Case C-343/19

Request for a preliminary ruling

Date lodged:

30 April 2019

Referring court:

Landesgericht Klagenfurt (Austria)

Date of the decision to refer:

17 April 2019

Applicant:

Verein für Konsumenteninformation

Defendant and respondent:

Volkswagen AG

IN THE MATTER OF:

Applicant [...]

Verein für Konsumenteninformation (Association for Consumer Information)

[...]

1060 Vienna

[...]

Defendant [...]

Volkswagen AG [...]

38440 Wolfsburg [...]

GERMANY [...]

Concerning:

EUR 3 611 806.00 plus appendages (Other claim — General dispute)

1. The following question is referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU:

Is point 2 of Article 7 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to be interpreted as meaning that, in a situation such as that in the main proceedings, the 'place where the harmful event occurred' may be construed as the place in a Member State where the damage occurred, when that damage consists exclusively of financial damage that is the direct result of an unlawful act committed in another Member State?

2. The proceedings in Case 21 Cg 74/18v before Landesgericht Klagenfurt (Klagenfurt Regional Court) are stayed pending the preliminary ruling by the Court of Justice of the European Union [...] **[Or. 2]**

Grounds:

I. Facts:

The applicant is a non-profit making consumer organisation under the legal form of an association under the Austrian Vereinsgesetz (Law on associations), having its registered office in Vienna, Austria. The applicant's tasks according to its statutes include the assertion of consumers' civil claims assigned to it for the purpose of bringing an action before the courts. In Case 21 Cg 74/18v before Klagenfurt Regional Court, the applicant asserts claims for damages (assigned to it) of 574 purchasers of motor vehicles against the defendant and seeks a declaration establishing the liability of the defendant for as yet unquantifiable damage arising from the installation in the purchased vehicles of an engine that infringes provisions of EU law.

The defendant is a motor vehicle manufacturer under the legal form of a company limited by shares under German law (Aktiengesellschaft), having its registered office in Wolfsburg, Germany. The defendant is entered under No HRB 100484 in the commercial register of Amtsgericht Braunschweig (Braunschweig Local Court).

II. Forms of order sought and arguments of the parties:

The applicant seeks from the defendant the payment of EUR 3 611 806.00 plus appendages and a declaration establishing the liability of the defendant for all damage that is not yet quantifiable and/or that is yet to be suffered in the future.

It bases its request for payment on delictual or quasi-delictual claims for damages and argues that all the consumers specified in the action purchased, before the public disclosure of the VW emissions manipulation on 18 September 2015, (used) vehicles, which were fitted with an engine (EA 189) developed by the defendant in each case, in Austria from either a commercial car dealer or a private seller. These engines were equipped with a prohibited defeat device within the meaning of Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007. In-built manipulative software meant that 'cleaner emissions', that is to say emissions that complied with the prescribed limit values, were emitted on the test bench, whereas a level of pollutants many times higher than the prescribed limit values was actually emitted under the real-world driving conditions of the vehicles, that is to say on the road.

It was only by means of this manipulative software that the defendant was able to obtain EU type approval for vehicles with the EA 189 engine. The provisions of the **[Or. 3]** aforementioned regulation served to protect individuals, because a certificate of conformity within the meaning of Regulation (EU) No 168/2013 of the European Parliament and of the Council of 15 January 2013 on the approval and market surveillance of two- or three-wheel vehicles and quadricycles had to be issued for each of the vehicles placed on the market by the defendant, and that certificate also had to be provided to the purchaser.

The damage incurred by the vehicle owners consisted in the fact that, had they been aware of the alleged manipulation, they would have either not purchased the vehicles at all or at least purchased them at a purchase price reduced by 30%. The respective vehicles were defective from the outset and therefore worth considerably less than what the defendant claimed and the vehicle owners assumed. The market value and therefore also the purchase price of a manipulated vehicle would be significantly lower than the purchase price actually paid. The difference constituted a recoverable loss incurred through reliance on an expectation. In the alternative, the applicant bases its request on the fact that the value of a manipulated vehicle on the automobile market and on the used car market was much lower than a vehicle that had not been manipulated.

