Provisional text

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 2 April 2020 (1)

Case C-343/19

Verein für Konsumenteninformation
v
Volkswagen AG

(Request for a preliminary ruling from the Landesgericht Klagenfurt (Regional Court, Klagenfurt, Austria))

(Preliminary ruling proceedings — Regulation (EU) No 1215/2012 — Jurisdiction in matters relating to liability in tort, delict or quasi-delict — Place of the event giving rise to the harm — Manipulation of emissions values in car engines)

1. In 1976, the Court addressed for the first time a question that the legislature had left open in Article 5(3) of the Brussels Convention. (2) The Court was required to rule on whether, in order to determine jurisdiction, the 'place where the harmful event occurred' was the place where the damage occurred or the place where the event which gave rise to that damage occurred. (3)

2. For the purpose of providing an interpretation which would be useful to the system for the allocation of international jurisdiction among the Member States, the Court retained the possibility of using both connecting factors. The solution (which was the most reasonable for that case) became a paradigm. It makes sense at a purely theoretical level, given that any non-contractual liability requires an event, damage, and a causal link between the two.

3. The solution is not as clear in practice, except in simple cases, like that resolved by the judgment in *Bier*. That is particularly true of damage which, by its very nature, has no material expression: that occurs with harm which does not affect the physical integrity of a specific person or thing but rather assets in general terms.

4. The Court, which has addressed those issues on a number of occasions and from different angles, (4) now has the opportunity to refine its case-law on Article 7(2) of Regulation (EU) No 1215/2012. (5)

I. Legal framework: Regulation No 1215/2012

5. Recital 16 of Regulation No 1215/2012 reads:

‘In addition to the defendant’s domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice. The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen. This is important, particularly in disputes concerning non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.’

6. Chapter II (‘Jurisdiction’) contains a section headed ‘General provisions’ (Articles 4, 5 and 6) and another headed ‘Special jurisdiction’ (Articles 7, 8 and 9).

7. Pursuant to Article 4:

‘1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

…’

8. Under Article 7:

‘A person domiciled in a Member State may be sued in another Member State:

…

(2) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;

…’

II. Main proceedings and question referred for a preliminary ruling

9. The Verein für Konsumenteninformation (‘VKI’) is a consumer organisation established in Austria. Its company objects include, inter alia, the bringing of legal actions in pursuit of consumers’ claims, which consumers assign to them for that purpose.

10. On 6 September 2018, VKI brought an action before the referring court against Volkswagen AG, a company governed by German law and established in Germany, where it manufactures motor vehicles.

11. In its action, VKI pursues claims for damages assigned by 574 purchasers of vehicles. VKI also seeks a declaration establishing the liability of Volkswagen for as yet unquantifiable future damages. Both claims are linked to the installation in the purchased vehicles of a defeat device (manipulative software) which masked, on the test bench, the true exhaust emission values, contrary to provisions of EU law. (6)

12. VKI argues that all the consumers who have assigned their claims purchased in Austria, from either a commercial car dealer or a private seller, vehicles fitted with an engine developed by Volkswagen. Those purchases were made before the public disclosure, on 18 September 2015, of the emissions manipulation perpetrated by the manufacturer.

13. In VKI’s submission, the damage incurred by the vehicle owners consisted of the fact that, had they been aware of the alleged manipulation, they would probably not have purchased the vehicles or they would have done so at a lower price. The difference between the price of a manipulated vehicle and the price actually paid constitutes a recoverable loss incurred through reliance on an expectation. In the

alternative, VKI bases its claim on the fact that the value of a manipulated vehicle on the automobile market and on the used car market is much lower than the price of a vehicle that has not been manipulated.

14. VKI further submits that the damage incurred by the purchasers has been exacerbated by increased fuel consumption, poorer driving or engine performance or greater depreciation. In addition, it is to be expected that there will be a further reduction in the market value of the affected vehicles, which run the risk of suffering further adverse effects, such as driving bans on the vehicles concerned or the withdrawal of authorisation to be used in road traffic. At the time when the action was lodged, some of that damage was not yet quantifiable or had not yet occurred and therefore VKI's claim in this respect is merely an application for a declaration.

15. From the perspective of the international jurisdiction of the court with which it has lodged its action, VKI relies on Article 7(2) of Regulation No 1215/2012.

16. Volkswagen requests that the forms of order sought by VKI be dismissed and contests the international jurisdiction of the referring court.

17. Against that background, the Landesgericht Klagenfurt (Regional Court, Klagenfurt, Austria) has referred the following question for a preliminary ruling:

'Is point 2 of Article 7 of Regulation [No 1215/2012] to be interpreted as meaning that, in a situation such as that in the main proceedings, the "place where the harmful event occurred" may be construed as the place in a Member State where the damage occurred, when that damage consists exclusively of financial damage that is the direct result of an unlawful act committed in another Member State?'

