Case C-308/23

Supplement to the request for a preliminary ruling

Date lodged:

1 August 2023

Referring court:

Landgericht Duisburg (Germany)

Date of the decision to refer:

21 July 2023

Applicant:

Mr Y V

Defendant:

Mercedes-Benz Group AG

[…]

LANDGERICHT DUISBURG

DECISION

1 O 223/20

In the case of

Mr Y V,

applicant,

Represented by: BRR Automotive Rechtsanwaltgesellschaft mbH, Berlin,

v

Mercedes-Benz Group AG, represented by its board of directors, Mercedesstraße 120, Stuttgart,

defendant,

Represented by: Rechtsanwälte Junge und Kollegen, Cologne,

the First Civil Chamber of the Landgericht Duisburg (Regional Court, Duisburg, Germany),

on 21 July 2023,

acting through Judge Nennecke, single judge at the Landgericht,

ruled:

In addition to the order of 26 April 2023, the Court of Justice of the European Union ('Court of Justice') should be requested to respond to the following additional questions as part of the preliminary ruling already requested on the basis of the order of 26 April 2023, Article 267 TFEU:

10. Are the provisions of Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007, in particular Articles 18(1) and 3(36) of that directive also intended to protect the individual purchaser of a vehicle specifically against making the acquisition of a vehicle which does not comply with the requirements of European Union law, which he or she would not have made in the knowledge that the vehicle does not meet the requirements of European Union law because it was not intentional on his or her part?

11. Irrespective of the answer to the above question, under European Union law, in the event of an infringement by the vehicle manufacturer of the provisions of Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 or of the provisions of national law adopted on the basis of that directive, in particular a case of infringement by the vehicle manufacturer of the prohibition on issuing an incorrect certificate of conformity, must the manufacturer always or, in any event, in certain cases, be obliged to exempt the purchaser in full from the consequences of the acquisition of a vehicle which does not meet the requirements of European law based on that infringement, therefore, should he or she so request, to reimburse the cost of acquiring the vehicle, if applicable, concurrently in return for delivery and transfer of the vehicle and offsetting the value of any other benefits obtained by the purchaser as a result of the acquisition of the vehicle? If that applies only in certain instances: In which instances is this the case?

12. If Question 11 is to be answered in the negative or only in the affirmative in certain cases: Is the limitation of the claim for compensation of the purchaser of a vehicle which does not meet the requirements of European law as regards its exhaust emissions and/or the characteristics of its emission control system in line with the amount by which the vehicle purchaser has overpaid, taking into

account the risks associated with the unlawful defeat device, still consistent with the requirements of European law if the manufacturer has merely negligently issued an incorrect certificate of conformity for the vehicle, from which its compliance with all the regulatory acts at the time of its manufacture is evident? If this is not always the case: In which instances is this not the case?

13. If Question 12 is to be answered in the affirmative: Is the limitation of the claim for compensation of the purchaser of a vehicle which does not meet the requirements of European Union law as regards its exhaust emissions and/or the characteristics of its emission control system in line with the amount by which the vehicle purchaser has overpaid, taking into account the risks associated with the unlawful defeat device, but no more than 15% of the purchase price, still consistent with the requirements of European Union law if the manufacturer has merely negligently issued an incorrect certificate of conformity for the vehicle, from which its compliance with all the regulatory acts at the time of its manufacture is evident? If this is not always the case: In which instances is this not the case?

I.

The facts underlying the present dispute arise, in so far as they are relevant to the preliminary ruling sought, from the order of the Chamber of 26 April 2023 referred to in the operative part and, moreover, from Case 1 O 223/20 – Landgericht Duisburg, already submitted to the Court of Justice (Case C-308/23).

II.

The reason for the supplement to the questions referred, formulated in the order cited regarding Questions 10 and 11 set out in the operative part, ensues from the arguments of the Bundesgerichtshof (Federal Court of Justice, Germany) in its judgments of 26 June 2023 (Case Via ZR 335/21, Via ZR 533/21 and Via ZR 1031/22), which were issued with regard to the judgment of the Court of Justice of 21 March 2023 (Case C-100/21).

1.

As is apparent from its aforementioned order of 26 April 2023, the Chamber inferred from Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 a prohibition on issuing an incorrect certificate of conformity for a vehicle for which a certificate of conformity must be issued under Articles 18(1) and 3(36) of that directive, which is also consistent with the understanding of the Bundesgerichtshof (see in particular the judgment of 26 June 2023, Case Via ZR 335/21, paragraph 23) and it further inferred from the aforementioned judgment of the Court of Justice of 21 March 2023 that that prohibition is also intended to protect individual purchasers of vehicles from

acquiring a vehicle which does not comply with the requirements of European Union law.

