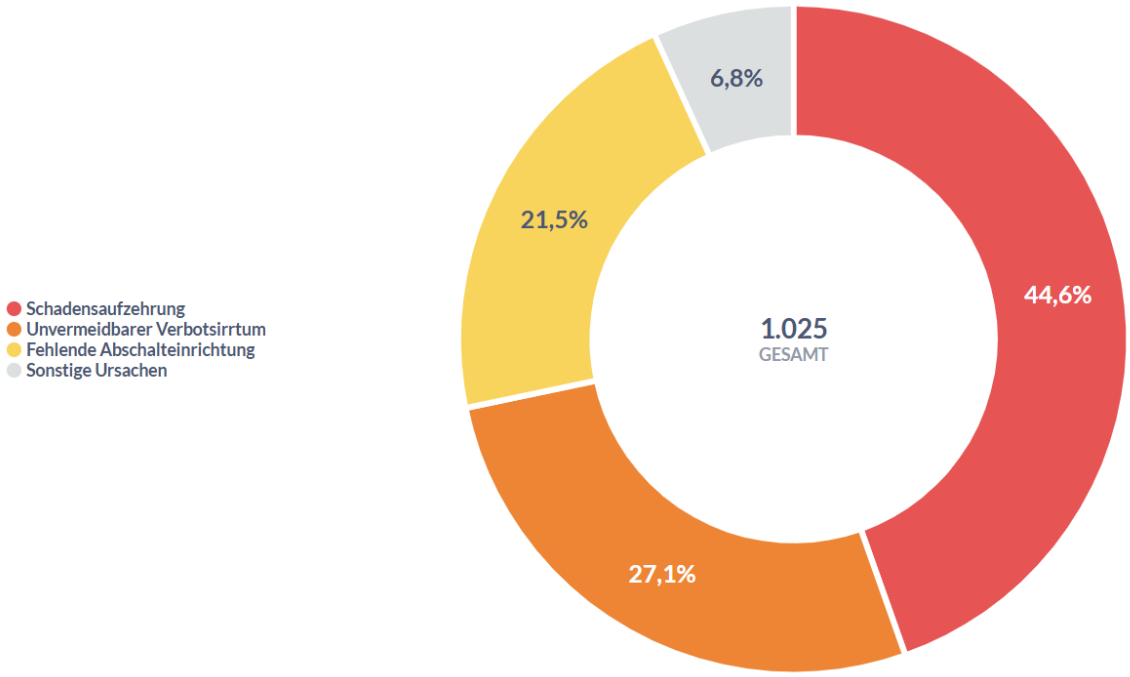

Figure 5: Reasons for losing in the 1st instance

Of the total of **891 appeal decisions dismissing claims**, the claim was denied in a total of **475 cases (53%)** despite a breach of Union law by the vehicle manufacturer (due to the use of an unauthorised defeat device) that gave rise to liability, based on the assumption that the damage had been fully absorbed. 33