III. Analysis

A. Introduction

18. Article 7(2) of Regulation No 1215/2012, which provides applicants with the choice of an alternative jurisdiction to the general jurisdiction (the courts for the Member State in which the defendant is domiciled, provided for in Article 4(1) of that regulation), has always presented a challenge to those interpreting it. (7)

19. The number and variety of situations in which an action 'in matters relating to tort, delict or quasi-delict' can be brought has meant that the Court has been required to deal with the interpretation of the provision in very different contexts and, over time, in contexts which also differ from those envisaged when the provision was adopted. (8) The Court has had to adapt and enhance that interpretation in response to references for a preliminary ruling from Member States. (9)

20. There are, however, a number of constant guidelines for the interpretation of the provision: the central function of the principles which inform it, namely the principle that rules must be foreseeable (for the parties) and the principle of proximity between the court with jurisdiction and the dispute; the concern with maintaining the practical effect of the special rule within the framework of the system for the delimitation of jurisdiction, which does not, however, permit a broad interpretation; (10) and the neutrality of that rule in relation to the parties. In any event, the interpretation is autonomous and is independent of the definition of 'event' and 'damage' in national law and of the substantive rules applicable to civil liability. (11)

21. Article 7(2) of Regulation No 1215/2012 assumes a particularly close connection between the court and the dispute. That connection serves to ensure legal certainty and to prevent a person from being sued in a court of a Member State which that person could not reasonably have foreseen. It also enables the sound administration of justice and the efficacious conduct of proceedings. (12)

22. Where the unlawful conduct and its consequences are situated in different Member States, the jurisdiction criterion splits into two on the basis that, in matters relating to non-contractual liability, both places have a significant connection to the dispute. In those circumstances, the applicant can choose between two jurisdictions when lodging his or her action.

23. The criterion laid down in Article 7(2) of Regulation No 1215/2012 thus retains its practical effect, which would be nullified if the provision were interpreted as referring only to the place of the event giving rise to the harm, since the latter is usually the same as the place of the defendant's domicile. (13) The dual jurisdiction rule has not been abandoned in either case. (14)

24. Article 7(2) of Regulation No 1215/2012 was not intended as a rule of jurisdiction for the protection of the applicant. Although, from a systematic point of view, it could be construed as offsetting the rule *actor sequitur forum rei*, (15) that does not mean that it should be applied systematically in a way which favours the courts of the victim's State of domicile (*forum actoris*). (16) That has been permitted only where (and because) the victim's place of domicile is also the place where the damage occurred. (17)

25. Based on those factors in combination, the Court drew up guidance for the interpretation of Article 7(2) of Regulation No 1215/2012 in relation to the 'place where the damage occurred'; in some instances this guidance was intended to be general and in others it concerned specific matters:

– Generally speaking, and in so far as is relevant here, the Court rejected irrelevant categories of damage: for the purposes of the provision, only initial, and not consequential, damage is important; (18) that is, only damage sustained by the direct victim and not damage sustained by a third party 'by ricochet'. (19)

– As regards certain specific areas (for example, liability for infringement of personality rights on the internet), the Court allowed the criterion of the victim's centre of main interests. (20) In doing so, the Court was seeking to strike a balance in favour of the rightholder, thereby compensating for the global nature of the internet. (21)

26. Where the alleged damage is merely financial, the Court laid down a number of criteria to which I shall refer below.

B. Reply to the question referred for a preliminary ruling

27. In order to reply to the referring court's question, which is similar to the earlier question which gave rise to the judgment in *Universal*, it is necessary, at the outset, to determine whether the alleged damage is initial or consequential and whether that damage is material or purely financial. (22) It is also necessary to determine whether the individuals who assigned their claims to VKI, as the persons to whom the compensation sought is payable, are direct or indirect victims.

28. Subsequently, based on the classification of the damage, it will be necessary to establish the relevant place for the purposes of jurisdiction.

29. The referring court also asks whether the result reached in the previous task should be corrected in the light of considerations of foreseeability and proximity. I believe that it is important to point out, at this juncture, that an affirmative answer would entail a substantial alteration of the interpretation and application of Article 7(2) of Regulation No 1215/2012, which have prevailed thus far.

30. In their observations, the parties involved have raised further uncertainties regarding the interpretation of the provision but, since those uncertainties are not set out in the order for reference, I shall not state my view in that regard. (23)

1. Nature of the damage: initial or consequential, material or financial; direct or indirect victims

31. The referring court attributes the damage to the software which, when installed in the vehicle, constitutes a defect in that vehicle. The referring court characterises that damage as initial damage, while the reduction in the purchaser's assets is merely financial damage. (24)

32. The referring court also draws attention to the question of who sustained the damage: the consumers represented by VKI or everyone who purchased the cars, beginning with the first dealers and importers. In the latter situation, the individuals whose claims VKI is pursuing, who are at the end of the chain, would not be direct victims.

33. When examining the nature of the damage, a distinction should be drawn between the place of the events giving rise to the damage and the place where the consequences (damage) of those events arose:

– The manufacture of an object, with or without defects, takes place in the former place. That was the view the Court took in the judgment in *Zuid-Chemie*, with regard to liability for damage caused by a defective product. (25)

– The damage (more correctly, the loss) is the negative consequence of the events in the sphere of the applicant's protected legal interests. (26)

34. On that basis, the event giving rise to the damage in this case consists of the installation, during the vehicle manufacturing process, of software which alters the vehicle's emissions data.

35. The damage derived from that event is, in my view, initial and financial.

36. In normal circumstances (the absence of any defect), the purchase of an item contributes to the assets of which that item becomes part a value which is at least equivalent to the outgoing value (which, in the case of a purchase, is represented by the price paid for the item).

37. If, at the time of purchase, the vehicle's value is lower than the price paid because that vehicle is purchased with an original defect, the price paid does not match the value received. The difference between the price paid and the value of the tangible goods received in return causes a financial loss which occurs at the same time as the purchase of the vehicle (but which, however, will not be discovered until later).