Regarding the request for a declaration, the applicant argues that it could be assumed that the damage incurred by the vehicle owners had been further exacerbated by increased fuel consumption, poorer driving or engine performance and/or greater depreciation. In addition, a further reduction in the market value of the vehicles affected by the alleged manipulation could be expected. Furthermore, further adverse effects threatened to materialise, such as driving bans on the vehicles concerned or the withdrawal of approval. This damage was not yet quantifiable or had not yet occurred.

Regarding the international jurisdiction of the court seised, the applicant relies on point 2 of Article 7 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('the Brussels I Recast

Regulation'). The conclusion of the sales contract, the payment of the purchase price and the transfer or delivery of the vehicles all took place in the jurisdiction of the court seised. This was not a case of mere consequential damage, but rather initial damage that conferred jurisdiction. It materialised in the form of a reduction in the value of the consumers' assets, at the earliest upon the purchase and transfer of the vehicles at the place of transfer, thus in the jurisdiction of the court seised. It was at this place that the delictual conduct of the defendant took effect for the first time and directly damaged the consumers.

The **defendant** requests that the form of order sought be rejected and contests the international jurisdiction of the court seised pursuant to point 2 of Article 7 of the Brussels I Recast Regulation. **[Or. 4]**

III. Procedural background:

The referring court served notice of the action on the defendant and invited it to draw up its defence, in which the defendant raised the objection of lack of international jurisdiction, on which the referring court must now rule.

Legal assessment

IV. Principles of EU law:

The relevant provisions of the Brussels I Recast Regulation read as follows:

'[...] CHAPTER II

JURISDICTION

SECTION 1

General provisions

Article 4

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

[...]

SECTION 2

Special jurisdiction Article 7

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

[...] 2. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur; [...]'

V. The question referred for a preliminary ruling:

[Or. 5] Pursuant to Article 66(1) of the Brussels I Recast Regulation, the latter applies to proceedings instituted on or after 10 January 2015. The applicant brought the action before Klagenfurt Regional Court on 6 September 2018, for which reason the Brussels I Recast Regulation applies to the proceedings instituted.

In *Bier* v *Mines de potasse d'Alsace* (Case 21/76 of 30 November 1976), the European Court of Justice ruled that, at the option of the applicant, jurisdiction in matters relating to delict pursuant to point 3 of Article 5 of the Brussels I Regulation (now point 2 of Article 7 of the Brussels I Recast Regulation) can be established both at the place where the event which gave rise to the harm occurred ('Handlungsort') and the place where the harm arose ('Erfolgsort').

Place where the event which gave rise to the harm occurred is any place where an act falling within point 3 of Article 5 of the Brussels I Regulation was wholly or partly carried out or where the event which gave rise to the harm originated. **Place where the harm arose** is the place where the harmful effects of the event entailing liability to the detriment of the person who is the victim of that event occur. In the case of financial damage caused by delictual conduct, the place where the harmful event occurred is also to be understood as the place where a reduction in assets occurred, whereby it is only the place where the initial damage occurred that confers jurisdiction, not the place where any consequential damage occurred.

According to the case-law of the European Court of Justice, 'the place where the harmful event occurred' can be understood only as *"indicating the place where the event giving rise to the damage, and entailing tortious, delictual or quasi-delictual liability, directly produced its harmful effects upon the person who is the immediate victim of that event"* (Case C-220/88 of 11 January 1990, *Dunmez France SA* v *Hessische Landesbank*, paragraph 20). In the same decision — and in many others — the Court of Justice of the European Union also made clear that jurisdiction in matters relating to delict constitutes an exception to the general rule whereby jurisdiction is attributed to the courts of the defendant's domicile. Those cases of special jurisdiction are based on the existence of a particularly close connecting factor between the dispute and courts other than those of the defendant's domicile, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings. It is one of the objectives of the Brussels I Regulation to avoid the multiplication of courts of competent jurisdiction which would heighten the risk of irreconcilable decisions (Case C-220/88 of 11 January 1990, *Dunmez France SA* v *Hessische Landesbank*, paragraphs 17 and 18).

