



## Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

4 October 2018\*

(Failure of a Member State to fulfil obligations — Directive 2006/40/EC — Emissions from air-conditioning systems in motor vehicles — Article 5(4) and (5) — Directive 2007/46/EC — Approval of motor vehicles — Articles 12, 29, 30 and 46 — Vehicles not conforming to technical requirements — Responsibility of the national authorities)

In Case C-668/16,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 23 December 2016,

**European Commission**, represented by C. Hermes and D. Kukovec and by A.C. Becker, acting as Agents,

applicant,

v

**Federal Republic of Germany**, represented by T. Henze and D. Klebs, acting as Agents,

defendant,

THE COURT (Second Chamber),

composed of M. Ilešič, President of the Chamber, A. Rosas (Rapporteur), C. Toader, A. Prechal and E. Jarašiūnas, Judges,

Advocate General: P. Mengozzi,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 11 January 2018,

after hearing the Opinion of the Advocate General at the sitting on 11 April 2018,

gives the following

### Judgment

- 1 By its application, the European Commission seeks a declaration that the Federal Republic of Germany has failed to fulfil its obligations under Directive 2006/40/EC of the European Parliament and of the Council of 17 May 2006 relating to emissions from air-conditioning systems in motor vehicles and

\* Language of the case: German.

amending Council Directive 70/156/EEC (OJ 2006 L 161, p. 12) ('the Air Conditioning Systems Directive'), and Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive) (OJ 2007 L 263, p. 1), as amended by Commission Regulation (EU) No 371/2010 of 16 April 2010 (OJ 2010 L 110, p. 1) ('the Framework Directive'):

- by failing to take the measures necessary to restore the conformity of vehicles of types 246, 176 and 117 with their approved types (Articles 12 and 30 of the Framework Directive);
- by failing to take the measures necessary to implement penalties (Article 46, in conjunction with Articles 5 and 18, of the Framework Directive); and
- by upholding on 17 May 2013 an application by Daimler AG for extension of the existing vehicle type 245G to vehicles for which a different type-approval had been granted previously, to which the new requirements of the Air Conditioning Systems Directive are applicable, and thereby circumventing that directive.

## Legal context

### *European Union law*

#### *Air Conditioning Systems Directive*

- 2 The Air Conditioning Systems Directive is one of the regulatory acts listed in Annex IV, Part I, to the Framework Directive. Article 5(4) and (5) of the directive provides:

'4. With effect from 1 January 2011 Member States shall no longer grant EC type-approval or national type-approval for a type of vehicle fitted with an air conditioning system designed to contain fluorinated greenhouse gases with a global warming potential higher than 150.

5. With effect from 1 January 2017, in respect of new vehicles which are fitted with an air-conditioning system designed to contain fluorinated greenhouse gases with a global warming potential higher than 150, Member States shall:

- (a) consider certificates of conformity to be no longer valid for the purposes of Article 7(1) of Directive 70/156/EEC; and
- (b) refuse registration and prohibit sale and entry into service.'

#### *Framework Directive*

- 3 Recitals 2 and 3 of the Framework Directive are worded as follows:

'(2) For the purposes of the establishment and operation of the internal market of the Community, it is appropriate to replace the Member States' approval systems with a Community approval procedure based on the principle of total harmonisation.

(3) The technical requirements applicable to systems, components, separate technical units and vehicles should be harmonised and specified in regulatory acts. Those regulatory acts should primarily seek to ensure a high level of road safety, health protection, environmental protection, energy efficiency and protection against unauthorised use.'

4 Article 3 of the Framework Directive states:

'For the purposes of this Directive and of the regulatory acts listed in Annex IV, save as otherwise provided therein:

...

17. "type of vehicle" means vehicles of a particular category which do not differ in at least the essential respects specified in Section B of Annex II. A type of vehicle may contain variants and versions as defined in Section B of Annex II;

...'

5 Article 4(1) to (3) of that directive provides:

'1. Member States shall ensure that manufacturers applying for approval comply with their obligations under this Directive.

2. Member States shall approve only such vehicles, systems, components or separate technical units as satisfy the requirements of this Directive.

3. Member States shall register or permit the sale or entry into service only of such vehicles, components and separate technical units satisfy the requirements of this Directive.

...'

6 Article 5(1) of the directive provides:

'The manufacturer is responsible to the approval authority for all aspects of the approval process and for ensuring conformity of production, whether or not the manufacturer is directly involved in all stages of the construction of a vehicle, system, component or separate technical unit.'

7 Article 6 of the Framework Directive, entitled 'Procedures to be followed for the EC type-approval of vehicles', states in paragraph 6:

'The manufacturer shall submit the application to the approval authority. Only one application may be submitted in respect of a particular type of vehicle and it may be submitted in only one Member State.

A separate application shall be submitted for each type to be approved.'

8 Article 12 of that directive, entitled 'Conformity of production arrangements', is drafted as follows:

'1. The Member State which grants an EC type-approval shall take the necessary measures in accordance with Annex X to verify, if need be in cooperation with the approval authorities of the other Member States, that adequate arrangements have been made to ensure that production vehicles, systems, components or separate technical units, as the case may be, conform to the approved type.

2. The Member State which has granted an EC type-approval shall take the necessary measures in accordance with Annex X in relation to that approval to verify, if need be in cooperation with the approval authorities of the other Member States, that the arrangements referred to in paragraph 1 continue to be adequate and that production vehicles, systems, components or separate technical units, as the case may be, continue to conform to the approved type.

Verification to ensure that products conform to the approved type shall be limited to the procedures set out in Annex X and in those regulatory acts that contain specific requirements. To that end, the approval authority of the Member State which has granted the EC type-approval may carry out any of the checks or tests prescribed in any of the regulatory acts listed in Annex IV or Annex XI on samples taken in the premises of the manufacturer, including production facilities.

3. When a Member State which has granted an EC type-approval establishes that the arrangements referred to in paragraph 1 are not being applied, deviate significantly from the arrangements and control plans agreed, or have ceased to be applied, although production is not discontinued, that Member State shall take the necessary measures, including the withdrawal of the type-approval, to ensure that the conformity of production procedure is followed correctly.'

- 9 In Chapter V of the Framework Directive, entitled 'Amendments to EC type-approvals', Article 14 thereof, entitled 'Specific provisions concerning vehicles', provides in paragraph 2:

'The revision shall be designated an "extension" if, in addition to the provisions of paragraph 1:

- (a) further inspections or fresh tests are required;
- (b) any information on the EC type-approval certificate, with the exception of its attachments, has changed;
- (c) new requirements under any of the regulatory acts applicable to the approved vehicle type enter into force.

...'