38. Does the existence of the vehicle as a *tangible* object preclude classification of the harm as financial? I do not think so. When the vehicle's actual characteristics were made public, purchasers did not discover that they had a *lesser* vehicle or *another* vehicle but rather a vehicle with a lower value: in short, a smaller asset. The vehicle, as a physical object, *symbolises* the reduction in assets and makes it possible to identify the origin of that reduction. However, in this case, that does not alter the *intangible* essence of the loss which the software manipulation caused to purchasers.

39. That financial damage is, I repeat, initial and not consequential: it is derived directly from the event giving rise to the damage (manipulation of the engine) and not from earlier damage sustained by the applicant as a result of the same event.

40. As regards the nature of the victims, I believe that the persons who purchased the cars (and assigned their claims to VKI for it to pursue in the courts) are *direct* victims for the purposes of Article 7(2) of Regulation No 1215/2012. The damage they allege does not follow on from earlier damage sustained by other individuals before them.

41. The loss of value of the vehicles did not become a reality until the manipulation of the engines was made public. In some instances, the applicants may be end users who obtained the vehicle from another, previous buyer; however, the latter did not experience any loss because, at that time, the damage was latent and was not disclosed until later when it affected the then owner. Therefore, it is not possible to describe the damage as being passed on from the original buyers to successive buyers.

2. Place where the event giving rise to the damage occurred

42. The national court asks only about the determination of the place where the damage arose and not about the place where the event giving rise to the damage occurred. In the order for reference, the national court makes clear that, in its opinion, the event triggering (the event giving rise to) the damage occurred in the place where the manipulated vehicles were manufactured, that is to say, Germany.

43. Accordingly, in line with the general rule, the vehicle manufacturer, as a person domiciled in Germany, would, in principle, be subject to the jurisdiction of the courts of that Member State. However, since the basis for the claim is a tortious, delictual or quasi-delictual act, it is also possible for that person to be sued in another Member State, specifically, in the courts for the place where the damage arose.

3. The place where the damage occurred

(a) General position

(1) Identification in the Court's case-law of the place where damage that is merely financial occurred

44. As I have pointed out, VKI's action is not based on material damage to a person or a thing but rather on damage that is merely financial.

45. In the Court's case-law, the place where the damage occurred is the place where the adverse effects of an event actually manifest themselves. (27)

46. The absence of *physical* damage impedes the identification of that place and creates uncertainties from the start of the procedure. The absence of physical damage also creates uncertainty about whether it is appropriate to use that place as a rule of jurisdiction for the purposes of Article 7(2) of Regulation No 1215/2012. It is unsurprising that, in the course of previous references for a preliminary ruling, it was suggested that the Court abandon the choice between the place of the event giving rise to the damage and the place where the damage occurred in respect of situations involving financial loss alone. (28)

47. In truth, there are arguments in favour of that suggestion. The dual jurisdiction rule is not a requirement in the application of the provision; it is justified because, *and if*, the attribution of jurisdiction meets 'any objective need as regards evidence or the conduct of the proceedings'. (29) The interpretation laid down in the judgment in *Bier* did not seek to establish more than one court with jurisdiction for actions concerning non-contractual liability and instead its aim was not to exclude relevant connecting factors from the analysis of the important elements — the event and the damage — in those actions.

48. In that regard, the option of the 'place where the damage occurred' should perhaps not apply in certain circumstances: (30) (i) where the nature of that damage is such that it is not possible to ascertain where it occurred by applying a simple test; (31) (ii) where the place of the damage must be established by resorting to fictions; (32) and (iii) where the examination tends to result in an unforeseeable place or a place which can be manipulated by the applicant. (33)

49. In that connection, it should be noted that in the judgment of 19 February 2002, *Besix*, the Court excluded the application of Article 5(1) of the Brussels Convention (now Article 7(1) of Regulation No 1215/2012) in relation to an obligation which 'is not capable of being identified with a specific place or linked to a court which would be particularly suited to hear and determine the dispute relating to that obligation'. (34)

50. Since paragraphs 1 and 2 of Article 7 of Regulation No 1215/2012 pursue the same aims of proximity and foreseeability, the approach applicable to paragraph 1 may also apply to paragraph 2.

51. Admittedly, the Court has not excluded the jurisdiction of courts for the place where the damage occurred where that damage is only financial. (35) However, whilst it has not rejected outright the

maintenance of that option, it has occasionally come close to that solution. There is not one single line of argument, as can be seen in cases in which the financial loss is the result of infringements of competition law (36) compared with those in which the loss arose as a result of a failed investment.

52. Occasionally, the Court associates the damage with an omission or an event caused by the defendant's actions immediately, and logically, prior to the damage, which are likely to be more (although not completely, as in the case of damage resulting from something which *does not happen*) perceptible.

– That occurred in the judgment of 21 December 2016, *Concurrence*, in connection with a selective distribution network: the damage that the distributor was entitled to claim consisted of the reduction in the volume of sales *and* the ensuing loss of profits. (37)

– On the same lines, the judgment of 5 July 2018, *AB flyLAL-Lithuanian Airlines*, considered the financial loss in conjunction with the reduction in the company's sales. (38)

– The judgment of 29 July 2019, *Tibor-Trans*, assessed damage consisting of additional costs incurred in the purchase of trucks because of artificially high prices: the Court did not focus on where the payment took effect but rather on the purchase of the trucks on a market affected by concerted practices. (39)

53. The presentation of financial damage by reference to noticeable actions or events helps to establish that damage *physically* in a territory or, directly, avoids having to do this. I see no reason why that should not become a general approach, (40) although I think it helpful to draw attention to its risks: linking financial damage to the closest tangible event preceding it may lead to over-elaborate arguments about the categories of 'initial' and 'consequential' damage. (41)

54. The financial loss itself took centre stage in other judgments, in which the Court accepted that the damage occurred in the account in which the financial loss was expressed in accounting terms. Typically, that occurs in relation to investments. (42)

55. In those cases, reasons of proximity between the dispute and the court, or of foreseeability for the parties, require that factual elements other than the place where the damage occurred must, taken together, confirm the suitability of that place when it comes to attributing jurisdiction. Identification of the place where those elements occurred or exist enables confirmation (or, on the other hand, necessitates rejection) of the view regarding the place taken to be that where the financial damage occurred.