In *Antonio Marinari* v *Llodys Bank plc and Zubaidi Trading Company*, the Court of Justice of the European Union emphasised that jurisdiction in matters relating to delict under the Brussels I Regulation cannot be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising **[Or. 6]** elsewhere. Consequently, the term *'place where the harmful event occurred or may occur'* cannot be construed as including the place where the victim claims to have suffered financial damage following upon initial damage arising and suffered by him in another Contracting State (Case C-364/93 of 19 September 1995, *Antonio Marinari* v *Llodys Bank plc and Zubaidi Trading Company*, paragraphs 14 and 15).

The referring court infers from the case-law cited that jurisdiction in matters relating to delict is available to direct victims only if they assert initial damage and not mere consequential damage.

In this specific case, the applicant alleges that the claims asserted by it relate to initial damage that the vehicle owners suffered as a result of the purchase and transfer of the substandard vehicles at the place of transfer. It was only as a result of this that the delictual conduct of the defendant took effect and directly damaged the consumers.

The court takes the view, however, that the manipulative software installed in the EA 189 engine, as alleged by the applicant, gives rise to initial damage, as it resulted in the installation of an engine that infringed Regulation (EC) No 715/2007 and the vehicle was therefore afflicted with a defect that (subsequently) had the effect of reducing the value of that vehicle. The adjudicating court takes the view that the damage caused by a reduction in value, as asserted by the applicant party, constitutes consequential damage resulting from the vehicle afflicted with a material defect.

The action is based on claims of consumers who purchased the vehicles as new or used cars either from commercial car dealers or from private sellers. Were the applicant's claims, according to which the damage manifested itself in the acquisition of the vehicles and therefore in the vehicles themselves, to be upheld, the referring court takes the view that the question arises as to whether the alleged initial damage according to the applicant's arguments must not have actually been incurred by the respective first purchaser, in this case the authorised dealer or general importer of the vehicles. If it is found that a first instance of initial damage was incurred by the respective first purchaser, any damage that may have been incurred by all subsequent purchasers would have to be qualified as mere consequential damage.

The reason for this is that, according to the decision delivered by the European Court of Justice in *Marinari*, the term 'place where the harmful event occurred' cannot be construed as including the place where the victim claims to have suffered financial damage following upon initial damage arising and suffered by

him in another Contracting State. Mere consequential damage was **[Or. 7]** therefore ruled out as a basis for conferring jurisdiction.

However, the present situation can be distinguished from *Marinari* in that the applicant in that case himself suffered initial damage in a Member State and additionally sought to allege consequential damage — which had been alleged in a different Member State. However, the applicant's arguments in the present case aim to establish that, up until the purchase and transfer of the vehicles and before the disclosure of the alleged manipulation, the vehicle owners could not yet have suffered any damage at all and therefore — unlike in *Marinari* — any initial damage either.

However, the referring court takes the view that, in addition to the question regarding initial and consequential damage, the question also arises as to whether jurisdiction for purely financial damage arising from a delictual act can be conferred pursuant to point 2 of Article 7 of the Brussels I Recast Regulation.

In *Rudolf Kronhofer* v *Marianne Maier and Others*, the European Court of Justice ruled on the place where the harm arose in the case of purely financial damage, so as to establish guiding principles, and made clear that the expression *'place where the harmful event occurred'* does not refer to the place where the claimant is domiciled or where 'his assets are concentrated' by reason only of the fact that he has suffered financial damage there resulting from the loss of part of his assets which arose and was incurred in another Contracting State (Case C-168/02 of 10 June 2014, *Rudolf Kronhofer* v *Marianne Maier and Others*, paragraph 21). Referring to the decision in *Marinari* (Case C-364/93 of 19 September 1995, *Antonio Marinari* v *Lloyds Bank plc and Zubaidi Trading Company*, paragraph 14), it was emphasised that, according to the case-law of the Court, the term *'place where the harmful event occurred'* cannot be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere. Otherwise, the determination of the court having jurisdiction would depend on matters that were uncertain, such as the place where the victim's 'assets are concentrated' and would thus run counter to the strengthening of the legal protection of persons established in the Community which, by enabling the claimant to identify easily the court in which he may sue and the defendant reasonably to foresee in which court he may be sued, is one of the objectives of the Convention. Furthermore, such an interpretation would be liable in most cases to give jurisdiction to the courts of the place in which the claimant was domiciled. The Convention does not favour that solution except in cases where it expressly so provides (Case C-168/02 of 10 June 2014, *Rudolf Kronhofer* v *Marianne Maier and Others*, paragraphs 19 and 20).

