Case C-276/20

Request for a preliminary ruling

Date lodged:

24 June 2020

Referring court:

Landgericht Erfurt (Germany)

Date of the decision to refer:

15 June 2020

Applicant:

A, G, E

Defendant:

B AG

...

Landgericht Erfurt (Regional Court, Erfurt)

Translation
C-276/20 — 1

...

Order for reference

In the case of

_____ A_____, G_____, E_____

– Applicant –

...

against

B_____AG, represented by directors B_____, W_____

– Defendant –

...

seeking compensation following the 'emissions scandal'

the Eighth Civil Chamber of the Regional Court, Erfurt, comprising

...

sitting alone on 15 June 2020

made the following order: [Or. 2]

I. ...

II. The following questions are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU:

1. Under EU law, especially the principle of effectiveness, and for the purposes of European fundamental rights, must no deduction for actual use of the vehicle be applied to the damage sustained by the purchaser where the manufacturer of a vehicle or engine infringes European registration law and European emissions standards? Does that preclusion of any deduction apply where a manufacturer causes a customer intentional damage contrary to public policy?

2. Is the referring court an independent and impartial court or tribunal for the purpose of Article 267 TFEU, read in conjunction with the third sentence of Article 19(1) TEU and Article 47(2) of the Charter of Fundamental Rights of the European Union?

Grounds

A. Facts and main proceedings

The main proceedings have been initiated in one of the numerous 'emission scandal' cases brought throughout Europe seeking compensation from manufacturers of vehicles or engines fitted with an unlawful defeat device.

The applicant purchased a new passenger vehicle from a car dealer on 2 June 2012 ... . The vehicle was fitted with a Euro 5 emissions standard diesel engine made by

the defendant ... . The engine was fitted with control software to reduce nitrogen oxide emissions during laboratory testing but not under normal driving conditions.

The vehicle was delivered to the applicant and first registered on 20 July 2012, following payment of the gross purchase price of EUR 21 000. The applicant had a software update installed on 25 June 2018 during the course of a product recall. It lodged an action in September 2018 demanding payment of EUR 21 000, that is the full purchase price, plus interest from 20 July 2012, in exchange for the return of the vehicle. **[Or. 3]**

B. The questions referred and their relevance

I. First question referred

1. The legal situation in Germany has been broadly clarified in cases such as this. The Bundesgerichtshof (Federal Court of Justice, Germany) found in a landmark judgment ... that the defendant is liable under Paragraph 826 of the Bürgerliches Gesetzbuch (German Civil Code, 'the BGB') by reason of intentional damage contrary to public policy (Federal Court of Justice judgment of 25 May 2020, VI ZR 252/19 ...). That finding was based on the assumption that the vehicle had been fitted with an unlawful defeat device within the meaning of the first sentence of Article 5(2) of Regulation (EC) No 715/2007 (see also Opinion of Advocate General Sharpston of 30 April 2020, C-693/18 ...).

a) If the manufacturer of a vehicle or engine is liable, the transaction is reversed. The purchaser who sustained the damage can demand compensation from the manufacturer in exchange for the return of the vehicle, based on damage equal to the original purchase price paid.

b) The specific amount payable in compensation is disputed and has not yet been definitively clarified. From a financial perspective, it revolves around two questions: first, whether and to what extent the actual use of the vehicle by the purchaser should be taken into account to reduce the damage and, second, whether and to what extent and, in particular, from what time, compensation payable by the manufacturer should attract interest.

c) The Federal Court of Justice would like to offset the actual use made of the vehicle (mileage driven) in the interim against the damage by deducting it from the purchase price ... .

That is not by any means compulsory under German law and there are substantial arguments as to why that is ... . In particular, it is reasonable to expect the injured party to compensate for any advantages (in this case the actual use of the vehicle), while the burden on the injuring party should not be eased inappropriately ... .

d) The referring court has doubts as to whether that deduction takes account of the principle of the effectiveness of EU law and the need to optimise the

fundamental rights and principles of the Charter of Fundamental Rights of the European Union (second sentence of Article 51(1) of the Charter) **[Or. 4]**. Furthermore, offsetting of advantages and disadvantages may be excluded in application *mutatis mutandis* of the provisions on the sale of consumer goods.

aa) The principle of the effectiveness of EU law requires that the application of national law must neither frustrate nor render excessively complicated the exercise of rights and claims conferred under EU law (see Article 47 of the Charter and Article 19 TEU). Nor may the objectives of EU law be frustrated or rendered excessively complicated.