56. In that (recent) case-law of the Court which, thus far, is restricted to three judgments, (43) the line of reasoning concerning Article 7(2) of Regulation No 1215/2012 is divided into two parts; the determination of the place where the damage arose is only one of these. That place, once identified, does not automatically present the required proximity and foreseeability but is instead a starting point which must be confirmed by the *other specific circumstances* of the dispute, taken as a whole. (44)

57. Although that line of argument is complex and diverges from that applied to other types of damage, I do not believe that the Court's reasoning has changed substantially. The analysis does not afford primary importance to proximity or foreseeability or authorise the person conducting the interpretation to weigh up all the circumstances of the case in order to identify the *most suitable* forum in the light of those criteria. That point has created uncertainties on the part of the referring court, (45) and I shall therefore deal with it in more detail below.

(2) Scope of the 'specific circumstances' criterion

58. In its case-law thus far, the Court has relied on the 'specific circumstances' of the case in order to define the jurisdiction criterion relating to the 'place of the damage'.

59. As I have explained, that task involves verifying the existence of factors which ensure that the place identified as being that where 'the damage occurred' is close and foreseeable, in accordance with the standards laid down in Regulation No 1215/2012. That satisfies the requirements relating to the legal protection of both parties and to the conduct of the proceedings. There is no general requirement to conduct that examination; in other words, it is not necessary for every type of damage: it is required, or may be required, for purely financial damage.

60. Furthermore, the criterion is not used so that the court seised of the dispute can compare the 'place of the event giving rise to the damage' with the 'place where the damage occurred' and choose the most suitable of the two.

61. I do not dispute that the equivalence, in terms of proximity and foreseeability, between the place of the event giving rise to the damage and the place where the damage occurred, first laid down in the judgment in *Bier*, is theoretical or ideal. That judgment also states that it is not appropriate to opt for one of those places to the exclusion of the other because each one can, '*depending on the circumstances*', (46) be helpful from the point of view of the evidence and of the conduct of the proceedings.

62. The particular nature of the circumstances of the case is not a valid criterion (nor has the Court adopted it) for deciding between the jurisdiction of the courts for the place of the event giving rise to the damage and the courts for place where the damage occurred. That choice has consciously been left to the applicant, which entails acceptance that it will be made, above all, to suit the applicant's own interests.

63. The relative nature of the objectives of proximity and legal certainty is, moreover, a structural feature of the system of allocating jurisdiction under Regulation No 1215/2012. Each of the jurisdictions provided for in Article 7 reflects an *ex ante* balancing exercise, carried out, in the abstract, by the legislature, between the requirements of foreseeability and of proximity.

64. The result of that balancing exercise strikes a reasonable balance between the two principles, which must be maintained when the rule is implemented. In that connection, the Court previously stated that it is not possible to dismiss the result of applying the criterion formally laid down by Article 7 of Regulation No 1215/2012, even if, in the particular case, it leads to a court which has no connection with the dispute. A defendant may be sued in the court for the place which the provision designates, even where the court thus established is not the court most closely connected with the dispute. (47)

65. The reference to 'the court objectively *best placed* to determine whether the elements establishing the liability of the person sued are present' (48) does not require, from the point of view of the method or the result, a comparison between different courts which may have jurisdiction on the basis of the place of the event giving rise to the damage and the place where the damage occurred in order to determine the best-placed court in each case.

66. That expression is a reflection of the balancing exercise between legal certainty and proximity to the dispute which is crystallised in the jurisdiction criterion enshrined in the legal provision. In other judgments, the Court uses different expressions, such as 'a particularly close linking factor', (49) which do not encompass the notion of a comparison. In so far as they are not misleading in relation to the task of the authority which applies the provision, those other expressions are, in my view, more appropriate.

(3) Observations concerning the 'other specific circumstances'

67. The question of which 'other specific circumstances' must be present as the basis for the jurisdiction of the courts for the place where the damage arose, if that damage is merely financial, clearly depends on each dispute: that expression encompasses the notion of contingency and refers to the particular case concerned. However, I believe that, generally speaking, the following can be classified as 'other specific circumstances':

– factors relevant to the proper administration of justice and the effective conduct of proceedings; and

– factors which may have served to form the parties' views about where to bring proceedings or where they might be sued as a result of their actions. (50)

68. That better explains the factors listed by the Court in the judgment in *Löber*, (51) the benchmark for this fresh approach. Those factors include the origin of the payments (identification of the place where the personal and clearing accounts were located); the market on which the prospectus was notified and the certificates were traded and acquired; and the location of the persons with whom the investor had direct dealings and also their domicile.

69. Those factors may be presumed to contribute to the evidence of the unlawful conduct, the damage and the causal link between the two. They are, furthermore, factors which take account of the parties' positions in the dispute: as regards Ms Löber — the applicant — those factors indicated that hers was not a cross-border investment; (52) as regards Barclays Bank — the defendant — those factors should have alerted it to the possibility that individuals in certain Member States who were inadequately informed would make investments which would result in damage.

