Anonymised version

Case C-685/19

Request for a preliminary ruling

Date lodged:

17 September 2019

Referring court:

Landgericht Frankenthal (Regional Court of Frankenthal, Germany)

Date of the decision to refer:

2 September 2019

Applicant:

OK

Defendant:

Daimler AG

[…]

Regional Court

of Frankenthal (Pfalz)

Order

In the case of

OK, […] Ludwigshafen am Rhein

– Applicant –

[…]

v

Daimler AG, […] Stuttgart

– Defendant –

[…]

concerning compensation

on 2 September 2019, […] [panel and name of the judge who issued the order] ordered as follows on the basis of the hearing of 2 September 2019:

I. […] [Procedural matters]

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

Question 1:

Is Article 5(2), sentence 2, letter (a) of Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of **[Or. 2]** motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information to be interpreted and applied as meaning that a need for the use of defeat devices within the meaning of that provision is only to be found if, even using the state-of-the-art technology available when type approval was obtained for the vehicle model in question, the protection of the engine against damage or accident and the safe operation of the vehicle could not be guaranteed?

Question 2, in the event that question 1 is answered in the affirmative:

Are deviations from the general obligation to use the state-of-the-art technology available at the time of the type approval admissible for other reasons, such as a lack of long-term experience or disproportionately high costs of the state-of-the-art technology in relation to other technologies with considerable effects on the retail price?

Question 2, in the event that question 1 is answered in the negative:

Even with the use of technological components which are in principle admissible, does a prohibited defeat device exist in the form of the so-called ‘thermal window’, if the parameters set in this regard in the engine control unit are chosen such that the exhaust gas purification is not activated or only activated to a limited extent

a) because of the chosen temperatures, taking into account the temperatures usually to be expected for a large part of the year

b) because of other parameters — such as the current altitude of the vehicle above sea level — in relevant regions of Germany or the European internal market.

[Or. 3]

Grounds:

The decision is based on Article 267 TFEU.

A. Subject matter of the main proceedings

The parties are in dispute regarding compensation claims concerning the acquisition of a motor vehicle. On 20 October 2015, the applicant acquired, for his business, a used Mercedes Benz C 220 BlueTEC T model vehicle with a kilometrage of 10 205 km and first registration on 24 July 2015 from the defendant for a gross purchase price of EUR 46 220.00, which vehicle, according to the defendant, met the requirements for inclusion in the 'Euro 6' emission class for diesel vehicles. Whether the vehicle actually met the requirements for this classification is in dispute between the parties. The defendant did not comply with a request for rescission sent to him by the applicant, via a letter from the latter's lawyers setting a deadline of 14 February 2019.

The Kraftfahrtbundesamt (Federal Motor Transport Authority, Germany) has not to date ordered an official recall in respect of the vehicle at issue and vehicles of the same type.

The applicant seeks the rescission of the purchase contract on the basis of tort law in the form of the repayment of the purchase price against, concurrently, delivery and transfer of the vehicle to the defendant and is of the opinion that an item of control software found in the vehicle, which interfered with the exhaust gas purification and the effectiveness thereof in a temperature-dependent manner *inter alia*, constituted a prohibited defeat device within the meaning of Regulation (EC) No 715/2007.

B. Legal context

The applicant seeks the rescission of the purchase contract on the basis of tort law on the basis of Paragraphs 826 and 249(1) of the Bürgerliches Gesetzbuch (German Civil Code; BGB).

Paragraph 826 BGB reads as follows:

A person who, in a manner contrary to public policy, intentionally inflicts damage on another person **[Or. 4]** *is liable to the other person to make compensation for the damage.*

Paragraph 249(1) BGB reads as follows:

A person who is liable in damages must restore the position that would exist if the circumstance obliging him to pay damages had not occurred.

According to established case-law of the Bundesgerichtshof (Federal Court of Justice, Germany) damage within the meaning of Paragraph 826 BGB is not only to be found when the financial situation of the applicant has deteriorated as a result of the damaging conduct. Rather, in the context of liability under Paragraph 826 BGB, there is already sufficient damage where, although the performance and consideration are objectively of equal value, liability-establishing conduct has led the injured party to conclude a contract which he would not otherwise have concluded […] [reference to national case-law] and the performance of which is not fully useful for the injured party […] [reference to national case-law].