The objectives and purposes of EU registration and emissions law can only be effective in practice if infringements are penalised and prevented in future (see also Article 46 of Directive 2007/46/EC). An effective and dissuasive penalty is needed in order to guarantee the objectives of a high level of road safety, health protection, environmental protection, energy efficiency, protection against unauthorised use and, where necessary, consumer protection. The national courts must take account of that (see judgment of 3 October 2013, C-32/12).

However, these two objectives (to penalise and prevent) appear to be undermined where infringement of the law may 'pay off', that is where it can essentially be committed risk free. The offsetting applied by the Federal Court of Justice might unjustly ease the burden on the injuring party from the perspective of EU law. As time passes, the advantage offset increasingly benefits the manufacturer and may unreasonably burden the injured purchaser. That might give rise to a strong incentive to infringe the law anyway and procrastinate settlement of the claim.

In any event, the longer the proceedings last, the less the 'damage'. Cases have already been heard in German courts in which the advantage of use calculated by the applicable standards exceeded the original purchase price, meaning that there is no damage to compensate. The compensation payable by the defendant in exchange for the return of the vehicle would also be significantly reduced in the main proceedings. When the action was brought in September 2018, the applicant had apparently already driven approximately 130 000 km, resulting in a reduction of EUR 9 000.

bb) Both the principle of effectiveness and EU fundamental rights might preclude any consideration of actual use ... .

The Charter is applicable in this case, that is it is binding on and imposes an obligation on the European Union and its Member States (Article 51(1) of the Charter). The applicability of European Union law (in this case registration law) includes and entails **[Or. 5]** applicability of the fundamental rights guaranteed by the Charter (judgment of 26 January 2013, C-617/10, paragraph 21).

From a substantive perspective, the right to life (Article 2(1) of the Charter) and the right to physical and mental integrity (Article 3(1) of the Charter) are relevant as an 'ecological human right'. As these fundamental rights are closely

interwoven with human dignity (Article 1 of the Charter), they produce a direct effect on third parties or horizontal effect. Therefore, they have binding effect between private individuals in a civil dispute (see judgment of 17 April 2018, C-414/16, paragraph 76 et seq.). The principles of health protection (Article 35 of the Charter), environmental protection (Article 37 of the Charter) and consumer protection (Article 38 of the Charter) also apply. All these fundamental rights and principles impose extensive protection which the courts must take into account ... .

cc) Finally, assessments pursuant to the law on the sale of consumer goods (Directive 1999/44/EC) might have to be applied in this case. For example, a seller who has sold consumer goods which are not in conformity may not require the consumer to pay compensation for the use of those defective goods until their replacement with new goods (judgment of 17 April 2008, C-404/06).

e) Is offsetting always precluded where, as in this case, the manufacturer caused the customer intentional damage contrary to public policy? The Federal Court of Justice found in that regard that, in taking the strategic decision during engine development to falsely obtain type approval by wilfully deceiving the Kraftfahrt-Bundesamt (Federal Motor Transport Authority) and to place the faulty vehicles on the market, the defendant was deliberately exploiting the naivety and trust of vehicle purchasers ..., presumably in order to reduce costs, maximise profits and gain a competitive edge.

f) Lastly, the question arises, if actual use of the vehicle is to be taken into account to reduce the damage, as to whether the principle of effectiveness and EU fundamental rights would be satisfied by charging substantial interest on the compensation actually awarded, as a kind of offset.

Provisions are available under German law under which interest is not only payable from the date when litigation is pending onwards (Paragraph 291 of the BGB), but can also be backdated to the date of default by the injuring party in respect of the compensation (Paragraphs 286 and 288 of the BGB) or, still further, **[Or. 6]** to payment of the purchase price (Paragraphs 849 and 246 of the BGB).

2. The answer of the Court and its direction on the first question and all the associated points are necessary in order for the court to give judgment and have serious financial implications for the parties. The applicant in the main proceedings is seeking compensation equal to the full purchase price paid by her, without any deduction for the mileage driven by her. She is also seeking interest from 20 July 2012, that is from the date of payment of the purchase price, on the basis of Paragraph 849 of the BGB.