(b) The instant case

(1) The place where the damage occurred

70. In the light of the foregoing considerations, it is necessary to be cautious when seeking to apply to any action concerning purely financial damage a *modus operandi* which, for the purposes of applying Article 7(2) of Regulation No 1215/2012, requires, first, identification of the place where the damage arose and, second, confirmation (or not) of its suitability as a jurisdiction criterion as part of an overall assessment of the specific circumstances of the case.

71. As regards this dispute, I believe that there are parallels with the cases that led to the judgments in *Kolassa*, *Universal* and *Löber*. I also believe that the factor which may justify the application of the same method is *not* the vehicle.

72. Where the financial loss is symbolised by a specific physical object, it may suggest that this object and its location serve as the starting point for establishing jurisdiction in the context of Article 7(2) of Regulation No 1215/2012. (53) The *physical* location of the object at the time when the loss occurs (54) is, as in the case of a bank account, insufficient: all the more so, when the object is something moveable.

73. From the defendant's point of view, the location of the vehicles is unforeseeable. In terms of proximity between the court and the dispute, a car itself counts for less than the proof of who owns it and of when it was purchased, particularly where, as the order for reference indicates, an examination of each specific car is not necessary for the purpose of assessing the damage (because it has been estimated as the same percentage of the price for all those affected). (55)

74. The correct starting point is, rather, the act pursuant to which the product became part of the person concerned's assets and caused the damage. The place where the damage occurred is the place where that transaction was concluded; the courts for that place will have (international and territorial) jurisdiction if the other specific circumstances of the case also support the allocation of jurisdiction to those courts.

75. Those circumstances, which it is for the referring court to identify and assess, must include not only circumstances relating to the victim, (56) but also any factors indicating the defendant's intention to sell its vehicles in the Member State whose jurisdiction is in issue (57) (and, as far as possible, in certain districts within that State). (58)

(2) 'Other specific circumstances' and the jurisdiction of the Austrian courts

76. As I have pointed out, it is not straightforward to state in the abstract which circumstances should be present as the basis for jurisdiction to lie with the courts for the place where the 'damage occurred', or

the guidelines for conducting the overall analysis. However, the lack of certainty about both these matters creates the risk of non-uniform application of Article 7(2) of Regulation No 1215/2012 and also leads to confusion about the method. This is made clear in the final remarks in the order for reference.

77. The national court is uncertain whether the fact that the vehicles were purchased and transferred in Austria is sufficient to support the jurisdiction of the Austrian courts. In the national court's view, other aspects, coming within the category of facts, militate in favour of the courts for the place where the event giving rise to the damage occurred (the German courts). The latter would, 'from the standpoint of efficacious conduct of the proceedings, in particular of the proximity to the subject matter of the dispute and the ease of taking evidence, … be objectively better placed … to clarify where the responsibility for the alleged damage lies'. (59)

78. The referring court takes the view that, pursuant to the judgments of the Court on purely financial damage, which lay down the obligation to take into account, for the purposes of Article 7(2) of Regulation No 1215/2012, the context and the specific circumstances of the case, it is entitled to tip the balance in favour of the jurisdiction of the courts of another State (Germany). It adds that reference to the place of purchase and transfer of the vehicles jeopardises the ability of the defendant to foresee which court will have jurisdiction, particularly because, in this case, some vehicles were bought second-hand.

79. I share the view of the Landesgericht Klagenfurt (Regional Court, Klagenfurt) that, in the context of Article 7(2) of Regulation No 1215/2012, it is not enough that Austria was the territory on which the cars were purchased and transferred if Volkswagen could not reasonably have suspected that that purchase might take place in that Member State.

80. However, I disagree with its approach to the appraisal of the 'specific circumstances' of this case:

– First, a vehicle manufacturer like Volkswagen is in a position to foresee with ease that its vehicles will be placed on the market in Austria. (60)

– Second, the sole purpose of the examination of those circumstances as a whole must be to confirm (or reject) the jurisdiction of the court for the place where the damage occurred. However, that examination must not be used to *choose* which court (the referring court or the courts for the place of the event giving rise to the damage) should decide on the substance of the case, on the grounds that it is closer and foreseeable.

IV. Conclusion

81. In the light of the foregoing considerations, I propose that the following reply be given to the Landesgericht Klagenfurt (Regional Court, Klagenfurt, Austria):

'(1) Article 7(2) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that, where an unlawful act committed in a Member States consists of the manipulation of a product, the existence of which is concealed and only becomes apparent after the product is purchased in another Member State for a price that is higher than its actual value:

– a purchaser of that product, who retains the product as part of his or her assets when the defect is made public, is a direct victim;

– the place where the event giving rise to the damage occurred is the place where the event which created the defect in the product took place; and

– the damage occurred in the place, situated in a Member State, where the victim purchased the product from a third party, provided that the other circumstances confirm the attribution of jurisdiction to the courts of that State. Those circumstances must include, at all events, one or more factors which enabled the defendant reasonably to foresee that an action to establish civil liability as a result of his or her actions might be brought against him or her by future purchasers who acquire the product in that place.

(2) Article 7(2) of Regulation No 1215/2012 must be interpreted as meaning that it does not authorise the court for the place where the damage occurred to determine that it does or does not have jurisdiction based on an appraisal of the other circumstances of the case, aimed at identifying which court — itself or the court for the place of the event giving rise to the damage — is best placed, in terms of proximity and foreseeability, to decide on the dispute.'