In *Harald Kolassa* v *Barclays Bank plc*, the European Court of Justice reiterated that the mere fact that the applicant has suffered financial consequences does not **[Or. 8]** justify the attribution of jurisdiction to the courts of the applicant's domicile if both the events causing loss and the loss itself occurred in the territory

of another Member State. However, such an attribution of jurisdiction is justified if the applicant's domicile is in fact the place in which the events giving rise to the loss took place or the loss occurred (judgment of 28 January 2015, *Harald Kolassa* v *Barclays Bank plc*, paragraphs 49 and 50).

Taking account of the applicant's arguments and the European Court of Justice case-law cited, the location of the occurrence of the damage would have to be in Austria at first glance, because it was only here that the damage occurred and had an effect on the respective vehicle owners. This would militate in favour of Austria being the place where the harm arose within the meaning of point 2 of Article 7 of the Brussels I Recast Regulation.

However, in the judgment in *Universal Music International Holding BV* v *Michael Tetreault Schilling and Others*, delivered soon after, the European Court of Justice made clear that one individual fact cannot be relied on in the specific case of purely financial damage and stated that purely financial damage which (in the main proceedings) occurred directly in the applicant's bank account could not, in itself, be qualified as a 'relevant connecting factor', pursuant to (what is now) point 2 of Article 7 of the Brussels I Recast Regulation. It is only where the other circumstances specific to the case also contribute to attributing jurisdiction to the courts for the place where a purely financial damage occurred, that such damage could, justifiably, entitle the applicant to bring the proceedings before the courts for that place (Case C-12/15 of 16 June 2016, *Universal Music International Holding BV* v *Michael Tetreault Schilling and Others*, paragraphs 38 and 39).

Finally, in *Helga Löber* v *Barclays Bank plc*, the European Court of Justice reaffirmed the taking into account of specific circumstances and facts in the attribution of jurisdiction to courts away from the jurisdiction of the defendant's domicile (judgment of 12 September 2018, *Helga Löber v Barclays Bank plc*, paragraphs 29 and 31).

The referring court therefore harbours doubts as to whether, in this specific case, the mere purchase from Austrian car dealers and the transfer of the vehicles in Austria are sufficient in themselves to establish the jurisdiction of the Austrian courts within the meaning of point 2 of Article 7 of the Brussels I Recast Regulation. If the assessment of the place where the harm arose within the meaning of point 2 of Article 7 of the Brussels I Recast Regulation were not based exclusively on the place of conclusion of the sales contract and the transfer of the vehicles in Austria, but rather account were taken of 'other specific circumstances in the attribution of jurisdiction to courts' within the meaning of the case-law of the European Court of Justice cited, the following can be found: **[Or. 9]**

The applicant's allegation essentially asserts that the defendant was deceptive in relation to the fact that the engines produced by it conformed to EU law, as a result of which it caused the vehicle owners damage that consisted in the vehicles having a lower value from the outset. The defendant's tortious conduct alleged by the applicant was carried out in Germany. All the claims always relate to the same