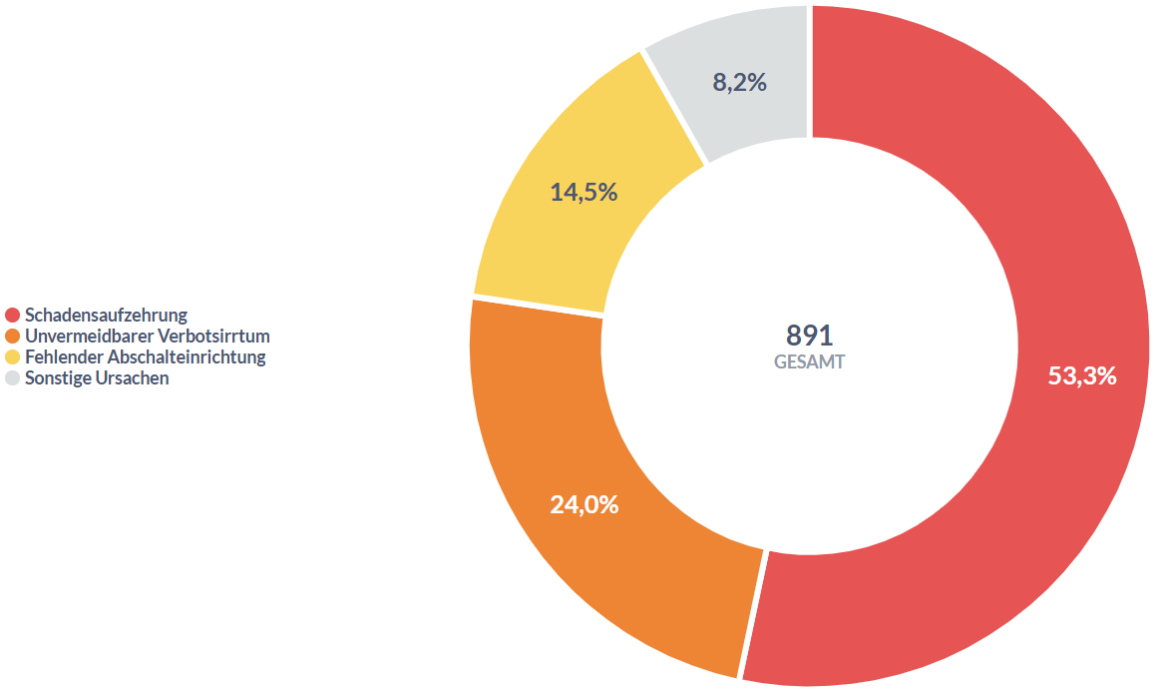

Figure 6: Reasons for losing the appeal (2nd instance)

(c) Legal Classification

The benefits of use and the residual value of the vehicle are taken into account in accordance with the case law of the Federal Court of Justice on the **tort interest**[11] in 2020 and on the **differential damage**[12] in 2023 to reduce the damage twice, insofar as they exceed the value of the vehicle when the purchase contract was concluded (purchase price paid less the amount of damages). 34

The purchaser of a vehicle does not enrich himself when he uses his vehicle. His vehicle, which he has already purchased at too high a price due to the vehicle manufacturer's infringement of Art. 5 Para. 2 of Regulation 715/2007, loses further value with every kilometre driven. The owner's benefit of use is therefore offset by a mirror image reduction in the value of his property. Offsetting these advantages of use in favour of the manufacturer is therefore not a skimming off of an enrichment on the part of the purchaser, but a double reduction in assets (firstly through the loss in value of his property, secondly through the reduction of the claim for damages). This applies all the more if the amount of damages is reduced to zero in the course of such an offsetting and the plaintiff must allow the residual value of his vehicle to reduce his claim even if he has not sold it at all and consequently has not realised any sales proceeds. 35

Consequently, it should be noted: The offsetting of the benefits of use leads to the fact that the compensation of the damage suffered, which is required under EU law, is made practically impossible from a certain distance travelled after the purchase. 36

In the literature and parts of case law, it is also criticised that by applying the equalisation of benefits in combination with the denial of so-called tort interest, the BGH misjudges the nature 37

[11] see BGH, judgement of 30 July 2020, file no. VI ZR VI ZR 397/19, para. 25.
[12] see BGH, judgement of 26 June 2023, Ref. 335/21, para. 44.

and function of tort law as well as central values of applicable civil law and contradicts the case law of other civil courts.[13] **This is because, if the tort interest is intended to compensate for the loss of the usability of the (fully or partially) seized material substance and the vehicle that the diesel buyers were able to use has taken the place of the money, on closer inspection this is also a double calculation of compensation for the use of the motor vehicle at the expense of the vehicle purchasers, if the BGH takes into account the abstract benefit of use at the expense of the vehicle purchasers on the one hand and then deducts the concrete compensation for use - calculated on the basis of the kilometres driven and a hypothetical total mileage - from the compensation to be paid on the other.[14]**

Furthermore, taking into account the residual value not realised through resale usually means that any differential damage would already have been used up at the time the contract was concluded without the buyer having driven a single kilometre with their vehicle. In the opinion of the BGH, this is nevertheless in conformity with EU law, taking into account the requirement of effective and dissuasive sanctions. [15] 38

The BGH denies the purchaser's claim against the vehicle manufacturer for so-called "tort interest" pursuant to Section 849 BGB from the time of the damaging act (payment of the purchase price) in the event of the use of an unauthorised defeat device. 39

It makes a serious economic difference whether a vehicle buyer only receives interest on the overcharged purchase price from the purchase contract (differential damage) years later from the date of service of the claim or whether he already receives interest on the overpaid purchase price for the period from the date of purchase. Conversely, there is no objective reason why a vehicle manufacturer should be able to use the overpayment for years without interest and operate with it without having to hand over the resulting unlawful enrichment to the injured party. It is contrary to effective compensation for the damage incurred if the statutory interest claim is denied for the period from the conclusion of the purchase agreement. The money spent on the vehicle is no longer available to the vehicle buyer from the time of payment of the purchase price, i.e. he has lost the usability of this amount upon payment of the purchase price. 40

