

## **Technology and law are inseparable**

### **Why illegal manipulations of technology change our legal system**

Statutory provisions and the rights and interests they seek to protect, i.e. people, health and the environment, are of great importance within the regime of ISO 9001:2015. Yet, the ongoing erosion of the rule of law creates opportunities for organizations that are looking for ways to circumvent current regulations. If we get used to this kind of mentality, the rule of law will soon become obsolete.

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The quality management standard EN ISO 9001:2015 and its predecessors are harmonized European standards and thus have a quasi-regulatory status. This is even more true with respect to European regulatory acts such as Directive 2007/46/EC establishing a framework for the approval of motor vehicles and the EU type approval Regulation 2018/858, which will enter into force in 2020 and repeal the former. As a safeguard for ensuring “conformity of production”, ISO 9001 is one of the cornerstones of the European type approval regime. The national type approval authorities are responsible for the so called *initial assessment* of a manufacturer’s fitness for quality production, which they usually have carried out by a Technical Service.

However, the system obviously does not work in the way originally intended. Neither the State nor the courts nor the organizations concerned (and those responsible within it for the QM systems) appear to be able to enforce the law – because if they were and the system worked, there should be no Dieselgate and the annual recall figures would not be so exorbitantly high.

The diesel emission scandal and recalls – and such examples could easily be found within almost all industries – have in common that they are caused by infringements of the law, for which there can be no justification or exculpatory defense. No one has so far invoked that the root causes for recalls had been unavoidable.

*Defeat devices*, that is devices which manipulate control units, have been illegal since the introduction of the EU Regulation 715/2007, if not even earlier. The fact alone that, in 2007, European legislators thought it necessary to include the prohibition of defeat devices in the Regulation and to impose drastic sanctions in case of violations (which most EU Members States including Germany had not done in domestic legislation), shows how great they estimated the danger of violations to be.

And yet, since the diesel scandal came to light in the second half of 2015, cleverly hidden defeat devices continue to be discovered; the violations of statutory provisions have continued although everyone was aware of the legal prohibition. That is shameless.

### **Legal loopholes are not an excuse**

There have been many voices, including some of the politicians responsible (who at the same time hold important positions on the supervisory boards of vehicle manufacturers), who trivialized the violations in their criticism by pointing out that the vehicle manufacturers had

merely exploited unclear or ambiguous legal loopholes. This claim is deeply disrespectful of the law and also wrong.

Article 3(10) of EU Regulation 715/2007 sets out a clear legal definition of what constitutes a defeat device: “[A]ny element of design which senses temperature, vehicle speed, engine speed (RPM), transmission gear, manifold vacuum or any other parameter for the purpose of activating, modulating, delaying or deactivating the operation of any part of the emission control system, that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use.” With its unambiguous wording regarding the underlying intention of the provision (“for the purpose of – that reduces”), this definition hardly leaves any room for manipulations (or the fetish for “thermal windows”).

Whoever messes with any of the system components mentioned in the definition does so with the intention of achieving an illegal purpose. Assuming anything else or even defending their actions amounts to unfair and dishonest behavior by legal standards.

The legal system relied on the onerous burden of proof that the authorities had to meet and that depended heavily on their areas of responsibility – a trend that was supported by the vehicle manufacturers’ right to self-review, which had been pushed through because of the successful lobbying activities of the “CARS 21 High Level Group”.

### **Legislative response: reversing the burden of proof**

European legislators have set an example with their reaction to the situation: The new type approval Regulation (EU) 2018/858, which will become effective as from September 2020 but already entered into force in July 2018, reverses the burden of proof: Pursuant to Article 5(2), vehicle manufacturers must provide evidence as to their products’ compliance with the relevant requirements in a way that is reproducible by the competent authorities. It is now the manufacturers who bear the risk as the decision about whether the information is reproducible or not lies with the authorities. Manufacturers no longer hold sway over whether they have reached a sufficient degree of plausibility.

As regards recalls, too, the law is violated time and again – because every official recall is preceded by the discovery that the affected vehicles (for whichever reason) violate statutory safety provisions. According to the Product Safety Directive 2001/95/EC (transposed into German law by the revised Product Safety Act of November 2011), placing unsafe products on the market is prohibited. This principle is applicable in all Member States and under all domestic legal orders.

All vehicles that are affected by a recall were unsafe in the legal sense because of a defect in design and/or production and should never have been placed on the market. This is also the reason why all the *Certificates of Conformity* that the manufacturers delivered were wrong. According to Annex IX to Directive 2007/46/EC, the manufacturer must furnish every buyer with such a Certificate containing an individual assurance that the vehicle they purchased complies with all European legal requirements. The judicial system deems a false Certificate of Conformity a criminal form of causing wrong entries to be made in public records (*mittelbare Falschbeurkundung*), for which the CEO of one vehicle manufacturer was recently remanded in pre-trial custody for several months.