- 10 In the same chapter, Article 15 of that directive, entitled 'Specific provisions concerning systems, components or separate technical units', provides in paragraph 2:

'The revision shall be designated an "extension" if, in addition to the provisions of paragraph 1:

- (a) further inspections or fresh tests are required;
- (b) any information on the EC type-approval certificate, with the exception of its attachments, has changed;
- (c) new requirements under any of the regulatory acts applicable to the approved system, component or separate technical unit enter into force.

...'

- 11 Article 17 of the Framework Directive, relating to the cessation of validity of an EC type-approval of a vehicle, provides in paragraph 1:

'An EC type-approval of a vehicle shall cease to be valid in any of the following cases:

...

(b) production of the approved vehicle is definitively discontinued voluntarily;

...'

12 Article 18(1) of Directive 2007/46, entitled 'Certificate of conformity', provides in the first subparagraph of paragraph 1 thereof:

'The manufacturer, in his capacity as the holder of an EC type-approval of a vehicle, shall deliver a certificate of conformity to accompany each vehicle, whether complete, incomplete or completed, that is manufactured in conformity with the approved vehicle type.'

13 Article 29 of the Directive is worded as follows:

'1. If a Member State finds that new vehicles, systems, components or separate technical units, albeit in compliance with the applicable requirements or properly marked, present a serious risk to road safety, or seriously harm the environment or public health, that Member State may, for a maximum period of six months, refuse to register such vehicles or to permit the sale or entry into service in its territory of such vehicles, components or separate technical units.

In such cases, the Member State concerned shall immediately notify the manufacturer, the other Member States and the Commission accordingly, stating the reasons on which its decision is based and, in particular, whether it is the result of:

- shortcomings in the relevant regulatory acts, or
- incorrect application of the relevant requirements.

2. The Commission shall consult the parties concerned as soon as possible and, in particular, the approval authority that granted the type-approval in order to prepare the decision.

3. Where the measures referred to in paragraph 1 are attributed to shortcomings in the relevant regulatory acts, the appropriate measures shall be taken as follows:

- where separate directives or regulations listed in Part I of Annex IV are concerned, the Commission shall amend them in accordance with the regulatory procedure with scrutiny referred to in Article 40(2),
- where UNECE Regulations are concerned, the Commission shall propose the necessary draft amendments to the relevant UNECE Regulations in accordance with the procedure applicable under the Revised 1958 Agreement.

4. Where the measures referred to in paragraph 1 are attributed to incorrect application of the relevant requirements, the Commission shall take the appropriate measures to ensure compliance with such requirements.'

14 Article 30 of the Framework Directive, entitled 'Vehicles, systems, components or separate technical units not in conformity with the approved type', provides:

'1. If a Member State which has granted an EC type-approval finds that new vehicles, systems, components or separate technical units accompanied by a certificate of conformity or bearing an approval mark do not conform to the type it has approved, it shall take the necessary measures, including, where necessary, the withdrawal of type-approval, to ensure that production vehicles,

systems, components or separate technical units, as the case may be, are brought into conformity with the approved type. The approval authority of that Member State shall advise the approval authorities of the other Member States of the measures taken.

...

3. If a Member State demonstrates that new vehicles, components or separate technical units accompanied by a certificate of conformity or bearing an approval mark do not conform to the approved type, it may ask the Member State which granted the EC type-approval to verify that vehicles, systems, components or separate technical units in production continue to conform to the approved type. On receipt of such a request, the Member State concerned shall take the requisite action as soon as possible and in any case within six months of the date of the request.

4. The approval authority shall request the Member State which granted the system, component, separate technical unit or incomplete vehicle type-approval to take the necessary action to ensure that vehicles in production are brought back into conformity with the approved type in the following cases:

- (a) in relation to an EC vehicle type-approval, where the non-conformity of a vehicle is attributable exclusively to the non-conformity of a system, component or separate technical unit;
- (b) in relation to a multi-stage type-approval, where the non-conformity of a completed vehicle is attributable exclusively to the non-conformity of a system, component or separate technical unit being part of the incomplete vehicle, or of the incomplete vehicle itself.

On receipt of such a request, the Member State concerned shall take the requisite action, if necessary in conjunction with the Member State making the request, as soon as possible and in any case within six months of the date of the request. Where a failure to conform is established, the approval authority of the Member State which granted the system, component or separate technical unit EC type-approval or the approval of the incomplete vehicle shall take the measures set out in paragraph 1.

...'

15 Article 32(1) and (2) of that directive provides:

'1. Where a manufacturer who has been granted an EC vehicle type-approval is obliged, in application of the provisions of a regulatory act or of Directive 2001/95/EC [of the European Parliament and of the Council of 3 December 2001 on general product safety (OJ 2002 L 11, p. 40)], to recall vehicles already sold, registered or put into service because one or more systems, components or separate technical units fitted to the vehicle, whether or not duly approved in accordance with this Directive, presents a serious risk to road safety, public health or environmental protection, he shall immediately inform the approval authority that granted the vehicle approval thereof.

2. The manufacturer shall propose to the approval authority a set of appropriate remedies to neutralise the risk referred to in paragraph 1. The approval authority shall communicate the proposed measures to the authorities of the other Member States without delay.

The competent authorities shall ensure that the measures are effectively implemented in their respective territories.'

16 Article 45(5) of the Framework Directive reads as follows:

'This Directive shall not invalidate any EC type-approval granted to vehicles of category M1 before 29 April 2009 nor prevent the extension of such approvals.'

17 Article 46 of that directive, headed ‘Penalties’, provides:

‘Member States shall determine the penalties applicable for infringement of the provisions of this Directive, and in particular of the prohibitions contained in or resulting from Article 31, and of the regulatory acts listed in Part I of Annex IV and shall take all necessary measures for their implementation. The penalties determined shall be effective, proportionate and dissuasive. Member States shall notify these provisions to the Commission no later than 29 April 2009 and shall notify any subsequent modifications thereof as soon as possible.’

18 Annex II to the Framework Directive, entitled ‘Definition of vehicle categories and vehicle types’, states in Part A(1), that Category M1 covers ‘vehicles designed and constructed for the carriage of passengers and comprising no more than eight seats in addition to the driver’s seat’. Part B of that annex provides:

‘1. For the purposes of category M1:

A “type” shall consist of vehicles which do not differ in at least the following essential respects:

- the manufacturer,
- the manufacturer’s type designation,
- essential aspects of construction and design:
  - chassis/floor pan (obvious and fundamental differences),
  - power plant (internal combustion/electric/hybrid).

“Variant” of a type means vehicles within a type which do not differ in at least the following essential respects:

- body style (e.g. saloon, hatchback, coupé, convertible, station-wagon, multi-purpose vehicle),
- power plant:
  - working principle (as in item 3.2.1.1 of Annex III),
  - number and arrangement of cylinders,
  - power differences of more than 30% (the highest is more than 1,3 times the lowest),
  - capacity differences of more than 20% (the highest is more than 1,2 times the lowest),
- powered axles (number, position, interconnection);
- steered axles (number and position).