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1 Original language: Spanish.

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2 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1972 L 299, p. 32).

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3 Judgment of 30 November 1976, *Bier* (21/76, EU:C:1976:166; 'judgment in *Bier*').

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4 Inter alia, judgments of 11 January 1990, *Dumez France and Tracoba* (C-220/88, EU:C:1990:8; 'judgment in *Dumez*'); of 19 September 1995, *Marinari* (C-364/93, EU:C:1995:289; 'judgment in *Marinari*'); and of 10 June 2004, *Kronhofer* (C-168/02, EU:C:2004:364; 'judgment in *Kronhofer*'). More recently, judgments of 21 May 2015, *CDC Hydrogen Peroxide* (C-352/13, EU:C:2015:335; 'judgment in *CDC*'); of 28 January 2015, *Kolassa* (C-375/13, EU:C:2015:37; 'judgment in *Kolassa*'); of 16 June 2016, *Universal Music International Holding* (C-12/15, EU:C:2016:449; 'judgment in *Universal*'); and of 12 September 2018, *Löber* (C-304/17, EU:C:2018:701; 'judgment in *Löber*').

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5 Regulation of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1).

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6 In VKI's submission, the engines were equipped with a prohibited defeat device within the meaning of Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information (OJ 2007 L 171, p. 1), which meant that 'cleaner emissions', that is to say, emissions that complied with the prescribed limit values, were emitted on the test bench. However, when the vehicles were driven on the road, the volume of pollutant gases was higher than those limit values.

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7 That is so in the case of Regulation No 1215/2012 just as it was in the case of the 1968 Convention and its successor, Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1). On the relationship between those instruments, recital 34 in the preamble to Regulation No 1215/2012 draws attention to the need for continuity of interpretation, which enables, as a rule, the application to Article 7(2) of that regulation of the case-law of the Court of Justice on Article 5(3) of the 1968 Convention and Regulation No 44/2001.

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8 The Report by Mr P. Jenard on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1979 C 59, p. 1) explains (p. 26) that, at that time, the model

was road traffic accidents. It was not possible to imagine then the virtual space as a context for the commission of an unlawful act or a place where damage is sustained.

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9 The only amendment to the wording since the provision was adopted was the express inclusion of the reference to the place where the harmful event 'may occur', which clarified that the provision is intended to apply to actions for preventive measures.

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10 Judgment of 5 June 2014, *Coty Germany* (C-360/12, EU:C:2014:1318; 'judgment in *Coty Germany*'; paragraph 45), and judgment in *Universal*, paragraph 25. The interpretation does not have to be restrictive but strict.

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11 Starting with the judgment in *Marinari*, paragraph 19, followed by, inter alia, the judgment of 27 October 1998, *Réunion européenne and Others* (C-51/97, EU:C:1998:509, paragraph 15), and the judgment in *Coty Germany*, paragraph 43.

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12 Judgment in *Bier*, paragraphs 11 and 17; judgment of 22 January 2015, *Hejduk* (C-441/13, EU:C:2015:28, paragraph 19); and judgment of 17 October 2017, *Bolagsupplysningen and Ilsjan* (C-194/16, EU:C:2017:766, paragraph 26).

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13 Judgment in *Bier*, paragraphs 20 and 23, and judgment of 16 July 2009, *Zuid-Chemie* (C-189/08, EU:C:2009:475; 'judgment in *Zuid-Chemie*'; paragraph 31).

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14 Or in relation to purely financial damage. See footnote 28 below.

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15 Of which Article 4(1) of Regulation No 1215/2012 is an expression.

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16 Judgments of 25 October 2012, *Folien Fischer and Fofitec* (C-133/11, EU:C:2012:664, paragraph 46), and of 16 January 2014, *Kainz* (C-45/13, EU:C:2014:7, paragraph 31).

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17 Judgment in *Kolassa*, paragraph 50. In the judgment in *Löber*, paragraph 32, the Austrian domicile of the holder of a bank account (in which the financial loss had occurred) was accepted for the purpose of attributing jurisdiction to the Austrian courts for the 'place where the damage occurred' as an additional factor for confirming such jurisdiction.

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18 Judgment in *Marinari*, paragraphs 14 and 15. In fact, damage can be 'consequential' in two senses: (i) as damage derived from other, earlier damage (the event caused harm which actually arose elsewhere: judgment in *Marinari*, paragraphs 14 and 15; 'accessory to initial damage arising and suffered by a direct victim' in the words of Advocate General Léger in the Opinion in *Kronhofer* (C-168/02, EU:C:2004:24, point 45); and (ii) as damage sustained by a victim 'by ricochet', that is, an indirect victim (judgment in *Dumez*, paragraphs 14 and 22). In this Opinion, I use the term in the first sense.

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19 Judgment in *Dumez*, paragraphs 14 and 22. The graphic expression 'by ricochet' appears occasionally in the Court's case-law to distinguish between persons who are entitled to compensation for damage they have sustained personally and persons other than the 'direct victim' who may 'obtain compensation "by ricochet",

following damage sustained by the victim'. In that connection, see judgment of 10 December 2015, *Lazar* (C-350/14, EU:C:2015:802, paragraph 27).

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20 Judgment of 25 October 2011, *eDate Advertising and Others* (C-509/09 and C-161/10, EU:C:2011:685; 'judgment in *eDate*').

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21 Judgment in *eDate*, paragraph 47.

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22 The question is framed in a way which suggests that the Austrian court is not in doubt about that point. However, the content of the order for reference appears to suggest the opposite.