It would probably not be compatible with the principle of effectiveness under EU law and Art 13 of Regulation 715/2007/EC, according to which sanctions against infringements of this Regulation must be "effective, proportionate and dissuasive",[16] if damage already occurred upon conclusion of a contract for the purchase of a vehicle in breach of EU law due to an excessive purchase price, but interest on this damage, namely the excessive purchase price, was only awarded from the time the action was served, which may be several years after the time of the damage. In this respect, in light of the principle of effectiveness under EU law in conjunction with Art. Article 13 of Regulation 715/2007/EC, the fact that the infringement of Regulation 715/2007/EC was culpable, systematic and took place over a longer period of time to the detriment of a large number of vehicle purchasers and that the compensation for the damage incurred in the individual case falls far short of a general absorption of the so-called infringer's profit should also be recognised. 41

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[13] see Heese, NJW 2020, 2779 [2784], para. 85.
[14] see OLG Karlsruhe judgement of. 19 November 2019, Ref. 17 U 146/19, BeckRS 2019, 28963 para. 116; OLG Cologne judgement of 26 May 2020, Ref. 26 May 2020, Ref. 4 U 188/19, BeckRS 2020, 15291 para. 40; OLG Oldenburg judgement of 12 March 2020, Ref. 14 U 302/19, BeckRS 2020, 3450 para. 57.
[15] see BGH, judgement of 26 June 2023, Ref. VIa ZR 335/21, para. 44, 80.
[16] cf. also the same wording in Art 13 Directive on Unfair Commercial Practices 2005/29/EC

A claim for interest from the time of the harmful act, i.e. the purchase of the vehicle, should therefore be required under EU law. National regulations that refuse to do so and only award interest from the time of lis pendens or default make it more difficult to effectively enforce claims for damages and are contrary to the principle of effectiveness and the principle of full compensation for damages under Article 5(2) of Regulation (EC) No 715/2007.[17] It is at least doubtful whether it is in conformity with EU law to award interest to the vehicle purchaser only from the time of lis pendens or later and not from the time of the harmful act by the vehicle manufacturer. The Court of Justice has clarified in several decisions that the principle of effectiveness and the principle of full compensation are violated if national provisions or their interpretation hinder the enforcement of claims under EU law. 42

In its case law, the Court of Justice emphasises that a claim for damages under EU law must include full compensation for the damage suffered. This also includes the right to interest from the time of the harmful act in order to ensure the economic equality of the injured party. Interest on arrears is not merely an ancillary claim, but an essential component of compensation.[18] 43

(3) The allocation of legal costs

(a) Explanations

Taking into account the allocation of legal costs under national civil procedure law (Sections 91 et seq. of the German Code of Civil Procedure), the economic result of the court proceedings pending at the time of the BGH ruling is regularly reversed and becomes downright absurd. Accordingly, the injured plaintiffs always lose their case in the context of an overall economic assessment - even if they have won the case in the legal sense. This leads to a paradoxical situation that cannot be reconciled with the requirements of EU law: **in Germany, it is not the vehicle manufacturer that compensates the plaintiff for the damage, but the plaintiffs who compensate the manufacturers if they win the case.** 44

Under German civil procedure law, the losing party must bear the costs of the legal dispute and, in particular, reimburse the costs incurred by the opponent insofar as they were necessary for the appropriate prosecution or legal defence. This so-called "all or nothing" principle is regulated in Section 91 ZPO. By way of derogation from this, the costs of the legal dispute are to be set off against each other or divided proportionately if each party is partly successful and partly unsuccessful in the legal dispute (Section 92 (1) ZPO). According to this, the court generally determines a percentage cost ratio based on the actual ratio between winning and losing in the main proceedings (so-called basic cost decision). 45

The application of Union law in accordance with the interpretation standards of the Court of Justice's case law in Case C-100/21 of 21 March 2023 led to the Federal Court of Justice establishing a maximum claim of 15% as the upper limit in its decision of 26 June 2023. However, at the time of its decision, it is estimated that up to one hundred thousand court proceedings were pending in Germany in which the subject of the action was the claim for rescission of the purchase contract (total reparation). After the decision, the plaintiffs had to change their claims from the so-called major to the minor damages (differential damages). If they did not do so, their claims were dismissed in their entirety.[19] 46

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[17] cf. ECJ, judgement of 21 March 2023, Mercedes-Benz Group, Case C-100/21, para. 93.