“Version” of a variant means vehicles, which consist of a combination of items shown in the information package subject to the requirements in Annex VIII.

...’

19 Annex IV of the Framework Directive contains, in particular, a list of the legislative acts to be complied with for the purposes of an EC type-approval for a vehicle, among which include, in Part I, the Air Conditioning Systems Directive.

20 Annex IX of the Framework Directive sets out the content of the EC certificate of conformity. Point 0 thereof states:

‘The certificate of conformity is a statement delivered by the vehicle manufacturer to the buyer in order to assure him that the vehicle acquired complies with the legislation in force in the Union at the time it was produced.

The certificate of conformity also serves the purpose of enabling the competent authorities of the Member States to register vehicles without having to require the applicant to supply additional technical documentation.

...’

21 Annex X of the Framework Directive describes the conformity of production procedure, which aims to ensure that each produced vehicle, system, component and technical separate unit is in conformity with the approved type. According to Point 0, second paragraph, thereof, the procedures include two inseparable procedures, namely the assessment of quality management systems and verification of the approval subject and product-related controls.

22 Council Regulation (EU) No 678/2011 of 14 July 2011 replacing Annex II and amending Annexes IV, IX and XI to Directive 2007/46 (OJ 2011 L 185, p. 30) *inter alia* amended the Framework Directive.

23 Recitals 3 and 4 of that regulation are worded as follows:

‘(3) Experience shows that the current criteria for determining whether a new model of vehicle is to be considered a new type are too vague. This lack of certainty can delay the implementation of new requirements laid down in [European Union] legislation regarding new vehicle types. Moreover, experience shows that it is possible to circumvent the [European Union] small series legislation by dividing a vehicle type into several sub-types under different type-approvals. Consequently, the number of new vehicles that may be put into service in the European Union under the small series regime can exceed what is permissible. It is therefore important to specify which vehicle technical features are to be used as criteria in determining what constitutes a new type.

(4) In accordance with the principles enshrined in the communications from the Commission entitled Action plan “Simplifying and improving the regulatory environment” and Action programme for “Reducing administrative burdens in the European Union”, it is appropriate to reconsider the criteria to be used for the definition of the variants and versions within a vehicle type with a view to reducing the administrative burden placed on vehicle manufacturers. This would result, moreover, in making the type-approval process more transparent for the competent authorities of the Member States.’

24 According to Article 3(1), second subparagraph, of Regulation No 678/2011, that regulation applies to new vehicle types for which approval will be granted on and after 29 October 2012. Article 2 of that regulation further provides that that regulation not invalidate any vehicle type-approval granted before 29 October 2012 nor prevent extension of such approvals.



*Directive 2001/95*

25 Article 2 of Directive 2001/95 provides:

‘For the purpose of this Directive:

...

(b) “safe product” shall mean any product which, under normal or reasonably foreseeable conditions of use including duration and, where applicable, putting into service, installation and maintenance requirements, does not present any risk or only the minimum risks compatible with the product’s use, considered to be acceptable and consistent with a high level of protection for the safety and health of persons ...

...

(d) “serious risk” shall mean any serious risk, including those the effects of which are not immediate, requiring rapid intervention by the public authorities;

...’

*German law*

26 Paragraph 7 of the EG-Fahrzeugsgenehmigungsverordnung (EC Regulation on the approval of vehicles) of 3 February 2011 (BGBl. 2011 I, p. 126), as amended by Article 4 of the Regulation of 19 October 2012 (BGBl. 2012 I, 2232), provides in paragraph 1:

‘EC type-approval of a vehicle expires when new requirements become mandatory for the registration, sale or entry into service of new vehicles under any regulatory act, within the meaning of Article 3(1) of the [Framework Directive], and it is not possible to change the approval. It also expires upon the final cessation of production of the type of vehicle approved. The manufacturer must notify the discontinuation of production at the Kraftfahrt-Bundesamt [Federal Office of Motor Vehicles, “the KBA”].’

27 Paragraph 25 of that regulation is worded as follows:

‘(1) If the KBA finds that vehicles, systems, components or separate technical units do not conform to the type approved, it may take the necessary measures under [the Framework Directive] applicable according to the type, to ensure compliance from production to type approved.

(2) In order to remedy shortcomings and to ensure the conformity of vehicles already put into circulation, components or technical units, the KBA may take secondary provisions retrospectively.

(3) The KBA may resume or withdraw type-approval, in whole or in part, particularly where it is found that

1. vehicles with a certificate of conformity or components or technical units with a prescribed designation do not conform to the type approved,
2. vehicles, components or technical units indicate a significant risk to road safety, public health or the environment,

3. the manufacturer does not have an effective system to monitor the conformity of production or does not use it in the manner provided

or

4. the type-approval holder does not respect the charges related to this type-approval.'

### **Background to the dispute and the pre-litigation procedure**

28 In 2006 the Air Conditioning Systems Directive was adopted, Article 5(4) of which provides that the air conditioning systems of all types of vehicles approved after 1 January 2011 are to use an air conditioning system designed to contain fluorinated greenhouse gases with a global warming potential no higher than 150.

29 Although, until then, European vehicle manufacturers used refrigerant R134a with a global warming potential close to 1300, in 2009 in the context of an international standardisation process, they decided to use the refrigerant with reference No R1234yf which has a global warming potential of 4.

30 Following disruption to the supply of refrigerant R1234yf caused by the destruction of the production sites by the Fukushima (Japan) tsunami, in April 2012, the Commission informed the Member States that, in view of the exceptional circumstances, it would not initiate infringement proceedings for the failure of vehicles to conform to the Air Conditioning Systems Directive, for as long as refrigerant R1234yf, the only refrigerant compatible with that directive, was unavailable, but that that moratorium would not be extended beyond 31 December 2012.

31 On 3 March 2011, 8 June 2011 and 18 October 2012, the KBA, as the German authority responsible for type-approval, approved, at Daimler's request, the new types of vehicles 246, 176 and 117 as conforming to the Air Conditioning Systems Directive.

32 In September 2012, Daimler informed the German authorities of concerns about the safety of using refrigerant R1234yf in vehicle types 246, 176 and 117. It recalled approximately 700 vehicles to replace the refrigerant and expressed its intention to use refrigerant R134a in those types of vehicles instead of refrigerant R1234yf, the use of which was the basis for the issue of the corresponding type-approvals, and to continue to use refrigerant R134a after the expiry of the moratorium in January 2013. In November 2012, the German authorities requested the Commission to authorise the non-implementation of the specifications of the Air Conditioning Systems Directive on the ground that it was necessary to conduct further safety checks regarding the safety of refrigerant R1234yf.