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23 The uncertainties concern the place of the event giving rise to the damage and the choice between that place and the place where the damage occurred when the applicants are not the victims themselves but rather an association which has taken over their claims.

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24 The Austrian court's uncertainties do not relate to the application for a declaration of liability for future or as yet unquantifiable damage, which VKI attributes to a software update after the date on which it became aware of the initial manipulation of the engines. Since the question referred for a preliminary ruling does not refer to those uncertainties, I shall refrain from commenting on them. However, I feel moved to state that the jurisdiction of the Austrian courts by reason of the place where the damage occurred, based on Article 7(2) of Regulation No 1215/2012, is debatable for a number of reasons.

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25 Judgment in *Zuid-Chemie*, paragraph 27: 'The place where the damage occurred must not … be confused with the place where the event which damaged the product itself occurred, the latter being the place of the event giving rise to the damage'.

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26 There has been an intense debate in Germany concerning whether owners of vehicles with manipulated engines are entitled to bring a claim against the manufacturer on the basis of non-contractual liability (in other words, concerning whether or not they are holders of a legal interest protected in that way). That is clear from the different court judgments: they are entitled to do so according to the judgments of the Landgericht Stuttgart (Regional Court, Stuttgart, Germany) of 17 January 2019 (23 O 180/18); the Landgericht Frankfurt (Regional Court, Frankfurt, Germany) of 29 April 2019 (2-07 O 350/18); and the Oberlandesgericht Koblenz (Higher Regional Court, Koblenz, Germany) of 12 June 2019 (Az.: 5 U 1318/18), against which an appeal is currently pending before the Bundesgerichtshof (Federal Court of Justice, Germany); they are not entitled to do so according to the judgment of the Landgericht Braunschweig (Regional Court, Brunswick, Germany) of 29 December 2016 (1 O 2084/15).

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27 Judgment in *Zuid-Chemie*, paragraph 27, and judgment in *CDC*, paragraph 52, inter alia many others.

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28 Opinion of Advocate General Szpunar in *Universal Music International Holding* (C-12/15, EU:C:2016:161, point 38): 'In certain situations, it is impossible to distinguish between "Handlungsort" and "Erfolgsort"'. That is also a view supported by legal commentators: Hartley, T.H.C., 'Jurisdiction in Tort Claims for Non-Physical Harm under Brussels 2012, Article 7(2)', *ICLQ*, vol. 67, pp. 987-1003, and Oberhammer, P., 'Deliktsgerichtsstand am Erfolgsort reiner Vermögensschäden', *JBl*, 2018, pp. 750-768.

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29 Judgment in *Kronhofer*, paragraph 18.

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30 In his Opinion in *CDC Hydrogen Peroxide* (C-352/13, EU:C:2014:2443, point 47), Advocate General Jääskinen argued that Article 5(3) of Regulation No 44/2001 could not be applied where the persons sustaining the alleged damage were scattered over a great many Member States because that would lead to multiple parallel proceedings, involving the risk of conflicting decisions, which would run counter to the general objective of Regulation No 1215/2012. The Court did not accept that proposal (which would also have had a bearing on this case, in view of the number of affected persons, the fact that the assignment of their claims did not alter the attribution of jurisdiction, and the fact that Article 7(2) of Regulation No 1215/2012 establishes territorial jurisdiction as well as international jurisdiction). The criterion of avoiding multiple proceedings must not, therefore, take precedence over the application of the provision by requiring the preventive exclusion of courts close to the dispute, which are foreseeable for the parties and which are authorised to hear the dispute by the provision. Where there are multiple simultaneous proceedings, this should be corrected through the mechanisms for *lis pendens* or related actions which are also laid down by Regulation No 1215/2012 (or by national mechanisms for multiple proceedings in the same Member State).

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31 In the judgment in *Universal*, the Court followed a line of reasoning which, in principle, would have led to the damage being located in the place where the applicant entered into the obligation that placed an irreversible burden on its assets (paragraphs 31 and 32). In my view, ‘the place where the obligation is incurred’ is not particularly helpful when it comes to identification of the place of the damage if it is construed as meaning that it is necessary to consult the applicable law. Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6) ensures, in theory, that the outcome of that consultation is identical in all the Member States but divergences cannot be ruled out even if these are due only to the different approaches to evidence under foreign law in each State and to the alternative solution in the event of a lack of evidence. However, these are well-known difficulties and are taken into account in the application of other jurisdiction criteria laid down in Regulation No 1215/2012 and its predecessors.

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32 Like that of the ‘place where the victim’s assets are concentrated’, which reflects the notion of damage having a simultaneous effect on all the applicant’s assets. That connecting factor was rejected in *Kronhofer*.

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33 For example, in cases involving an applicant’s bank accounts, in which the applicant can select the place after the obligation associated with the financial damage has arisen: see the judgment in *Universal*, paragraph 38. The Court accepts that the place where the account in which the transaction is expressed in accounting terms is located *is* the place where the direct financial loss occurs, but, as I shall explain, the Court takes the view that that is not sufficient to justify the option in Article 7(2) of Regulation No 1215/2012.

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34 C-256/00, EU:C:2002:99, paragraph 49. The case concerned an obligation not to do something, applicable without geographical limit.