[18] See ECJ, judgements of 13 July 2006, Manfredi and others, C-295/04 to C-298/04 and of 21 December 2016, Gutiérrez Naranjo and others, C-154/15, C-307/15 and C-308.

[19] see BGH, judgement of 23.04.2024, Ref. 1132/22, para. 14.

Although the BGH reduced the claim for damages to 5% to 15% of the purchase price, it made no statement in the light of EU law to the effect that if a vehicle manufacturer is found guilty of using an unauthorised defeat device, it must also bear all or at least the majority of the legal costs. 47

According to the decision of the Federal Court of Justice, the conversion of the claim, which is necessary in terms of civil procedure, is a permissible amendment to the claim under German civil procedure law, because the claim for so-called major damages, which was originally based primarily on Sections 826, 31 BGB, on the one hand, and the claim for differential damages pursuant to Section 823 (2) BGB in conjunction with Section 6 (1), 27 (1) EG-FGV, on the other, are merely based on different methods of calculating damages. §§ Sections 6 (1), 27 (1) EG-FGV on the other hand are merely based on different methods of calculating damages, which are essentially linked to the buyer's investment of trust when concluding the purchase contract. [20] 48

This change of application affected almost all diesel cases pending before German regional courts, higher regional courts and the Federal Court of Justice by 23 June 2023. Based on a survey of its members, the WVR estimates that this amounted to up to 100,000 proceedings. The major damages claim is for the cancellation of the purchase contract, the new differential damages claim is for between 5% and 15% of the purchase price. Under German law, the amount in dispute is the yardstick for the costs of proceedings. If a plaintiff seeks rescission, the value in dispute is the purchase price of the vehicle less the benefits of use.[21] 49

(b) Empirical analysis

In Germany, the costs of court proceedings are based on the amount in dispute and the cost burden of the respective litigant is based on the ratio of their victory and defeat. The cost ratios of the plaintiff in the event of a (partial) victory contained in the court decisions were also analysed here. 50

On average, the plaintiff has to bear 60% (median 66%) of the procedural costs of the first instance in the successful cases analysed here. In the case of an original reversal action with a fee dispute value (purchase price less compensation for use) of EUR 30,000, this corresponds to statutory procedural costs of at least **EUR 6,619.43** for the first instance only**; of this, the plaintiff has to bear an average of EUR 3,971.66 (median: EUR 4,368.82). This means that, as a rule, his compensation sum is completely consumed by the cost sharing**. 51

[20] see BGH, judgement of 26 June 2023, ref. VIa ZR 335/21, para. 45.
[21] see BGH, judgement of 25 May 2020, VI ZR 316/20, para. 57.

Prozesskosten	1. Instanz	Berufung	Revision
	30.000,00 €	30.000,00 €	30.000,00 €
Gerichtskosten			
Summe Gerichtskosten	1.347,00 €	1.796,00 €	2.245,00 €
Eigene Anwaltskosten RVG			
Summe eigene Anwaltskosten	2.864,93 €	3.205,86 €	4.342,31 €
Gegnerische Anwaltskosten			
Summe gegnerische Anwaltskosten	2.407,50 €	2.694,00 €	3.649,00 €
Gesamtsumme Prozesskosten	6.619,43 €	7.695,86 €	10.236,31 €
Gesamtsumme alle Instanzen	24.551,60 €		

Figure 7: Extract from Foris process cost calculator[22]

The proceedings analysed in the appeal instance were even more economically disadvantageous for the plaintiffs despite their legal success on the merits. This is because the procedural costs imposed on the plaintiffs for both instances together amounted to an average of 81% (median: 88%). 52

With an **original fee dispute value of EUR 30,000.00**, the statutory procedural costs for both instances totalled **EUR 14,315.29**. If the plaintiff bears an average of 81% (median: 88%) of these costs, this corresponds to total costs of **EUR 11,595.38** (or a median of **EUR 12,597.45**) for the legal action brought in two instances. The significance of this far greater burden of legal costs for the plaintiff compared to the defendant vehicle manufacturer is illustrated particularly vividly by the following example: 53