## **Ignorance of the law is no excuse**

How can such violations occur under a functioning quality management system? Consider, in particular, that these systems are put into place precisely in order to ensure compliance with statutory requirements, and that legislators included them in Regulations and other statutory provisions, implying that legislators deem them as fit for purpose and effective.

Speaking from practical experience, there are at least two possible explanations:

- There is no respect for the law anymore.
- It is considered common sense that laws do not have to be complied with because the risk of legal sanctions is so low.

Respect for the law requires laws to be known. It seems, however, that this cannot be expected (anymore). One of the biggest challenges in providing legal advice to my clients is that I often cannot expect them to know either industry-specific or generally applicable statutory provisions. Enthusiasm is accordingly lukewarm whenever I address the issue of applicable laws and have to approach conflicts that have occurred depending on the legal provisions.

My pointing out existing applicable laws is often met with a belittling smile stemming from the attitude that if one does not know the law, one cannot apply it. And since there have been no problems so far, the applicable laws cannot be all too relevant. Apart from this, the clients then take the position that, regarding statutory provisions and regulatory acts (including EN ISO 9001:2015), they are acting according to common practice within the industry. They claim they simply did not have neither the resources nor the time to check the availability of laws and then to take a closer look at them.

It was when the German Federal Court of Justice's (BGH) handed down its airbag decision, at the very latest, that it became clear that common industry practice does not deserve any legal protection under product safety law.

## **QM systems link technology with law**

A QM system according to EN ISO 9001:2015 establishes an inseparable and necessary link between the law and technology: It is an instrument to ensure that technological products are only produced within the legally permissible framework and it determines personal responsibilities within the production process. There is no technological data without legal relevance and vice versa: a contractual or statutory threshold is and remains a threshold and is not within anyone's arbitrary discretion. Thus, where a QM system allows for deviations from statutory or contractual thresholds, it has failed! And we have not even addressed the issue of responsibility.

There are a number of reasons why QM systems fail. Among these reasons, three stand out apart from the lack of resources mentioned above:

- **Lack of control over ever more complex systems:** OEMs increasingly lack the ability and expertise to develop their products from a higher-level perspective. Their dependence on specialists from outside their own industry or rival design partners limits the scope for them to comply with all the relevant legal requirements. Yet, all OEMs claim to possess this ability and, thus, have to let others take them at their word.
- **Complexity within the supply chain:** This complexity limits the ability of the manufacturers to ensure the quality of components, systems and separate technical

units at the different production interfaces, in particular due to cost saving issues. In turn, suppliers find themselves under increased pressure, often being blamed for defects. Defects occur, however, because the vehicle manufacturers are incapable of imposing binding specifications from the downstream perspective of the entire vehicle.

- **Time pressure and lack of product maturity:** Functional Safety Managers, for instance, who are responsible for signing off on safety-related systems, often need to confirm a safety status that does not exist yet. They have to do so because of cost savings, lack of time before production starts (SOP) or simply because product maturity is still lacking. The Managers then succumb to the pressure because of their personal dependence and their own psychological strain.

If we take a look at how these obvious violations of the law are currently dealt with, it becomes scary: Politicians set the legal rules and condone the fact that they are used only to a marginal extent or circumvented altogether. The debates on the automotive industry's violations are usually brought to an end by raising the knockout argument of potential job losses. Many German Higher State Courts (*Oberlandesgerichte*) do not deem illegal defeat devices a violation of the law and, using the crude means of the law governing the right to appeal, block the way to the Federal Court of Justice and (what is even worse) the Court of Justice of the European Union. The latter would be the legally competent authority to enforce EU law (the primarily infringed source of law in these cases), and this is also true in the German context and within the meaning of the Basic Law.

These weaknesses in the judiciary facilitate the automotive industry's shortcomings. When confronted with thresholds, the industry reacts by calling for state subsidies to fuel the development of new technologies. Before the violations of Dieselgate were revealed, this argument seemed to be appropriate – until the opposite was proven.

All of this adds up to a dangerous erosion of the law: if we get used to this mentality, the rule of law becomes obsolete. This erosion consequently leads to an urge for repetition: with a degenerating sense of justice comes a degeneration of ethics, morals and society's sense of responsibility, from which the awareness for quality originated. There is no quality without a true reflection of it in the law.

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