The existence of financial loss is generally assessed according to what is known as the difference hypothesis, that is to say according to a comparison of the financial situation that occurred as a result of the liability-establishing event with that which would have existed without that event […] [reference to national case-law].

In that respect, the financial situation of the applicant, and specifically his overall financial situation […] [reference to national case-law], as it appears following the conclusion of the contract for the acquisition of the vehicle at issue, must be compared with his financial situation as it would have developed without that contract. Damage exists where that comparison results in a negative difference, that is to say where the conclusion of the contract has been economically disadvantageous for the applicant.

That is in principle the case where the vehicle acquired is not worth the purchase price or where, despite the intrinsic value of the object purchased, the obligations and other disadvantages associated with the contract are not compensated for by the advantages. However, in this comparison, the advantages and disadvantages, measured in the light of the protective purpose of liability and the balancing function of damages, are to be determined in an evaluative manner […] [reference to national case-law]. […] **[Or. 5]** […] [Comments on the legal control of the difference hypothesis and reference to national case-law].

However, financial loss may already lie in the adverse effect on the specific financial arrangements of the applicant as the party affected by the culpable breach of an obligation. The compensation claim serves to make good the specific disadvantage suffered by the injured party; the concept of damage is therefore to some extent subject-related […] [reference to national case-law].

In this respect, it is sufficient that the applicant is burdened with an unwanted obligation as a result of the purchase of the vehicle at issue, inasmuch as the defendant’s contractual performance is not fully useful for the applicant. In that situation, the objective inherent value of the performance and that of the consideration are not relevant for the finding of financial loss that is eligible for

compensation […] [reference to national case-law]. However, such a finding requires that the performance obtained through the unwanted contract is not just regarded as damage from a purely subjective and arbitrary perspective, but that, upon consideration of the prevailing circumstances, the conclusion of the contract is also generally regarded as unreasonable, inappropriate to the specific financial interests and therefore disadvantageous […] [reference to national case-law].

This is the case here, since there is generally already a negative view of the conclusion of a contract for the acquisition of a motor vehicle which, for reasons connected with the manufacturer, does not comply with the Euro standard regarding harmful emissions that is assigned to the vehicle and advertised by that manufacturer.

C. Need for the ruling by the Court of Justice

The interpretation of Article 5(2), sentence 2, letter (a) of Regulation (EC) No 715/2007 is important for the resolution of the case.

In the opinion of the referring chamber, the applicant's claim can be upheld only if the defeat device at issue is a prohibited defeat device within the meaning of Article 5(2), sentence 2, letter (a) of Regulation (EC) No 715/2007. **[Or. 6]**

In the present case, unlike in many other situations, the question of the admissibility of the defeat device cannot be determined by the chamber by relying on an action taken by the Federal Motor Transport Authority or another public body in the form of the adoption, against the defendant, of administrative acts already in force concerning the present engine configuration. These do not (yet) exist — at least for now — in respect of the model series of the vehicle at issue.

Depending on the classification of the defeat device as admissible or prohibited, the action will have to be dismissed or will be successful on the merits.

If an admissible defeat device existed upon conclusion of the contract, the purchase contract regarding the vehicle did not impose an unwanted obligation on the applicant. In that case, the applicant would have instead acquired a vehicle that is legally compliant in this respect, which also corresponded to his intention upon concluding the purchase contract.

If the engine control concerning the exhaust gas purification did not meet the requirements of the exception provision of Article 5(2), sentence 2, letter (a) of Regulation (EC) No 715/2007, the vehicle did not comply with the legislation when the purchase contract was concluded. The applicant would then have entered into a contract which he would not have entered into if he had been fully informed of the circumstances, which means that the factual conditions for the rescission of the purchase contract on the basis of tort law would be met in that respect. In that case, within the meaning of the case-law of the Federal Court of Justice […] [reference to national case-law], upon objective consideration, the conclusion of the contract would also have to be regarded as unreasonable, inappropriate to the

specific financial interests and therefore disadvantageous overall. There is generally a negative view of the conclusion of a contract regarding the acquisition of a motor vehicle which, for reasons connected with the manufacturer, does not comply with the Euro standard regarding harmful emissions that is assigned to the vehicle and advertised by the manufacturer.