33 From 1 January to 26 June 2013, Daimler sold 133 713 vehicles of types 246, 176 and 117 fitted with an air conditioning system operating with refrigerant R134a.

34 On 3 January 2013, the KBA requested Daimler to specify the measures taken by the manufacturer with regard to the non-conformity of vehicle types 246, 176 and 117. In response to that request, on 15 January 2013, Daimler submitted an action plan to find a technical solution before 15 June 2013. On 4 March 2013, the KBA ordered Daimler to take the measures necessary to re-establish conformity, indicating that if conformity was not re-established, the corresponding type-approvals would be withdrawn with effect from 30 June 2013.

35 On 26 June 2013, Daimler informed the KBA that it had ceased production of types 246, 176 and 117.

36 On 17 May and 3 June 2013, the KBA accepted the requests submitted by Daimler for an extension of the approval of vehicle type 245G, obtained in 2008, that is before the Air Conditioning Systems Directive, to other variants.

- 37 The Commission sent the Federal Republic of Germany a request for information on 10 June 2013 and a letter of formal notice on 27 January 2014. It criticised the German authorities (i) for permitting 133 713 vehicles to be constructed and sold between January and June 2013, contrary to the established type-approval, (ii) for the circumvention of the Air Conditioning Systems Directive and (iii) for failing to impose penalties on the manufacturer.
- 38 On 26 March 2014, the Federal Republic of Germany replied. As regards the non-conforming vehicles, it relied on the discretion granted to the national authorities by the Framework Directive and the principle of proportionality. It explained that the information given by Daimler suggested that the use of refrigerant R1234yf constituted a safety risk.
- 39 Furthermore, according to the Federal Republic of Germany, the KBA was obliged to grant Daimler's request for an extension of the approval for type 245G.
- 40 On 25 September 2014, the Commission sent a reasoned opinion to the Federal Republic of Germany in which it maintained the complaints in its letter of formal notice. It called on that Member State to take the measures necessary to comply with the reasoned opinion within a period of two months from the reception of that opinion.
- 41 The Federal Republic of Germany responded to that opinion by letter of 25 November 2014, repeating in substance the same arguments as those set out in its reply to the letter of formal notice.
- 42 Since it was not satisfied with the Federal Republic of Germany's response, the Commission decided to bring the present action.

## **The action**

### ***The first plea: infringement of the Air Conditioning Systems Directive, in particular, Articles 12 and 30 thereof***

#### *Arguments of the parties*

- 43 By its first complaint, the Commission seeks a declaration that the Federal Republic of Germany has infringed the Air Conditioning Systems Directive and the Framework Directive, in particular, Articles 12 and 30 thereof, on the ground that it failed to take the measures necessary to re-establish the conformity of vehicle types 246, 176 and 117 to their approved types.
- 44 The Commission recalls that Articles 12 and 30 of the Framework Directive provide that the Member State which has approved a type of vehicle must verify the conformity of production of vehicles to the approved type and, if it finds a deviation from conformity of the production or of new vehicles constructed to take the measures necessary to ensure that they conform, if necessary, by withdrawing the type-approval so that production vehicles are brought into conformity with the approved type. The objective of Article 12 of the Framework Directive, and particularly paragraph 3 thereof, and Annex X to that directive, is not simply to provide for adequate arrangements in order to detect any divergence from conformity of production, but specifically to ensure the continuation of conformity of production by guaranteeing the adoption of the measures necessary if a deviation from conformity is discovered.
- 45 According to the Commission, in accordance with the combined provisions of Article 4(2) of and Annex IV to the Framework Directive and Article 5(4) of the Air Conditioning Systems Directive, vehicle types 246, 176 and 117 could be approved only on condition that the global warming potential of the refrigerant used in the air conditioning system of those vehicles did not exceed 150. Daimler has

produced new vehicles of types 246, 176 and 117 using a refrigerant having a global warming potential which exceeded 150 in their air conditioning system, so that those vehicles did not conform to the approved type of vehicle.

- 46 The Commission observes that the German authorities have acknowledged that, between 1 January 2013 and 26 June 2013, they were aware of the fact that 133 713 non-conform vehicles had been sold by Daimler.
- 47 The Commission claims that, in addition to those 133 715 vehicles, Daimler continued to construct vehicles corresponding to types 246, 176 and 117 by extending to those vehicles type 245G, an old vehicle type to which the requirements of the Air Conditioning Systems Directive were not applicable. In that context, it submits that, apart from the fact that their air conditioning systems use refrigerant R134a, vehicles in Class A, Class B and Class CLA, corresponding to the extension of vehicle type 245G, are the same as those corresponding to vehicles approved as types 246, 176 and 117. It considers that, in total, approximately 800 000 vehicles which do not conform to their approval were sold in this way in the period from the beginning of 2013 to the end of 2016.
- 48 The Commission criticises the Federal Republic of Germany for failing to take measures to ensure the re-establishment of conformity to the approved type, such as the withdrawal of the type-approval or the recall and repair of the vehicles concerned.
- 49 In response to the Federal Republic of Germany's argument on the safety concerns about the use of refrigerant R1234yf in vehicle types 246 176 and 117, the Commission claims that those concerns have since been shown to be unfounded. Moreover, for the legal assessment of the infringements complained of in the present case it is of little importance whether the German authorities concluded, on the basis of the information available to them, that the use of that refrigerant presented a risk for road safety and human health.
- 50 The Framework Directive does not contain any exceptions permitting Member States to ignore harmonised technical requirements in the event that concerns as to their appropriateness arise; however they do contain mandatory obligations to ensure compliance with all the technical requirements. Specifically, as regards Article 30 of the Framework Directive, the Commission argues that the considerations relating to proportionality relied on by the defendant do not dispense it from the obligation to take the measures necessary with regard to Daimler in order to re-establish conformity of the vehicles at issue to the approved type.
- 51 Finally, the Commission states that, if vehicles, albeit in compliance with the approved type 'present a serious risk to road safety or seriously harm the environment or public health', Article 29 of the Framework Directive authorises the Member State concerned, by way of exception, to refuse to register or permit the sale or entry into service of such vehicles for a maximum period of six months. However, the Federal Republic of Germany did not follow the procedure laid down in that regard.
- 52 The Federal Republic of Germany explains that, near the end of 2012, Daimler and other organisations, such as the Verband der Automobilindustrie and the Deutsche Umwelthilfe, took the view, on the basis of tests they had carried out, that the use of the new refrigerant R1234yf in vehicles constituted a 'serious risk for safety'. Those tests, which also concerned types of vehicles other than Daimler's, showed that, in certain situations, that refrigerant could spontaneously and violently ignite causing a vehicle fire and highly toxic exposure to hydrogen fluoride and carbonyl fluoride, which led to the conclusion that passengers in the vehicle and persons close by would be exposed to an immediate lethal hazard. Moreover, other automobile manufacturers shared the same opinion and, in the second half of 2012, converted their approvals for vehicles containing the new R1234yf refrigerant to approvals for older vehicles permitting the use of the R134a refrigerant.