II. Second question referred

1. The referring court, a civil court in the Thuringia region of Germany, shares the concerns and doubts of the Verwaltungsgericht Wiesbaden (Administrative Court, Wiesbaden, Germany) as to the institutional independence of the German

courts and their right of reference pursuant to Article 267 TFEU ... . The court refers to the question referred by the Administrative Court, Wiesbaden, on 28 March 2019 and the proceedings pending before the Court of Justice of the European Union (... C-272/19 ...).

a) The Court has repeatedly had occasion to interpret and apply the fundamental rules of Article 19 TEU and Article 47 of the Charter on judicial independence. It has also explained the requirements applicable to the preliminary ruling mechanism under Article 267 TFEU. There is no apparent reason why different standards should apply for the purpose of Article 267 TFEU and for the purpose of Article 19 TEU and Article 47 of the Charter. The Court rightly assumes that these fundamental rules of EU law are closely interconnected (see judgments of 25 July 2018, C-216/18, paragraph 54; of 27 February 2018, C-64/16, paragraphs 38 and 41 et seq.; and of 16 February 2017, C-503/15, paragraph 36 et seq.).

There is also good reason to believe that the standards of 'full independence' demanded by the Court of data protection authorities (judgment of 9 March 2010, C-518/07) apply a fortiori to courts seised to obtain comprehensive protection of fundamental rights.

b) According to the Court's settled case-law, a court must be able to exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever (see judgment of 16 February 2017, C-503/15, paragraph 36 et seq.). Only then are judges protected from external intervention or pressure liable to jeopardise their independence **[Or. 7]** and influence their decisions. Only that can dispel any reasonable doubt in the mind of an individual seeking justice as to the imperviousness of the courts to external factors and their neutrality with respect to the conflicting interests before them.

c) The national constitutional situation in Germany and in Thuringia does not meet those standards (see, with regard to the lack of independence of the German prosecution service, judgment of 27 May 2019, C-508/18). It only recognises a functional judicial independence in the key area of judicial activity, which is a personal independence. However, that is not sufficient to protect judges from all forms of external influence. The additional institutional independence of the courts required for that is by no means guaranteed. However, the independence of individual judges is guaranteed by the independence of the judiciary as a whole.

The organisation of the judiciary and the case-law of Thuringia do not meet the standards of judicial independence demanded under European constitutional law and by the European Court of Justice (see judgments of 19 November 2019, C-585/18, paragraph 121 et seq.; of 24 June 2019, C-619/18; and of 25 July 2018, C-216/18). More precisely:

aa) In Thuringia, as in every other federal state in Germany, the executive is responsible for the organisation and administration of the courts and manages their staff and resources. The Ministries of Justice decide on the permanent posts and the number of judges in a court and on the resources of the courts. In addition, judges are appointed and promoted by the Ministers for Justice. The underlying assessment of judges is the responsibility of the ministries and presiding judges who, aside from any judicial activity of their own, must be regarded as part of the executive. The Ministers for Justice and the presiding judges who rank below them administratively and are bound by their instructions act in practice as gatekeepers. In addition, the presiding judges exercise administrative supervision over all judges.

bb) The formal and informal blurring of numerous functions and staff exchanges between the judiciary and the executive are also typical of Germany and Thuringia. For example, judges may be entrusted with acts of administration of the judiciary. The traditional practice of seconding judges to regional or federal ministries is one particular cause for concern. Seconded judges are often integrated into the ministerial hierarchy for years. It is also not unusual for them to switch back and forth between ministries and courts and even between the status of judge and the status of civil servant.

The judge sitting alone who referred the question has personally been seconded three times (twice **[Or. 8]** to the Thuringia Ministry of Justice and once to the Thuringia State Chancellery).

This exchange of staff between the executive and the judiciary infringes both EU law and the Bangalore Principles of Judicial Conduct applied worldwide (see Commentary on the Bangalore Principles of Judicial Conduct, www.unodc.org, p. 36: '*The movement back and forth between high-level executive and legislative positions and the judiciary promotes the very kind of blurring of functions that the concept of separation of powers intends to avoid.*').

cc) Most importantly, these informal practices sometimes appear to be arbitrary. While the courts guarantee the absence of arbitrariness outwardly, informal practices may expose judges to the threat of arbitrariness and administrative decisionism. Inasmuch as 'expression-of-interest' procedures have been initiated recently, including in Thuringia, as awareness of the problem increases, for example on secondments and trial periods in higher courts or on the management of working groups for trainee lawyers, there is still no justiciability (enforceability).

dd) All this gives the executive the facility to exert undue influence on the judiciary, including indirect, subtle and psychological influence. There is a real risk of 'reward' or 'penalty' for certain decision-making behaviours (see Bundesverfassungsgericht (Federal Constitutional Court, Germany) order of 22 March 2018, 2 BvR 780/16, ... , paragraphs 57 and 59).

ee) The close interlock in Germany between the judiciary and the executive and the hierarchical structure and institutional dependence of the judiciary are rooted in the authoritarian state of 19th century Germany and in the Nazi principle of the 'führer'. In terms of administrative supervision, the entire German judiciary is based on the president model (which under National Socialism was perverted and abused by applying the principle of the 'führer' to the courts ...).