However, following a fresh in-depth examination, the question arises as a result of the arguments of the Bundesgerichtshof in its three judgments cited above before point 1, as to whether the provisions of Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007, in particular the prohibition on issuing an incorrect certificate of conformity for a vehicle, also serve the purpose of protecting the individual purchaser specifically against making an acquisition of a vehicle which does not comply with the requirements of European Union law, which in the knowledge of the actual circumstances he or she would not have intended to make, and which he or she therefore also would not have made, thus also protecting his or her right to economic self-determination and, in particular, his or her interest in not being induced to enter into an unintended obligation.

If that is the case, the right to reimbursement of the purchase price, relied on by the applicant in the present case, concurrently in return for delivery and transfer of the vehicle and deducting the value of the benefits which he himself derived from the vehicle pursuant to Paragraph 823(2) of the Bürgerliches Gesetzbuch (German Civil Code; BGB) in conjunction with Paragraph 6(1) of the EG-FGV (EC Regulation on the approval of vehicles) adopted on the basis of Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 applies, otherwise only, at least in the present case, if Question 11 set out in the operative part is answered in the affirmative or if, which in the present case, according to the current state of facts, does not appear to be the case, it were to be established that immoral damage had been inflicted intentionally on the applicant by the defendant (in the latter case, the Bundesgerichtshof affirms a corresponding right, see, for example, judgment of the Bundesgerichtshof of 25 May 2020, Case VI ZR 252/19).

The right asserted by the applicant on the basis of Paragraph 823(2) of the BGB exists if the individual vehicle purchaser, the applicant in the present case, is intended to be specifically protected by the provisions of Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 and consequently by the national provisions adopted pursuant to that directive, in the present case Paragraph 6(1) of the EG-FGV, against making the acquisition of a vehicle which does not comply with the requirements of European Union law which he would not have intended to make in the knowledge of the actual circumstances and consequently also would not have made, in other words, if the provisions of Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 and consequently also the national provisions adopted on the basis of those provisions are intended also in particular to protect the general freedom of action and, as a consequence thereof, the right of the purchaser of a vehicle to economic self-determination, here the applicant, thus the interest of not being induced to enter into an unintended obligation, and in fact in such a way that the issuing of a certificate of conformity, possibly also

negligently, results in a claim by the purchaser against the manufacturer, arising from the law on the legal consequences of a tortious act, for reimbursement of the cost of the acquisition in particular of the purchase price paid to the seller (see in particular the judgment of the Bundesgerichtshof of 26 June 2023 Case Via ZR 335/21, in particular paragraphs 20 and 23). In that case, even taken in isolation, the disadvantageous unintended acquisition of the vehicle falls within the scope of protection of the law infringed, that is to say, the scope against which the law infringed was intended to protect the purchaser. The Bundesgerichtshof considers this a prerequisite for a claim on his part against the vehicle manufacturer for exemption from the consequences of the purchase of a vehicle to the effect that, as a result, it is fully reversed for the purchaser, in this case the applicant, under Paragraph 823(2) of the BGB (see in particular the judgment of the Bundesgerichtshof of 26 June 2023, Case Via ZR 335/21, in particular paragraph 20).

The Bundesgerichtshof still does not see any such protective purpose of the provisions of Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 and the provisions of German law adopted on the basis of that directive (see in particular judgment of the Bundesgerichtshof of 26 June 2023, Case Via ZR 335/21, paragraphs 19 and 24 et seq.). It merely sees the interest protected by European Union law in not suffering a pecuniary loss within the meaning of the difference hypothesis through concluding a purchase contract for a vehicle as the result of a vehicle manufacturer infringing the European law on emissions (Bundesgerichtshof loc. cit., paragraph 32). However, the Bundesgerichtshof considers that the protection of European Union law does not extend to the purchaser’s interest in not being bound to the contract (Bundesgerichtshof loc. cit., paragraph 19).

