

Conclusion of the legal opinion „Rechtsgutachten zur Festsetzung von Geldbußen gegenüber Kraftfahrzeugherstellern wegen der Verwendung illegaler Abschalteinrichtungen“

by Professor Dr. Remo Klinger
GEULEN & KLINGER Rechtsanwälte

+++ The full legal opinion (German only) is available at <http://l.duh.de/p180718> +++

A. Conclusion

National law provides for the possibility of imposing fines on manufacturers of motor vehicles which have placed vehicles with unauthorised defeat devices on the market. In determining these association fines, a distinction must be made between fines imposed for committing criminal offences and fines imposed for administrative offences. Of particular relevance for the amount of the fine to be imposed is whether the offences in question were committed intentionally or negligently. The public prosecutor's office in Braunschweig made use of this option with regard to VW AG and imposed a fine of 1 billion euros.

However, this fine does not take account of the fact that fines should also be imposed for the issue of invalid Certificates of Conformity. These are different breaches of duty than the deeds punished to date by the public prosecutor's office in Braunschweig. Here the fine amounts to €5,000 per vehicle. If we take into account the 2.6 million VW vehicles affected from the start of the diesel scandal in 2015, this amounts to an additional sum of 13 billion euros. The fine imposed on VW AG to date is thus *at least 12 billion euros too low*.

This is especially true for all the other car manufacturers against whom no fines have yet been imposed.

These include not only domestic car manufacturers who have used illegal defeat devices (such as Daimler, Audi and Opel), but also foreign manufacturers who sold vehicles on the German market with invalid certificates of conformity (such as Fiat). The Federal Motor Transport Authority (“KBA - Kraftfahrt-Bundesamt”) cannot influence the EC type-approval granted abroad for foreign manufacturers. However, this does not mean that administrative offences committed in Germany cannot be punished in Germany.

If no further fines were to be imposed by German state authorities, this would result in a

violation of the obligation under EU law to impose dissuasive sanctions for infringements of the type-approval framework for motor vehicles. The already pending infringement proceedings against Germany, initiated by the EU Commission, will have to be continued until this has been done.

In addition, recognized environmental law associations may pursue in court any omission in the event of breaches of environmental law under the amendment to the Environmental Appeals Act ("*UmwRG - Umwelt-Rechtsbehelfsgesetz*") which came into force in 2017 (§ 1 para. 1 sentence 1 no. 6 EAA). According to the express instructions of the Compliance Committee of the Aarhus Convention, this also applies to breaches of environmental law in the registration of motor vehicles. Any kind of reference to installations is therefore incompatible with EU law and, on the basis of the most recent case-law of the European Court of Justice in its judgement of 20 December 2017 (Case "Protect"), should be disregarded where there is any doubt. The relevant type-approval standards serve not only to ensure proper road traffic, but first and foremost to protect the environment. The lack of penalties for such violations is in itself a violation of environmental law regulations, which could be pursued in court by recognised environmental associations.

Prof. Dr. Remo Klinger
(Attorney at Law)