Accordingly, in an average case (vehicle purchase price of EUR 40,013.23; median: EUR 37,674.97) and a fee dispute value of EUR 30,000.00, the appellant would only have been awarded compensation at all with a probability of 24%, namely in the amount of **EUR 3,764.27** (median: **EUR 3,052.20**). However, these proceeds are offset by the pro rata costs of the proceedings over two instances totalling **EUR 11,595.38** (or a median of **EUR 12,597.45**) at the expense of the plaintiff. 54

This means that in all cases in which the plaintiff originally (justifiably) sought a reversal (total reperation) and had to change his claim in the course of the BGH ruling of 26 June 2023 during the ongoing proceedings, the procedural costs imposed on him exceed the compensation amount awarded **by** an average of **2.1 times, i.e. by EUR 7,831.11, and by a median of 3.1 times, i.e. by EUR 9,545.25**. On balance, this results in a clearly negative overall economic result for the injured vehicle purchaser, even in the event of a successful legal action under liability law; it therefore makes no difference to the plaintiff whether his action against the vehicle manufacturer is successful or not, as he comes away empty-handed in both cases. 55

Economic loss with cost ratio at the expense of the plaintiff:

[22] cf. https://www.foris.com/prozesskostenrechner/

Even in the 145 proceedings examined in the first instance and successful for the plaintiff (calculation based on the judgement amount and cost ratio), a total economic loss arises for the plaintiff if the claim is pursued legitimately. 56

I. First instance (legal costs: EUR 6,619.43)

Cost item	average	Median
Compensation amount after judgement	EUR 3,701.13	EUR 3,319.50
Litigation costs at quota (60 or 66%)	- EUR 3,971.66	- EUR 4,368.82
Balance of judgement and legal costs	**EUR -270.53**	**EUR -1,049.32**

I. and II. Instance (legal costs: EUR 14,315.29)

Cost item	average	Median
Compensation amount after judgement	EUR 3,764.27	EUR 3,052.20
Litigation costs at quota (81 or 88%)	EUR -11,595.38	- 12,597.45 EUR
Balance of judgement and legal costs	**EUR -7,831.11**	**EUR -9,545.25**

In the case of successful proceedings for the plaintiff in the second instance (calculation based on the amount of the judgement and the median cost ratio), there is no economic advantage for the plaintiff if the claim is pursued legitimately, but rather serious economic damage. 57

Even in the event of a fully successful judgement for differential damages, this can only lead to a partial upholding of the claim as a percentage of the original claim (major damages). This means that the costs of the proceedings with which the plaintiff is burdened regularly exceed the claim for compensation awarded to him. **From an overall economic perspective, this results in a negative balance on the plaintiff's side despite the partial upholding of the claim, even though the original claim (high damages) was not a misrepresentation or even an abuse, but rather a justified and appropriate claim according to the standards of the national supreme courts.**[23] 58

(c) Legal Classification

In its settled case-law, the Court of Justice recognises a non-negligible risk that the holders of a legal position conferred by Union law may be deterred by national civil procedural law from enforcing the claims to which they are entitled under Union law because of the costs of legal proceedings in comparison with the amount of the disputed claim.[24] 59

[23] see BGH, judgement of 5 June 2024, case no. IV ZR 140/23, para. 8.
[24] See ECJ, judgements of 13/09/2018, Profi Credit Polska, C-176/17, para. 69; of 18/02/2016, Finanmadrid EFC, para. 52; of 14/03/2013, Aziz, para. 58; and of 14/06/2012, Banco Español de Crédito, para. 54.

Based on this risk, the Court of Justice has ruled that, under certain circumstances, provisions of national civil procedural law may be incompatible with higher-ranking Union law and must therefore not be applied. According to the case law of the Court of Justice, this is the case if the holder of a legal position that protects individual interests under EU law is ordered to pay part of the procedural costs in the event of a partial rejection of the recognised claim, even though he may be prevented from correctly quantifying the claim due to an unclear legal situation or contradictory practice.[25] 60