The Bundesgerichtshof therefore does not grant the purchaser of a vehicle a right to reimbursement of the cost of acquiring the vehicle, if applicable, concurrently in return for delivery and transfer of the vehicle and offsetting the value of any other benefits obtained as a result of the acquisition of the vehicle, solely on the basis of an infringement of the provisions of that directive in conjunction with Paragraphs 6 and 27(1) of the EG-FGV and Paragraph 823(2) of the BGB, as contended by the applicant in the present case (page 2 of the application of 18 August 2020, sheet 2 of the file, page 1 of the pleading of 23 May 2022, sheet 729 of the file, pages 1 et seq. of the records of the hearing of 17 February 2023, sheet 820/124 f. of the file), but only to reimbursement of such differential damage or loss, if any, as can be established based on a comparison of the financial situation that arose as the result of the event giving rise to liability with the financial situation which would have existed without that event (see in particular the judgment of the Bundesgerichtshof of 26 June 2023 Case Via ZR 335/21, paragraph 40).

The Bundesgerichtshof regards as reimbursable damage based on an infringement of the provisions of that directive in conjunction with Paragraphs 6 and 27(1) of

the EG-FGV and Paragraph 823(2) of the BGB only that amount by which the purchaser overpaid for the object of purchase, taking into account the risks associated with the unlawful defeat device (judgment of the Bundesgerichtshof of 26 June 2023, Case Via ZR 335/21, paragraph 40), limiting that right to a minimum of 5% of the purchase price and a maximum of 15% of the purchase price (Bundesgerichtshof loc. cit. paragraphs 73 and 75).

In that regard, the Bundesgerichtshof argues that the legal position under European Union law had been clarified by the judgment of the Court of Justice of 21 March 2023 (Case C-100/21) to the effect that European Union law does not require that the purchaser of a vehicle fitted with an unlawful defeat device be placed in a position as if he or she had not concluded the contract of sale, thus including the interest in rescission of the contract of sale within the material scope of the protection afforded by Paragraphs 6(1) and 27(1) of the EG-FGV (judgment of the Bundesgerichtshof of 26 June 2023, Case Via ZR 335/21, paragraph 23).

However, the Chamber does not infer any arguments from that judgment of the Court of Justice of 21 March 2023 as to whether the provisions of Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 are specifically intended to protect the individual purchaser against making the acquisition of a vehicle which does not comply with the requirements of European Union law, which he or she would not have intended to make in the knowledge of the actual circumstances, nor consequently would have made, therefore to that extent were also intended to protect his or her freedom of decision and for that reason alone require that, in the event of infringement by the manufacturer of the provisions of that directive and of the national provisions adopted on the basis thereof, in particular infringement of the prohibition on issuing an incorrect certificate of conformity, the purchaser is granted the right to claim against the manufacturer to exempt him or her entirely from the consequences of the contract based on that infringement, therefore to seek reimbursement of the cost of acquiring the vehicle, if applicable, concurrently in return for delivery and transfer of the vehicle and offsetting the value of any other benefits acquired as a result of the acquisition of the vehicle, as requested by the applicant in the present case.

Therefore, the Chamber regards it as necessary pursuant to Article 267 TFEU also to refer the additional Question 10 set out in the operative part to the Court of Justice, with the request for a reply.

2.

Irrespective of the foregoing, the Chamber also does not rule out that European Union law, in particular the principle of effectiveness referred to in the judgment of the Court of Justice of 21 March 2023 (paragraph 93), requires that where a certificate of conformity has been issued by the manufacturer, in this case the defendant, incorrectly attesting to the vehicle’s compliance with all the regulatory acts at the time of its production, the purchaser of a vehicle, in this case the applicant, is entitled to reimbursement of the cost of acquiring the vehicle

concurrently in exchange for its return and offsetting the benefits derived from the vehicle.

By contrast, in such a case, a claim only for reimbursement of the amount of the reduction in assets suffered by the purchaser may also be considered but the purchaser only receives a sum of money and must retain the vehicle. Where the manufacturer has not acted intentionally and has not intentionally harmed or even deceived the purchaser in an immoral manner, the Bundesgerichtshof only grants the purchaser a such a claim, which it also limits in terms of amount (in detail, judgment of the Bundesgerichtshof of 26 June 2023, Case Via ZR 335/21).

In any event, the Chamber considers it possible that European Union law, having regard in particular to the principle of effectiveness, if the interest protected by European Union law consists solely in not incurring financial loss by entering into a contract for the sale of a motor vehicle as a result of infringement by the vehicle manufacturer of the EU exhaust emissions rules, may require that the applicant is granted a claim against the manufacturer to release him or her completely from the purchase of the vehicle, hence to reimburse him or her the cost of purchasing the vehicle, if applicable concurrently against return and transfer of ownership of the vehicle, and offsetting the value of other benefits derived from acquisition of the vehicle. A fortiori, it considers this possible if the provisions of Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 are specifically also intended to protect the freedom of decision of an individual vehicle purchaser in the sense set out in point 1 above.