- 53 In those circumstances, the KBA considered, at that stage, that the vehicles fitted with the new refrigerant R1234yf presented a serious risk, within the meaning of Article 2(d) of Directive 2001/95, so that it could not be criticised for failing to require Daimler to implement the immediate conversion of the 133 713 non-conform vehicles to type which were sold between 1 January and 26 June 2013. Thus, the decision taken by the KBA to conduct its own tests in order to take an informed decision would be entirely consistent with the principle of proportionality and would also be recognised as correct by the Joint Research Centre (JRC) of the Union following extensive testing. Even if the result of its tests have not yielded sufficient evidence confirming the existence of a serious risk, within the meaning of Directive 2001/95, which would require immediate action, combustion and exposure to hydrogen fluoride have been found in any event, which is clear evidence of the persisting difficulty related to the use of refrigerant R1234yf in the air conditioning systems of motor vehicles. For safety reasons, the KBA therefore strongly recommended that the tests should be continued in order to evaluate more accurately the potential risks.
- 54 The Federal Republic of Germany states that, on seven occasions, the KBA requested Daimler to re-establish conformity of the 133 713 vehicles not conforming to the approved types and to develop possible technical solutions required for that purpose. By letter of 20 November 2015, Daimler notified the KBA of the safety measures it was planning for the use of the new refrigerant in its new vehicles and, by letters of 16 and 18 December 2015, 7 March 2016 and 23 September 2016, it described the possible technical solutions in order to re-establish, by conversion, conformity to the approved types of the 133 713 non-conform vehicles. However, since Daimler did not carry out the upgrade of those vehicles, expressing the concern that it could not guarantee an adequate assembly quality, the KBA, by administrative act of 23 March 2017, imposed an upgrade. However, Daimler challenged that order and the administrative review procedure is ongoing.
- 55 The Federal Republic of Germany challenges the figure of 800 000 vehicles put forward by the Commission in its first complaint, since that figure relates to type 245G vehicles.
- 56 The Federal Republic of Germany denies that it has infringed Article 12 of the Framework Directive. According to its interpretation of that provision, the latter does not concern the verification of the vehicles themselves, but verification of the existence of adequate arrangements to ensure that those vehicles conform to the approved type. In the present case, there is no evidence that the quality control carried out by Daimler was ineffective. Contrary to the Commission's assertions, deviation from conformity is not always accompanied by a failure of the quality control system's verification. On the contrary, the KBA was informed at an early stage that there had been a deviation from 1 January 2013, on the ground that the refrigerant R134a continued to be used in the place of the prescribed refrigerant R1234yf.
- 57 The Federal Republic of Germany also denies having infringed Article 30 of the Framework Directive. According to that Member State, that provision expressly confers discretion on the authorities of the Member States. The expression 'take the necessary measures' in that provision, reflects the principle of proportionality and establishes the requirement for Member States to act progressively and to withdraw the type-approval only in the last resort, as follows from the expression 'including, where necessary', in that provision.
- 58 It points out that Article 30(1) of the Framework Directive does not lay down any time limit, and that the time limit of four months granted to Daimler by the KBA, in its letter of 4 March 2013, to take the necessary measures in order to re-establish conformity was not too long, taking account of the six-month time limit laid down in Article 30(3) and (4).
- 59 The Federal Republic of Germany argues that the withdrawal of the approval notified by the KBA in that letter if the manufacturer failed to comply with the order to bring the vehicles concerned into conformity with the approved type before 30 June 2013 could no longer apply, since Daimler had definitively ceased production of those vehicles before the expiry of that time limit. Furthermore, the

Framework Directive does not contain any rules providing for what is to happen to the vehicles manufactured and sold until the withdrawal of the type-approval. Article 32 of that directive provides for the recall of vehicles, but only where they present ‘a serious risk to environmental protection’. That is not the case in the present proceedings. Non-conformity does not present a high risk for road safety and public health and is predicted to have only a marginal impact on the environment, having regard to the transitional provisions of the Air Conditioning Systems Directive which allowed the continued use of the old refrigerant in millions of new vehicles until the end of the six-year transitional period, expiring on 31 December 2016, and for many vehicles such as buses and coaches and heavy-duty vehicles which do not fall within the scope of that directive.

- 60 According to the Federal Republic of Germany, ordering the immediate conversion of the vehicles concerned, in the circumstances and taking account of the impossibility of such a conversion at that time, would have led to the decommissioning of those vehicles and would have caused serious economic loss for the owners of such vehicles, with repercussions on the market for Daimler and economically-linked undertakings throughout the European Union.

### *Findings of the Court*

- 61 It is appropriate to examine in succession the acts complained of, the interpretation of Article 12 of the Framework Directive, the interpretation of Article 30 thereof and, finally, the ground of defence relied on by the Federal Republic of Germany as regards the safety of those vehicles.
- 62 The acts complained of by the Commission with regard to the Federal Republic of Germany concern 133 713 vehicles which failed to conform to the approved types 246, 176 and 117, sold by Daimler between 1 January and 26 June 2013, the date on which that undertaking informed the KBA that it had definitively ceased production of those vehicles. In the context of the first complaint, the Commission also criticises the sale of approximately 800 000 vehicles not conforming to their approval during the period between the beginning of 2013 and the end of 2016. As the Commission stated in its reply, that figure of approximately 800 000 vehicles comprises, first, 133 713 vehicles not conforming to approved types 246, 176 and 117 and, second, vehicles corresponding to those types to which type 245G, an old type of vehicle to which the requirements of the Air Conditioning Directive were not applicable, was extended. The latter vehicles are also referred to in the Commission’s third complaint, by which it criticises the defendant for circumventing that directive.
- 63 In that connection, it must be held that the Commission cannot argue simultaneously in the first complaint that the vehicles were not manufactured in accordance with approved types 246, 176 and 117 and, in the third complaint, that an extension of type 245G was used for their manufacture.
- 64 Since the Commission does not deny, as Daimler indicated to the KBA, that the manufacture of vehicles of approved types 246, 176 and 117 was ended definitively on 26 June 2013, vehicles other than the 133 713 vehicles not conforming to the approved types which were sold by Daimler until that date must be excluded from consideration.
- 65 The Federal Republic of Germany does not contest the fact that those 133 713 vehicles did not conform to types 246, 176 and 117 approved after 1 January 2011, because they were fitted not with refrigerant R1234yf declared for those approved types, but a refrigerant whose global warming potential was more than 150, the reference level laid down in Article 5(4) of the Air Conditioning Systems Directive. However, it argues that it has not failed to fulfil its obligations under Article 12 or Article 30 of the Framework Directive as, first, the KBA was informed of the non-conformity from the end of 2012, which shows the efficient functioning of the quality control system laid down by Article 12 and, second, Article 30 confers discretion on the Member States. In the present case, the KBA acted proportionally, in accordance with the wording of that provision and the need to ensure the safety and health of humans and the protection of the environment.