In addition, in such a situation, there is also the threat of a financial disadvantage through the fixing of a higher motor vehicle tax. Under constitutional law with regard to the principle of legality of administrative action and the consequences thereof, the national tax administration is obliged to fix the correct tax when knowledge is gained of the application of incorrect bases of taxation, by amending the issued and still amendable motor vehicle tax decisions […] [reference to a national legal provision applicable in this respect]. As a result, it is not possible, either upon conclusion of the purchase contract or currently, to rule out the applicant being burdened with additional demands corresponding to the 'worse' emission class to which **[Or. 7]** the vehicle at issue has actually belonged since being placed on the market and which entails, for example, a higher tax rate […] [reference to the relevant national legal provision] and/or possible default fines or the like.

D. Discussion of the questions referred

The first question referred:

The environmental parameter-controlled manipulation of the exhaust gas purification constitutes a defeat device within the meaning of Article 3 No 10 of Regulation (EC) No 715/2007. Such a device is in principle prohibited under the first sentence of Article 5(2) of Regulation (EC) No 715/2007.

In so far as Article 5(2), sentence 2, letter (a) of Regulation (EC) No 715/2007 lays down an exception to that rule, it is subject to the express proviso that the need for the device must be justified. However, the term 'need' used in that provision is not legally defined in the Regulation. The target of reducing the emissions caused by vehicles is contained in Recital 4 of the Regulation. This intention is reflected — albeit in partly different forms and orientations —in, for example, Recitals 5, 6 and 12 of the Regulation.

In the opinion of the referring chamber, an optimal reduction would be obtained if the relevant state-of-the-art technology, at least that which exists when the type approval is first obtained for the vehicle series in question, were used.

However, it follows from Recital 7 of the Regulation that other factors must also be taken into consideration in setting emissions standards. That provision refers expressly to markets, manufacturers' competitiveness and the direct and indirect costs imposed on business. It could be concluded from this that those factors also should not be ignored in the context of the legal concept of need, within the meaning of Article 5(2), sentence 2, letter (a) of Regulation (EC) No 715/2007, which requires interpretation.

The question of whether and, as the case may be, to what extent or in which aspects other factors are to be taken into consideration here in order to interpret the term ‘need’ concerns the interpretation of European law, which is reserved for the Court of Justice. **[Or. 8]**

The second question referred:

If the Court of Justice considers that the use of the state-of-the-art technology is decisive in order to find whether there is a ‘need’ for the defeat device, this raises the question of whether and, where appropriate, under which conditions the manufacturers can deviate therefrom. This particularly applies against the background of the implications cited in Recital 7 of the Regulation and the balance between costs and benefits mentioned therein.

If the Court of Justice answers the first question referred in the negative, this then raises the question of the extent to which the defeat device may limit the exhaust gas purification, in order to still fall within the scope of the concept of ‘need’.

If the interference with the exhaust gas purification takes place in an (external) temperature-related manner, the choice of the minimum temperature may at least in practice lead to far-reaching ineffectiveness of the exhaust gas purification, at least where the temperature is chosen such that it is not reached for a non-negligible part of each year. If the minimum temperature chosen is, for instance, close to 10 °C, this temperature is already often not reached or only reached for a few hours per day in the winter months in Germany. Conversely, if the maximum temperature chosen is regularly reached or exceeded, in the summer for example, the exhaust gas purification will also be considerably reduced at those times. The same applies if the exhaust gas purification is controlled according to the altitude of the current position of the vehicle above sea level.

This would mean that, at certain times (of year) or from or up to a certain altitude above sea level, the exhaust gas purification would only take place to a limited extent or not at all. The aims of improving air quality (see Recitals 5 and 6 of the Regulation) and reducing particulate matter and ozone precursors (see Recital 4 of the Regulation) would thereby be achieved only to a limited extent, if at all.

[…] [Signature and name of the judge who issued the order]