A claim with content such as this is ultimately straightforward and, in any event, generally the amount can be established fairly accurately without obtaining an expert's report; only the expected total mileage to be taken into account in the calculation of the balancing of advantages needs to be estimated, but that does not pose any great difficulties. It affords the purchaser of the vehicle comprehensive protection against its disadvantages, since all its disadvantages are compensated for.

The Chamber cannot recognise any inappropriateness or disproportionality of a 'penalty' in a compensation claim as the vehicle manufacturer only has to pay for the disadvantages of the purchaser and in return receives the benefits which the purchaser derived from acquiring the vehicle, whether through delivery and transfer of the vehicle, or by offsetting the value of other benefits obtained. The manufacturer is then able, where technically possible, to restore the vehicle to a proper condition and resell it, thereby reducing the loss from the infringement.

By contrast, a right to reimbursement only of the amount of the difference in assets resulting from the economically disadvantageous acquisition of a vehicle which does not comply with the requirements of European Union law is disadvantageous to the purchaser of the vehicle. That is the case, in particular, where only the amount of excess paid by the purchaser for the acquisition of the

vehicle in view of the risks associated with the unlawful defeat device, is regarded as a reimbursable loss (see the judgment of the Bundesgerichtshof of 26 June 2023, Case Via ZR 335/21, paragraph 40).

Even this latter amount is not particularly straightforward, particularly if there is uncertainty whether the vehicle will be taken out of service in future as it does not comply with the requirements of European Union law and, in fact, in any case if the amount of difference in assets is disputed, cannot be quantified without a costly expert's report. If, like the Bundesgerichtshof has done (judgment of 26 June 2023, Case Via ZR 335/21), paragraphs 42, in fine, and 76, only the point at which the contract is concluded is taken as a basis for assessment of the difference in assets, there is always uncertainty, in terms of the effective date for the assessment of damage or loss incurred, as to whether the vehicle will be taken out of service in future. However, this uncertainty may also still exist on the day of the last oral hearing of the facts. It may therefore also play a role in the assessment of the damage, if, contrary to the case-law of the Bundesgerichtshof, the assessment of damage is based on the date of the last oral hearing of the facts.

This perspective raises doubts as to whether limiting the right of the purchaser of a vehicle, which does not meet the requirements of European Union law with regard to its exhaust emissions and/or its emission control system, to claim against the vehicle manufacturer who has infringed the provisions of Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007, only to reimbursement of the amount of the reduction in assets incurred as a result of purchasing the vehicle in a manner contrary to European Union law, makes it excessively difficult for the purchaser to obtain adequate compensation for his or her loss (see judgment of the Court of Justice of 21 March 2023 (Case C-100/21, paragraph 93).

In the final analysis, there is scarcely any indication as to how a claim for compensation with content such as this could be quantified. It is difficult to quantify the difference in assets reliably, since it is not clear how things will develop in the future, in other words, how the authorities will react and what technical possibilities will be found, to possibly (still) remedy the existing prohibited circuits and controls, and the disadvantageous effects of modifying the configuration of the vehicle control. This applies in particular if, in line with the arguments of the Bundesgerichtshof in its judgment of 26 June 2023 (Case Via ZR 335/21), paragraphs 42, in fine, and 76, the asset comparison relating solely to the date on which the contract was concluded is to be decisive for the assessment of the difference in assets to be reimbursed, but also if, in this regard, the date of the last oral hearing of the facts is taken as a basis while the further development relating to the vehicle in question is in abeyance because it is still unclear whether its withdrawal will be required or whether any technical measures, which may possibly be associated with other disadvantages, will be necessary.