- 66 As regards Article 12 of the Framework Directive, the Commission's first complaint concerns, in substance, paragraph 3 thereof, relating to the measures to be adopted by the Member States in the case of non-conformity of production of vehicles to an approved type, and not paragraph 1 thereof, which relates to the verification of the arrangements made by undertakings to ensure that vehicles conform to the approved type.
- 67 The Federal Republic of Germany is not criticised for failing to fulfil the obligation to ascertain the existence of deviations from conformity of the production, but for failing to take the measures necessary to re-establish conformity of production, as according to paragraph 3, when a Member State which has granted an EC type-approval establishes that the arrangements referred to in paragraph 1 are not being applied, deviate significantly from the arrangements and control plans agreed, or have ceased to be applied, although production is not discontinued, that Member State is to take the necessary measures, including the withdrawal of the type-approval, to ensure that the conformity of production procedure is followed correctly.
- 68 As regards Article 30(1) of the Framework Directive, it also provides that if a Member State which has granted an EC type-approval finds that new vehicles accompanied by a certificate of conformity do not conform to the type it has approved, 'it shall take the necessary measures, including, where necessary', the withdrawal of type-approval, to ensure that production vehicles are brought into conformity with the approved type.
- 69 In that connection, it is clear from the wording of those provisions that they leave a margin of discretion to the Member States when determining the measures which are necessary to ensure that the vehicles are brought into conformity with the approved type.
- 70 Furthermore, it is clear from the Framework Directive that it is possible that an approved type presents a serious risk which is discovered only after the approval. Thus, Article 29 of the directive provides that Member States may refuse to register such vehicles or to permit the sale or entry into service in its territory of such vehicles, components or separate technical units which present a serious risk to road safety, or seriously harm the environment or public health, even though they comply with the applicable requirements. Similarly, Article 32 of the Framework Directive concerns the recall of vehicles already sold, registered or put into service because one or more systems, components or separate technical units fitted to the vehicle, whether or not duly approved in accordance with the Framework Directive, presents a serious risk to road safety, public health or environmental protection.
- 71 By analogy, under Articles 12 and 30 of the Framework Directive, where, as in the present case, the authorities of the Member State concerned are informed by the manufacturer of the vehicles concerned of the existence of a deviation from conformity to the approved type, and that that deviation is justified by cogent and reliable objective evidence establishing the existence of a serious risk to human health and safety or to the environment submitted by that manufacturer, where the applicable requirements have been satisfied, those authorities are justified in not immediately requiring the recall and conversion of the vehicles concerned, or not immediately withdrawing type-approval concerned and in carrying out their own evaluation of the risks before deciding to impose, where necessary, that recall or conversion or the withdrawal of the type-approval.
- 72 As provided for in Articles 29 and 32 of the Framework Directive, it is nonetheless for that Member State to immediately inform the Commission and the other Member States of the serious risk of which it has been notified and, where necessary, of the measures suggested by the manufacturer in order to neutralise the risk concerned.
- 73 However, if at the end of that assessment, it appears that the serious risk relied on has not been established, that Member State must then take the necessary measures as soon as possible to ensure the conformity of the vehicles at issue with the approved type is re-established.

- 74 Since the approval procedure established by the Framework Directive, as stated in recital 2 thereof, is based on the principle of total harmonisation, the margin of discretion conferred on Member States by Articles 12 and 30 of the Framework Directive cannot permit them to evaluate themselves whether it is necessary to achieve that objective.
- 75 As the Advocate General observed, in paragraph 67 of his Opinion, to permit the Member States themselves to evaluate the necessity to achieve that objective of conformity would deprive the harmonised system of approval defined by the combined provisions of the Framework Directive and the regulatory acts of any effectiveness.
- 76 In that connection, it must also be observed, for information purposes, that Article 30(3) of the Framework Directive provides that, if a Member State makes a request for verification of conformity, the Member State which has granted the EU type-approval is required to take the measures required, in any event within six months of the date of that request. Similarly, Article 30(4) of the Framework Directive also lays down, in the conditions listed therein, the application of a maximum period of six months.
- 77 In the present case, it is clear from the documents before the Court that the German authorities were in constant contact with the Commission.
- 78 However, it must be observed that those authorities reacted belatedly to the non-conformity of vehicles of types 246, 176 and 117 to their approved types. Daimler's concerns relating to the safety of refrigerant R1234yf were brought to their attention in September 2012 and the Commission requested information on 10 June 2013 and sent a letter of formal notice on 27 January 2014 and a reasoned opinion of 25 September 2014. It is clear from the file before the Court that, from 8 October 2013, the German authorities found, at the end of the first phase of tests, that there was no significant probability that serious risks to public health and safety and the environment indicated by Daimler would arise. Moreover, the German authorities concede that, by letter of 20 November 2015, Daimler confirmed that it had found safety measures for the use of the new refrigerant in its new vehicles and that, from December 2015, Daimler had set out the possible technical solutions to re-establish conformity, by conversion, with the approval types for the 133 713 non-conform vehicles. However, it was only on 23 March 2017 that the KBA, by administrative act, ordered Daimler to bring into conformity, by conversion, the 133 713 vehicles, that is more than two years after the expiry of the two month period set out in that reasoned opinion.
- 79 Having regard to all of those elements, it must be held that, by failing, within the period prescribed in the reasoned opinion, to take the measures necessary to re-establish conformity to their approved types of 133 713 vehicles of types 246, 176 and 117 sold by Daimler between 1 January and 26 June 2013, as they were not fitted with refrigerant R1234yf declared for those approved types, but a refrigerant whose global warming potential was greater than 150, contrary to the limit provided for in Article 5(4) of the Air Conditioning Systems Directive, the Federal Republic of Germany has failed to fulfil its obligation under the latter directive and Articles 12 and 30 of the Framework Directive

***The second plea: infringement of the Air Conditioning Systems Directive and the Framework Directive, in particular Articles 46, 5 and 18 of the Framework Directive***

*Arguments of the parties*

- 80 By its second complaint, the Commission seeks a declaration that the Air Conditioning Systems Directive and the Framework Directive, in particular the combined provisions of Articles 46, 5 and 18 of the Framework Directive, have been infringed, in so far as the Federal Republic of Germany has failed to take the measures necessary to impose penalties.