The executive's extensive influence over judicial staffing decisions is not unique to the German legal culture. A judicial structure dating back to a pre-democratic era does not adequately obstruct political instrumentalisation. There is no *constitutional resilience* ... . **[Or. 9]**

ff) The blurring of powers in Thuringia, which is both informal and, beyond that, institutional, is fundamentally rooted in the following rules:

Article 89(2) of the Thüringer Verfassung (Thuringia Constitution) states that the Minister for Justice decides on the provisional appointment of judges and, with the consent of the Judge Selection Committee, on their lifelong appointment. Article 89(4) of the Thuringia Constitution authorises laws to be passed setting out the details of that arrangement.

Thus, Paragraph 3(1) of the Thüringer Richter- und Staatsanwältegesetz (Thuringia Law on Judges and Public Prosecutors, 'the ThürRiStAG') stipulates that the Minister for Justice is to appoint and dismiss judges and public prosecutors. According to Paragraph 3(2) of the ThürRiStAG, the Ministry of Justice is the highest administrative authority within the meaning of that law for judges and public prosecutors and, according to Paragraph 3(3) of the ThürRiStAG, the Minster for Justice is also a member of the Judge Selection Committee.

It follows from Paragraphs 3 and 63 of the ThürRiStAG that the Minister for Justice decides on promotions to higher office and, as the highest administrative authority, has the final and ultimately binding word both in the procedure and on the outcome. According to the third sentence of Paragraph 63(3) of the ThürRiStAG, in the case of dissent between the Judge Selection Committee and the Minister for Justice on a promotion to higher office, the Minister can propose another candidate or re-advertise the post ('right of veto').

Furthermore, the regional rules on the organisation of the judiciary include a number of regulations illustrating the blurring of powers and the authority of the executive. According to Paragraph 3 of the Gesetz zur Ausführung des Gerichtsverfassungsgesetzes (Law Implementing the Law on the Organisation of the Judiciary, 'the AGGVG'), the Minister for Justice establishes the number of divisions and chambers in the courts. Substantively similar rules on administrative jurisdiction can be found, for example, in Paragraphs 1(4) and 2 of the Gesetz zur Ausführung der Verwaltungsgerichtsordnung (Law Implementing the Code of Administrative Court Procedure, 'the AGVwGO'). Administrative supervision

applies in addition. According to Paragraph 10(1) of the AGGVG, administrative supervision is exercised by:

1. the Minister for Justice, over the ordinary courts and prosecution services in the federal state;

2. the president of the higher regional court and the president of the regional court, over the courts in their district.

The presidents too are subject to administrative supervision ... .

gg) Neither the rights of participation and representation of the judiciary in Thuringia nor the legal remedies available are a satisfactory corrective. First, **[Or. 10]** Paragraph 40 of the ThürRiStAG grants judges' representatives full rights of representation to a limited extent only and their rights of representation fall very short of the rights accorded to regional civil servants.

Second, there are serious obstacles to the arcane legal remedies available in the event of interference in judicial independence. Convening the judicial disciplinary tribunal is a stressful task and often exacts a high professional and social cost. It must not be forgotten that, as a rule, the legal remedy is directed against measures taken by superiors, that is the presidents of the courts, who are responsible for staff assessments and thus 'control' promotions and placements. Furthermore, an action in the judicial disciplinary tribunal in Thuringia is preceded by lengthy opposition proceedings conducted by the executive.

d) These shortcomings may give the public cause to doubt that the German courts are adequately protected from outside intervention or pressure, especially from the executive. There may also be cause to doubt that the courts are immune to direct or indirect outside influence. Lastly, there is also the risk of the application of the law being interest-driven, that is of a lack of neutrality with regard to the conflicting interests of the parties (see, for example, with regard to those criteria, the judgment of 19 November 2019, C-585/18).