Contrary to what the Bundesgerichtshof (loc. cit., paragraph 78) states without further justification, without an expert's report it is scarcely possible to quantify

the amount of the difference in assets in the event of a dispute, and uncertainties which can only be overcome more or less by estimating the damage, will be difficult to avoid, even after an expert's report has been obtained. In any event, the judge dealing with the case, undoubtedly like most of his colleagues, lacks the expert knowledge to make even merely a rudimentary estimate, based on the criteria specified by the Bundesgerichtshof loc. cit. paragraph 76, of the 'differential damage' appropriately. He is not a technician, nor does he have any insight as to the practice of the vehicle approval authorities, therefore he is unable to rely on his own expert knowledge to make a rudimentary assessment of the criteria which the Bundesgerichtshof loc. cit paragraph 76 regards as authoritative, in other words, the disadvantages associated with the use of an unlawful defeat device, in particular the risk of administrative orders, the extent of possible operational restrictions and the likelihood of such restrictions occurring, taking into consideration the circumstances of the individual case, least of all with regard to the date on which the contract was concluded. This applies all the more if the technical facts underlying the estimate of damage are in dispute. The other members of the Chamber are also not trained technicians and, as far as the competent single judge is aware, they also have no detailed insight as to the practice of the approval authorities. The judge dealing with the case would not be aware that any of the judges of the Landgericht Duisburg is a technician and has the necessary expertise to assess the questions at issue here.

Also the weight, considered by the Bundesgerichtshof (loc. cit. paragraph 77) as crucial for the assessment of the claim for compensation, of the specific infringement underlying the liability for the objective under European Union law of compliance with certain emission limits, cannot be assessed by the single judge nor by the Chamber as a collegial body in the absence of personal expert knowledge, without an expert. Without costly expert advice based on measurements, the Chamber is unable to establish in rudimentary terms or even just estimate which emission values the vehicle shows on the basis of the infringement and those which it would have shown without the infringement.

This is further complicated in that disadvantageous effects of changing the configuration of the vehicle control to remedy the unlawfulness of a vehicle, frequently contended by claimants, as in the present case (in detail page 31 of the application, sheet 32 of the file) and generally disputed by vehicle manufacturers, it is also argued here by the defendant that the vehicle had not lost value because of the alleged defect and its operational life had not been reduced (page 46 of the statement of defence, sheet 266 of the file), which, according to the defendant, is also implied by the disputing of a reduction in value following the software update already installed (page 15 of the defendant's pleading of 14 July 2022, sheet 785 of the file), the competent single judge in the present case is not aware of a case where the manufacturer had allowed disadvantages, as alleged by the applicant, of a change in the configuration of the vehicle control to remedy the unlawfulness of a vehicle, so that possibly very costly expert's reports need to be obtained, even for the purpose of establishing them, which is imperative to take into account in the assessment of the difference in assets.

If the burden of proof lies with the applicant, under German civil procedure law, the expert reports to be obtained must be paid in advance by the applicant, which an applicant who has no appropriate legal expenses insurance will normally be unable to afford, at least not without difficulty. Even if an applicant without insurance for legal expenses could afford the advance payment for the required expert's report, he or she will possibly refrain from doing so on the grounds that 'it is not worth it' because any additional compensation to be obtained is not so high that the risk of an advance payment of expert's costs at least in the mid-four-digit euro range would be worth it, given the litigation risks (risk of total or partial unprovability). This is particularly the case considering the case-law of the Bundesgerichtshof, according to which the additional compensation to be achieved amounts at most to 15% of the purchase price (upper limit), – 5% of the purchase price (lower limit) = 10% of the purchase price. There is reason to suspect that a large number of purchasers of vehicles which do not comply with the requirements of European Union law on exhaust emissions and the emission control system will refrain from claiming full reimbursement of the reduction in assets to which they are entitled, according to the arguments of the Bundesgerichtshof, simply for reasons of cost or, in any event, will not insist on any taking of evidence being necessary which in the end leads to the same results.

This problem is easily avoided in the assessment of the purchaser's claim for compensation for the reimbursement of the acquisition costs, where applicable, deducting the value of the benefits derived from the vehicle and concurrently in return for delivery of the vehicle.

In addition, if only a claim for the reimbursement of a difference in assets, which can only be estimated in terms of amount and which cannot really be reliably determined, is granted, there is, in the opinion of the Chamber, a risk that, due to the inadequacy of the means of assessment, the purchaser will ultimately not receive adequate compensation.

If one agrees with the Bundesgerichtshof that the date on which the contract was concluded is taken as the decisive date for calculating the reduction in assets, in extreme cases the purchaser of the vehicle may find that, within a period of one month of acquiring the vehicle, it is taken out of service, but that he or she therefore does not receive compensation of almost 100% of the purchase price, but only compensation significantly below that, according to the case-law of the Bundesgerichtshof (judgment of 26 June 2023, Case Via ZR 335/21) no more than 15% of the purchase price. Less extreme cases of 'miscalculation', with the result that the purchaser does not really receive any appropriate compensation, are entirely conceivable and are also a matter of concern.