- 81 In its application, the Commission claims that Daimler failed to comply with Article 5(1) of the Framework Directive, according to which the manufacturer must ensure that all the requirements on which the approval of the corresponding vehicle type is based continue to be observed. From January 2013, Daimler manufactured and sold vehicles of types 246, 176 and 117 which had air conditioning systems which did not conform to the approval of their types, operating with a refrigerant whose global warming potential is above the maximum value authorised by Article 5(4) of the Air Conditioning Systems Directive.
- 82 Daimler also infringed Article 18 of the Framework Directive, read together with Annex IX thereto, which requires manufacturers to issue a certificate of conformity to each vehicle constructed which conforms to the type of vehicle approved, such a certificate, as is clear from Annex IX to the Framework Directive, constituting an assurance from the vehicle manufacturer to the buyer that the vehicle purchased complies with the legislation in force in the Union at the time it was produced. Since from January 2013, types 246, 176 and 117 were no longer being constructed in accordance with the approval of their type, Daimler's statement in that certificate of conformity no longer corresponds to reality.
- 83 By failing to impose penalties on Daimler, the Federal Republic of Germany has infringed Article 46 of the Framework Directive, which provides that Member States must determine, in their national law, effective, proportionate and dissuasive penalties, applicable in the case where manufacturers fail to comply with the provisions of that directive.
- 84 In its defence, the Federal Republic of Germany argues that it is only if Daimler has been ordered to bring the vehicles concerned into conformity and Daimler had failed to comply with that order that sanctions could be imposed. At the hearing, the Federal Republic of Germany indicated that, in 2017, the KBA ordered Daimler to bring the vehicles concerned into conformity, that Daimler challenged that order, and that the administrative review procedure is ongoing. According to the Federal Republic of Germany, there is no infringement of Article 46 of the Framework Directive since no penalty is possible before the end of the administrative review procedure.

#### *Findings of the Court*

- 85 The Federal Republic of Germany does not deny that Daimler has failed to fulfil its obligations under the provisions of Articles 5 and 18 of the Framework Directive. However, it considers that Daimler's failure to fulfil its obligations should not be penalised per se, but only as a consequence of the fact that the measures intended to re-establish conformity under Articles 12 and 30 of the Framework Directive were not implemented.
- 86 In that connection, while Articles 12 and 30 of the Framework Directive deal with obligations imposed on Member States in order to ensure conformity of vehicles, systems, components or separate technical units, to the approved type, Articles 5 and 18 thereof relate to the manufacturers' obligations. The manufacturers are responsible for all the aspects, in particular of the certificate of conformity accompanying each vehicle produced in conformity with the vehicle type approved. As regards Article 46 of the Framework Directive, it provides that the Member States are to determine the penalties applicable for infringement of the provisions of that directive and are to take all necessary measures for their implementation by penalties which are effective, proportionate and dissuasive.
- 87 As the Advocate General observed, in point 95 of his Opinion, Article 46 of the Framework Directive pursues different objectives from those of Articles 12 and 30 thereof. The latter safeguard conformity with the technical requirements contained in the regulatory acts, whereas Article 46 services the objective of establishing and opening an internal market characterised by fair competition between manufacturers. In addition to that objective, the penalties laid down in Article 46 of the Framework

Directive must also ensure that the purchaser of a vehicle has a certificate of conformity enabling him, in accordance with Annex IX to that directive, to register it in any Member State without having to provide additional technical documents.

- 88 In any event, as stated in paragraph 79 of the present judgment, it is established that, by failing to take the measures necessary to re-establish conformity of the vehicles of types 246, 176 and 117 to their approved types within the period prescribed by the reasoned opinion, the Federal Republic of Germany failed to fulfil its obligations under Articles 12 and 30 of the Framework Directive.
- 89 Therefore, it is appropriate to uphold the Commission's second complaint and to declare that, by failing to take the measures necessary to apply the penalties referred to of Article 46 of the Framework Directive within the period prescribed by the reasoned opinion, in order to ensure that manufacturers comply with Articles 5 and 18 thereof, relating to the conformity of the production and the issue of a certificate of conformity, the Federal Republic of Germany has infringed the Air Conditioning Systems Directive and the combined provisions of Articles 46, 5 and 18 of the Framework Directive.

***The third plea: infringement of the Air Conditioning Systems Directive and the Framework Directive and, more specifically, the circumvention of the Air Conditioning Systems Directive***

*Arguments of the parties*

- 90 By its third complaint, the Commission seeks a declaration that the Federal Republic of Germany has infringed the Air Conditioning Systems Directive in that it circumvented that directive by accepting Daimler's request, on 17 May 2013, to extend the approval of the existing vehicle type 245G to vehicles to which another type-approval had already been granted applying new conditions of that directive.
- 91 It explains that, in accordance with Article 14 of the Framework Directive, an approved type may be extended to other vehicles which are different from the original approved type where those vehicles, first, satisfy the legal requirements which were in force for the grant of the original type-approval and, second, are so similar to the original approved type that they may be regarded as being covered by that type on the basis of the criteria laid down in Part B of Annex II to the Framework Directive.
- 92 According to the Commission, the present case does not concern such an extension of type 245G. Type 245G, approved in 2008, that is at a time when the Air Conditioning Systems Directive was not applicable, was extended to vehicles which had already been approved and manufactured as types 246, 176 and 117, that is at a time when that directive was applicable. Article 6(6) of the Framework Directive provides that a type that has already been approved cannot be approved again. Therefore, the replacement of approved types 246, 176 and 117, disguised as an extension of type 245G, constitutes a circumvention of EU law.
- 93 The Federal Republic of Germany states that the validity of the approvals of types 246, 176 and 117 expired when the undertaking ceased the production of the contested types on 26 June 2013. In May 2013, the vehicle type 245G was extended, within the legal limits, to other variants using the old refrigerant.
- 94 It argues that the Framework Directive gives a flexible definition of 'type of vehicle'. It points out that Annex II to the Framework Directive expressly permits the manufacturer to determine itself the extent of the vehicle type and, therefore, the scope of the type-approval within the limits of the characteristics defining each type. The Federal Republic of Germany supports its arguments by reference to Regulation No 678/2011, which, in order to remedy the lack of precision of the criteria of the

Framework Directive, amended it in order to redefine the definitions of ‘type-approval’ and ‘extension’ and to clarify the criteria used to determine if a new model of a vehicle should be regarded as a new type.