This can be transferred to the case constellations in the diesel complex. If, following a finding that the vehicle manufacturer has breached the prohibition contained in Article 5(2) of Regulation No. 715/2007, the request for adequate compensation of the vehicle purchaser is only partially granted because it is practically impossible or excessively difficult for the vehicle purchaser and plaintiff to precisely determine the scope of his claim for compensation in advance, a procedural rule according to which this vehicle purchaser has to bear part of the costs of such proceedings is likely to deter him from exercising his rights conferred by Union law, in particular the rights under Art. 18(1), Article 26(1) and Article 46 of Directive 2007/46/EC in conjunction with Article 3(10) and Article 5(2) of Regulation (EC) No 715/2007 in conjunction with the case-law of the Court of Justice, judgment of 17 December 2020, ref. C-693/18, judgement of 14.07.2022, ref. C-128/20, C-134/20, C-145/20, judgement of 21.03. 2023, ref. C-100/21, as this protects the individual interests of the individual purchaser of a motor vehicle vis-à-vis its manufacturer. 61

Accordingly, the costs of the proceedings could be imposed in full on the defendant vehicle manufacturer under the primacy of Union law, disregarding Section 92 ZPO. 62

d. Result of the evaluation

The court decisions in the period analysed were largely negative for the aggrieved vehicle buyers. This applies to both the first instance and the appeal instance. For example, 88% of first-instance decisions and 66% of appeal decisions dismissed the plaintiff's claim for damages against the respective vehicle manufacturer in its entirety. 63

The most important reason given by national courts for rejecting claims for damages in both instances was the assumption that the damages had been exhausted, with this accounting for more than half (53%) of the dismissal decisions on appeal. In the first instance, 45% of the court decisions dismissing claims were still based on an assumed absorption of damages. This can be seen as a structural reason for rejection. **The second most important reason given** by the courts for dismissing a claim in both instances was the possibility of structural exculpation due to legal error on the part of the vehicle manufacturer, the so-called "unavoidable prohibition error". This was the basis for 24% of the dismissed appeal decisions and 27% of the first-instance court decisions. 64

IV. Conclusion

The case law of the Federal Court of Justice and the judgements of German civil courts in the emissions scandal based on the standards established by it systematically undermine Union environmental law that protects individuals. 65

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[25] See ECJ, judgements of 21 March 2024, Profi Credit Bulgaria, C-714/22, para. 82-87; and of 16 July 2020, Caixabank and Banco Bilbao Vizcaya Argentaria, C-224/19 and C-259/19, para. 83, 98.

In this country, it is practically impossible for the buyer of a motor vehicle to receive appropriate compensation for the damage caused by the vehicle manufacturer's violation of the ban contained in Art. 5 Para. 2 of Regulation No. 715/2007. In some cases, the courts deny the existence of an unlawful defeat device, contrary to the findings of the ECJ, and in other cases they reject claims on the grounds that the vehicle manufacturer made an unavoidable mistake in believing that the device was capable of being approved. 66

If the courts come to a conviction, the accumulation of the cap on damages of 5% to 15%, the legal institution of the so-called equalisation of benefits and the distribution of legal costs under national law in accordance with the Code of Civil Procedure of 1879 leads to an absurd result. Accordingly, the injured plaintiffs always lose their proceedings pending at the time of the Federal Court of Justice's decision in June 2023 as part of an overall economic assessment - even if they have won the case in the legal sense. This leads to a situation that simply cannot be reconciled with EU law: in Germany, it is not the vehicle manufacturer that is liable for the damage it has caused, but the plaintiff himself, if he wins the case, has to pay a kind of penalty fee to the tort-feasor for pursuing his claims protected under EU law. 67

With the upcoming decision of the Court of Justice on the request for a preliminary ruling from the Ravensburg Regional Court (Case C-666/23), the practical effectiveness of EU environmental law is once again being negotiated. The length of time it has taken the German courts to deal with the diesel issue and the lack of willingness on the part of vehicle manufacturers to reach a consensual settlement of claims alone shows that, without clear guidance from the Court of Justice, national courts are undermining the principle of effectiveness of EU law and are simply unwilling to abandon their predominantly polluter-friendly legal approach in line with EU law, let alone impose effective, proportionate and dissuasive sanctions on polluters. 68

Only if the Court of Justice clarifies its guidelines from Case C-100/23 will it be able to ensure that its requirements from the decision of 21 March 2023, Case C-100/21, para. 93, are sufficiently taken into account in the Union. Accordingly, it must not be made practically impossible or excessively difficult for the purchaser of a motor vehicle to obtain adequate compensation for the damage suffered as a result of the manufacturer's infringement of Article 5(2) of Regulation No 715/2007. 69

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