Even if the date of the last oral hearing of the facts is taken as a basis, it may result in under-compensation, albeit probably not as extreme as in the example referred to above. The purchaser of the vehicle may also find that his or her vehicle is taken out of service only one month after the last oral hearing of the facts, with the result that the reduction in assets he or she suffered is greater than that estimated

at the date of the last hearing; this is particularly true if the damages are limited to 15% of the purchase price. In that regard also, almost countless further cases of miscalculation with resulting inadequate compensation for the vehicle purchaser are conceivable and are a matter of concern.

As is already clear from the foregoing, the considerations of the Bundesgerichtshof raise concerns within the Chamber, in particular, regarding an upper limit of the damage to be estimated, which is to be 15% of the purchase price: It seems entirely obvious to the Chamber that with such a limitation of the claim for compensation, it will be impossible for some of the purchasers of vehicles infringing EU emission regulations to obtain adequate compensation for the damage in a manner which is contrary to the requirements of European Union law, because their loss is in fact greater than 15% of the purchase price. The Chamber sees no indication as to why the difference in assets should necessarily be limited to no more than this proportion of the purchase price (Bundesgerichtshof, loc. cit, paragraphs 73 and 75).

For the reasons set out above, the Chamber also considers that it is at least possible that, irrespective of an upper limit of the reimbursable amount of 15% of the purchase price, some purchasers of vehicles infringing EU exhaust emission provisions in a manner contrary to European Union law will find it impossible, with a limitation of the claim for compensation to the amount which the purchaser paid in excess for the vehicle, in view of the risks associated with the unlawful defeat device, (see the judgment of the Bundesgerichtshof 26 June 2023, Case 335/21 Via ZR, paragraph 40), to obtain adequate compensation for the their loss/damage because, in fact, the damage is greater than that amount.

From this point of view, the risk of possible under-compensation can also be easily avoided by the purchaser's compensation claim against the manufacturer of the vehicle which does not comply with the requirements of European Union law, as requested, being based on reimbursement of the cost of acquiring that vehicle, if applicable, concurrently against return and transfer of ownership of the vehicle and offsetting other benefits derived from the acquisition of the vehicle.

Therefore, the Chamber has doubts as to whether a limitation of the claim for compensation of the purchaser of a vehicle which does not comply with the requirements of European Union law, to claim from its manufacturer who has infringed the provisions of Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007, an amount of reimbursement to be quantified based on the difference in assets, is consistent with the requirements of European Union law, in particular when the difference to be reimbursed to that extent is still limited by the upper limit set by the Bundesgerichtshof in its judgment of 26 June 2023 (Case Via ZR 335/21) cited multiple times above. However, it is for the Court of Justice, and not for the Chamber to decide on the matter, Article 267 TFEU.

Nor is the Chamber able to assess on the basis of its own competence the extent to which consumer protection under European Union law – the applicant is a consumer, in so far as is evident from the current state of affairs – also prohibits a limitation of the claims of a purchaser of a vehicle which does not meet the requirements of European Union law to claim reimbursement of the difference in assets suffered as a result of the disadvantageous acquisition, Article 267 TFEU.

3.

Therefore, pursuant to Article 267 TFEU, the case must be referred to the Court of Justice, requesting a decision regarding Questions 10 to 13 set out in the operative part.

The further handling and resolution of this dispute depends on the answer to these questions. The applicant seeks reimbursement of the purchase price against balancing of advantages which could not be granted to him according to the understanding of the Bundesgerichtshof of the content of European Union law provided for in Paragraph 823(2) of the BGB. The applicant can therefore only be granted what he is seeking if at least one of Questions 10 and 11 set out in the operative part is answered in the affirmative, at least in respect of his case, whilst otherwise he cannot in any event be given what he is seeking. If even Questions 12 and, if applicable, also 13 are answered in the affirmative in respect of his case, the claim he is to be granted is further reduced, according to the case-law of the Bundesgerichtshof. In any event, after further examination there are no sufficient indications, according to the current state of affairs, of an intentional infringement of the law by the defendant, in view of the defendant's arguments set out in the Chamber's order of 26 April 2023 and the opposing effects, communicated in the Chamber's order of 26 April 2023, of the circuits at issue in the present case on the various types of vehicle emissions. These opposing effects ensue in particular also from the control of the opening and closing of the radiator shutter and the resulting engine cooling.

(Nennecke)

Certified

Authenticating official of the court office

Landgericht Duisburg