- 95 That Member State considers that the Commission, in a manner which is simplistic and incorrect, treats the concept of ‘series’ or ‘class’, that is, in particular, Class A, Class B and the new Class B, used in marketing in the same way as type-approval. Vehicles constructed from 26 June 2013 in Class A, Class B and Class CLA on the basis of vehicle type 245G differ from the old types 246, 176 and 117 not only by their designation by type, but also by various technical details and by the approvals of systems.
- 96 As regards compliance with the Air Conditioning Systems Directive, the Federal Republic of Germany recalls that that directive expressly provides for a transitional period until 1 January 2017, a period during which the new registrations of vehicles using the old refrigerant could be made on the basis of old extended type-approvals. It concludes that it is not possible to treat the case at issue as an unlawful circumvention of the Air Conditioning Systems Directive.

### *Findings of the Court*

- 97 By its third complaint, the Commission complains that, essentially, the Federal Republic of Germany circumvented the requirements of the Air Conditioning Systems Directive and infringed the provisions of the Framework Directive by accepting an application by Daimler, on 17 May 2013, to extend the approval of the existing vehicle type 245G to vehicles which, according to that institution, had already been previously approved as types 246, 176 and 117. The Federal Republic of Germany argues that those vehicles were not identical.
- 98 In that connection, as the Advocate General observed, in point 112 of his Opinion, the Commission refers only to the trade names of the vehicles produced by Daimler. Furthermore, it does not produce any tangible evidence, in its application, establishing that the technical characteristics of the vehicles for which the extension of type 245G was granted and which have been produced after 26 June 2013 were identical to types 246, 176 and 117.
- 99 Furthermore, as the Advocate General observed, in points 113 and 114 of his Opinion, the legislation applicable in the present case confers a certain latitude on the manufacturer. It is clear from the text of the Framework Directive and, more specifically, Annex II thereto, that the manufacturer may determine itself the extent of a vehicle type. In addition, as is clear from Chapter V of that directive, it authorises the extension of old type-approvals. The broad interpretation of the Framework Directive is supported by recital 3 of Regulation No 678/2011, which amended that directive, according to which ‘experience shows that the current criteria for determining whether a new model of vehicle is to be considered a new type are too vague’.
- 100 It follows from those elements that the Commission has failed, in that regard, to provide sufficient evidence in support of its third complaint.
- 101 Moreover, the Commission argues essentially that the purpose of the extension laid down in Article 14(2) of the Framework Directive precludes a manufacturer avoiding the application of legal provisions in force to vehicles of new approved types by extending, to newly registered vehicles, of another type of previously approved vehicle. Such an extension is contrary to the objective of the Framework Directive to guarantee that newly registered vehicles satisfy a high level of safety and environmental protection.

102 In that regard, it must be observed that it follows from Article 14(2) of the Framework Directive that there is an extension of a vehicle type if further inspections or fresh tests are required, if any information on the EC type-approval certificate has changed, and if new requirements under any of the regulatory acts applicable to the approved vehicle type enter into force.

103 As the Advocate General observed in point 121 of his Opinion, it does not follow from Article 14 or any other provision of the harmonised system that the extension applied for must be designed to bring about technical progress towards the objectives of the Framework Directive relating to safety and the protection of the environment.

104 Furthermore, Article 5(5) of the Air Conditioning Systems Directive expressly provides for a transitional period until 1 January 2017, during which new registrations of vehicles using the old refrigerant could still be made on the basis of old extended type-approvals, while the technical requirements concerned were already in force from 1 January 2011 for new approvals. Therefore, as the Advocate General observed, in point 123 of his Opinion, that directive adopts a progressive approach.

105 Therefore, it cannot be concluded from the foregoing that the extension of the approval applied for by Daimler and granted by the KBA was incompatible with the Framework Directive or with the Air Conditioning Systems Directive.

106 Consequently, the Commission has failed to establish that the Federal Republic of Germany has infringed the provisions of the Framework Directive or that it has allowed Daimler to circumvent the Air Conditioning Systems Directive.

107 It follows from the foregoing that the Commission's third complaint is unfounded.

108 In the light of all the foregoing considerations, it must be held that the Federal Republic of Germany has failed to fulfil its obligations:

- under the Air Conditioning Systems Directive and Articles 12 and 30 of the Framework Directive, by failing to take the measures necessary, within the period prescribed in the reasoned opinion, to re-establish conformity to their approved types of 133 713 vehicles of types 246, 176 and 117, sold by Daimler between 1 January and 26 June 2013, when they were fitted not with the refrigerant R1234yf declared for those approved types, but a refrigerant having a global warming potential which was greater than 150, contrary to the limit laid down in Article 5(4) of the Air Conditioning Systems Directive, and
- under the Air Conditioning Systems Directive and the combined provisions of Articles 46, 5 and 18 of the Framework Directive, by failing to take the measures necessary to apply the penalties referred to in Article 46 of the Framework Directive within the period prescribed in the reasoned opinion, in order to ensure that manufacturers comply with Articles 5 and 18 of that directive, relating to the conformity of production and the issue of a certificate of conformity.

109 The remainder of the application must be dismissed.

### **Costs**

110 Under Article 138(1) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

111 In the present case, the Commission and the Federal Republic of Germany applied, respectively, for the other party to be ordered to pay the costs.

112 Under Article 138(3) of the Rules of Procedure, if it appears justified in the circumstances of the case, the Court may order one party, in addition to bearing its own costs, to pay a proportion of the other party's costs. In the present case, it is appropriate, in accordance with that provision to order the Federal Republic of Germany to bear its own costs and to pay half of those incurred by the Commission

113 The Commission is ordered to bear half of its own costs.

On those grounds, the Court (Second Chamber) hereby:

**1. Declares that, the Federal Republic of Germany has failed to fulfil its obligations:**

- **under Directive 2006/40/EC of the European Parliament and of the Council of 17 May 2006 relating to emissions from air-conditioning systems in motor vehicles and amending Council Directive 70/156/EEC, and Articles 12 and 30 of Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive), as amended by Commission Regulation (EU) No 371/2010 of 16 April 2010, by failing to take the measures necessary, within the period prescribed in the reasoned opinion, to re-establish conformity to their approved types of 133 713 vehicles of types 246, 176 and 117, sold by Daimler between 1 January and 26 June 2013, when they were fitted not with the refrigerant R1234yf declared for those approved types, but a refrigerant having a global warming potential which was greater than 150, contrary to the limit laid down in Article 5(4) of Directive 2006/40, and**
- **under Directive 2006/40 and the combined provisions of Articles 46, 5 and 18 of Directive 2007/46, by failing to take the measures necessary to apply the penalties referred to in Article 46 of Directive 2007/46 within the period prescribed in the reasoned opinion, in order to ensure that manufacturers comply with Articles 5 and 18 of that directive, relating to the conformity of production and the issue of a certificate of conformity;**

**2. Dismisses the action as to the remainder;**

**3. Orders the Federal Republic of Germany to bear its own costs and to pay half of the costs incurred by the European Commission;**

**4. Orders the European Commission to bear half of its own costs.**

[Signatures]