e) The principle of the separation of powers between the executive and the judiciary is also underlined in the case-law of the European Court of Human Rights. For example, it recently questioned the independence and impartiality of the notary senate established in the Celle Court of Appeal (ECtHR, 30 January 2020, *Franz v. Germany*, CE:ECHR:2020:0130JUD002929516 ...). The fact that the judges of that senate are under the administrative authority of the president of the higher regional court as regards their careers and potential disciplinary proceedings against them is capable of giving rise to objectively justified concerns on the part of the applicant.

f) The Administrative Court, Wiesbaden, addresses such proceedings in practical terms in cases before the administrative courts to which the respective Ministry of Justice is party, for example in the case of civil service disputes or in litigation between competing candidates.

The civil courts often deliver judgment in proceedings to which their own federal state or the Federal Republic of Germany is party, for example in the case of major construction projects or government liability. There is cause to question if the courts have the required quality of a 'neutral' third party in such cases involving the executive as a litigant or party, given their institutional dependence on the executive (see, with regard to this essential requirement of independence, judgments of 9 October 2014, C-222/13, paragraph 29, and of 22 December 2010, **[Or. 11]** C-517/09, paragraph 38).

Freeing the judiciary from the shackles of the executive to create independent judicial structures with adequate financial resources and a flat hierarchy, as many Member States have already done, is the only way to guarantee a high standard of German case-law and good judging in the future, which is the *sine qua non* to confidence in the justice system.

2. The right of reference pursuant to Article 267 TFEU and the interpretation of the third sentence of Article 19(1) TEU and Article 47(2) of the Charter requested of the Court will enable the court to give judgment and are not hypothetical in nature. They are closely and inextricably connected with the main proceedings and the specific situation facing the referring court (see judgment of 27 February 2018, C-64/16, paragraph 19 et seq.). The following circumstances in fact and in law are particularly relevant:

a) In the main proceedings, the court is required, as an EU court, to rule on issues concerning the application and interpretation of EU law, in this case European registration law, in light of the principle of effectiveness and the European fundamental rights also enacted in Article 19 TEU and Article 47 of the Charter. The main proceedings are closely connected to EU law.

b) The procedural problem arises here as to whether and subject to what conditions a right of reference even exists. The Court is regarded as having the jurisdiction and power to explain to the referring court points of EU law which may help to solve the question of the right of reference (see, judgment of 19 November 2019, C-585/18, paragraph 100). If the Court has the jurisdiction and power to clarify questions, whether preliminary or not, concerning the interpretation of procedural provisions of EU law which the referring court is required to apply in order to deliver its judgment (see judgment of 26 March 2020, C-558/18), paragraph 50), then that should apply a fortiori to questions concerning the necessary attributes of the referring court.

c) There is, moreover, a close and inextricable connection between the question referred on the emissions scandal and the status of the referring court. The State is heavily invested in the defendant. Given the economic and labour market interests tied up in the German automotive industry, especially in the current pandemic, and the sheer volume of proceedings, the courts are under immense pressure. It has also been noticed that civil courts close to the defendant, unlike the **[Or. 12]**

large majority of German instance courts (and now the Federal Court of Justice), have dismissed actions against the defendant.

d) Furthermore, a letter from the president of the Oberlandesgericht Dresden (Higher Regional Court, Dresden, Germany) of 9 April 2020 ... is extremely important. That letter, which was addressed to all the presidents of the higher regional courts in Germany, was circulated and distributed among the judiciary in Thuringia and even reached the referring judge sitting alone.

The suggestion that they consider whether further processing of and rulings on emission proceedings can be 'deferred' is capable of exerting direct influence. That applies a fortiori to the reticence clearly expressed in the letter in respect of the *'chance of full refund of the purchase price without any deduction for use, even where the vehicle has been used for years'*. That is addressed by the first question referred.

e) In addition, there is an increasingly critical attitude towards preliminary references in Germany, at least inasmuch as they are made by instance courts, to the point at which calls have been made to curb the right of reference of the instance courts. For example, Ferdinand Kirchhof, the outgoing vice-president of the Federal Constitutional Court expressed the opinion that the right of reference of the lower courts favoured circumvention of the higher courts and tended to divide case-law ... .

All this may cause the instance courts in Germany to refrain from referring preliminary questions (see, with regard to the unrestricted and unrestrictable right of reference, judgment of 26 March 2020, C-558/18, paragraph 55 et seq.).

...