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35 See the case-law cited in footnote 4. The question as to whether the place where damage which, *initially*, is only financial originated can be classified as the ‘place where the harmful event occurred’ was addressed by the Court in the judgment in *Zuid-Chemie*, in relation to liability for defective products. Since material damage had occurred in that case, the Court took the view that the question was hypothetical and, therefore, did not reply. It cannot be inferred from the fact that the Court did not reply that, in a situation involving financial damage and other (subsequent and non-consequential) physical damage, the place of the latter damage supplants that of the former for the purposes of establishing international jurisdiction.

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36 In that context, the judgment in *CDC* appears to be an isolated case. In his Opinion in *CDC Hydrogen Peroxide* (C-352/13, EU:C:2014:2443), Advocate General Jääskinen stated in point 50 that one of the places where the damage occurred, from an economic point of view, was the place of performance of the contracts whose content was limited by the cartel. The place finally adopted by the Court — the registered office of each of the persons concerned, which was the other possibility put forward by the advocate general — was not taken up in subsequent judgments.

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37 C-618/15, EU:C:2016:976, paragraph 33: '… in the event of infringement, by means of a website, of the conditions of a selective distribution network, the damage which the distributor may claim is the reduction in the volume of its sales resulting from the sales made in breach of the conditions of the network and the ensuing loss of profits'.

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38 C-27/17, EU:C:2018:533; 'judgment in *flyLAL*'; paragraphs 35 and 36.

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39 C-451/18, EU:C:2019:635; 'judgment in *Tibor-Trans*'; paragraphs 30, 32 and 33.

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40 The judgment in *Universal*, in paragraphs 31 and 32, took that approach, which tends to rely on actions that are more or less noticeable (on that occasion, the conclusion of a settlement in the Czech Republic in the context of arbitration proceedings held there).

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41 In his Opinion in *flyLAL-Lithuanian Airlines* (C-27/17, EU:C:2018:136, point 70), Advocate General Bobek drew attention to the fact that the reduction in sales and ensuring loss of revenue do not necessarily happen in the same place. He described the former as 'initial damage' and the latter as 'consequential' damage. The Court did not accept that view, or at least not explicitly.

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42 Not only investments: see the judgment in *Universal*, where the harmful event was the negligence of a lawyer who had drafted a binding contract for his client.

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43 Judgments in *Kolassa*, *Universal* and, in particular, *Löber*.

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44 Judgment in *Löber*, paragraphs 31 and 36, and the operative part.

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45 See pp. 9 and 10 of the order for reference.

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46 Paragraph 17 (italics added).

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47 Judgment of 29 June 1994, *Custom Made Commercial* (C-288/92, EU:C:1994:268, paragraphs 17 (in conjunction with paragraph 16) and 21). The judgment refers to special jurisdiction in matters relating to a contract but the principle is the same in the paragraph relating to actions to establish non-contractual liability. In that regard, on the subject of non-contractual liability, see judgment of 27 October 1998, *Réunion européenne and Others* (C-51/97, EU:C:1998:509, paragraphs 34 and 35).

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48 For example, in the judgment of 16 January 2014, *Kainz* (C-45/13, EU:C:2014:7, paragraph 24).

49 Judgment in *flyLAL*, paragraph 27.

50 The choice of one or the other will vary depending, at the very least, on the unlawful act and the structure of the proceedings. The situation where an infringement has been established in an earlier action and the purpose of the proceedings is to determine whether, and how, it has affected a particular applicant is, naturally, different from that where the infringement itself has not yet been established. Furthermore, individuals' expectations in relation to the legal consequences of their actions are defined by reference to legal classifications and to the rules governing these laid down in law.

51 Judgment in *Löber*, paragraphs 32 and 33.

52 In its case-law on Article 7(2) of Regulation No 1215/2012, the Court links the legal protection of persons established in the Union with two objectives: the applicant must be able to identify easily the court in which he or she may sue and the defendant reasonably to foresee in which court he or she may be sued (see, for example, the judgments in *Kolassa*, paragraph 56, and *Löber*, paragraph 35). It would appear that the person bringing proceedings is only protected *ex post facto* but that the point of reference for the defendant is earlier. In fact, that is not the case: everyone must be able to predict (reasonably) the consequences of their actions before carrying them out; the sphere of legal protection cannot be restricted on account of a characteristic — that of being an applicant or, on the other hand, a defendant — which is unknown at the time when an act or omission takes place. That is why, in the judgment in *Löber*, a number of the 'specific circumstances' concerned Ms Löber (the applicant) and her actions prior to the occurrence of the damage.

53 The observations of VKI, the Commission and the United Kingdom, which describe the damage as 'hybrid' (as opposed to merely financial) appear to suggest this, although it is not clear what inferences they draw from that description for the purposes of attributing international jurisdiction.

54 This is the time when the vehicle was purchased by the person who owned it when the defect in the engine was made public.

55 Order for reference, p. 9.

56 From the victim's perspective, in the light of the judgment in *Löber*, relevant circumstances may be, inter alia, the fact that the purchase was negotiated in the same place and that this was also the place of transfer of the vehicle and (again, in accordance with the judgment in *Löber*) the purchaser's place of domicile.

57 From the defendant's perspective, relevant circumstances may be, inter alia, the import (directly or through a general importer linked to the defendant) of the vehicles into the State in which the defendant is being sued; the placing of the vehicles on the market in that State by official dealers or distributors; sales promotion by means of advertising carried out by the defendant or on its behalf in that State; and the issue of certificates of conformity translated by the defendant into the language of that State.

58 I should stress that Article 7(2) of Regulation No 1215/2012 is intended to attribute international and territorial jurisdiction to a particular court within the designated jurisdiction.

59 Order for reference, pp. 9 and 10.

60 See, in that connection, footnote 57.