wrongdoing of which the defendant is accused, which took place in Germany. The question therefore arises as to whether, in light of their proximity to the facts and evidence, the German courts in the defendant's domicile would not be objectively better placed to examine the claims asserted. The sole circumstance of where in Austria (or Europe) a vehicle was purchased or transferred makes no difference in the examination of the questions relevant to the claims asserted. Any court seised of the dispute would have to resolve the same questions: did the defendant carry out the acts of deception alleged by the applicant? Did the EA 189 engine meet the requirements of EU law? Did the defendant's acts or omissions affect the value of the vehicles equipped with the engine? In this context, it can be assumed that a large proportion of the relevant factual evidence and testimony is situated in Germany. The question of whether the vehicles lost value in Austria on account of the claimed manipulation could be assessed in Germany just as well as it could in Austria. The reduction in value claimed in the action is calculated as a percentage, meaning that an expert evaluation of each individual vehicle is not necessary. The EU type approval referred to by the applicant was also not issued in Austria and was therefore not revoked in Austria.

If the considerations put forward in *Universal Music* were to be applied to this case, there are a number of factors that would militate in favour of Germany being the place where the harm arose. In *Universal Music*, the financial damage incurred by the applicant occurred because she transferred money from her account to the Netherlands. Nevertheless, the European Court of Justice found that the Netherlands was not the place where the harm arose, because the conferral of jurisdiction on the Czech courts was justified for reasons of the sound administration of justice and the efficacious conduct of the proceedings. Although, according to the applicant's submissions, the damage in the present case occurred as a result of the purchase and transfer of the vehicles equipped with an allegedly manipulated engine in Austria, the alleged damage is attributable, according to the statement of claim, to a set of facts that occurred in Germany. From the standpoint of efficacious conduct of the proceedings, in particular of the proximity to the subject matter of the dispute and the ease of taking evidence, the German courts would therefore also be objectively better placed in the present case to clarify where the responsibility for the alleged damage lies. **[Or. 10]**

If, in line with the view taken by the applicant, the question of jurisdiction is based on the place of purchase and transfer of the vehicles to the end customers, including purchasers of used cars, the defendant also harbours doubts as to the possibility of foreseeing which court will have jurisdiction.

Finally, the referring court also harbours doubts as to whether a finding that the Austrian courts have international jurisdiction would be compatible with the strict interpretation, required pursuant to the case-law of the European Court of Justice, of the rules of special jurisdiction of the Brussels I Regulation (see, inter alia, judgment of 16 June 2016, Case C-12/15, *Universal Music International Holding BV* v *Michael Tetreault Schilling and Others*, paragraph 25; *Löber*, paragraph 17).

In support of conferring jurisdiction on the Austrian courts, however, it could be argued that one (of several) of the delictual bases for claims asserted by the applicant relates to liability arising from wilful deception pursuant to Paragraph 874 of the Allgemeines bürgerliches Gesetzbuch (Austrian Civil Code, 'the ABGB'). In order to clarify whether such a claim exists, the referring court would have to assess whether the individual vehicle owners concerned — the claims of whom are being asserted by the applicant — were actually deceived and the conduct of the defendant was the cause of the alleged damage. It would therefore be necessary to hear the vehicle owners concerned as witnesses. The sole fact that a court has to hear witnesses who are domiciled in Austria is however not sufficient, in the absence of further connecting factors serving as a basis for jurisdiction for the place where the harmful event occurred pursuant to point 2 of Article 7 of the Brussels I Recast Regulation, to give the referring court international jurisdiction. Solely on the basis of the applicant's purpose as an association, it is evident that the arguments in favour of the place where the harm arose being in Austria within the meaning of point 2 of Article 7 of the Brussels I Recast Regulation are based on understandable interests of consumer protection. The referring court takes the view that these interests should, however, be disregarded in the assessment of international jurisdiction. Accordingly, in *Andreas Kainz* v *Pantherwerke AG* (Case C-45/13 of 16 January 2014, *Andreas Kainz* v *Pantherwerke AG*, paragraph 31), for instance, the European Court of Justice emphasised that Article 5(3) of Regulation No 44/2001 (corresponding to point 2 of Article 7 of the Brussels I Recast Regulation) is specifically not designed to offer the weaker party stronger protection.

Procedure:

As the correct application of EU law is of decisive importance to the decision regarding the international jurisdiction of the referring court, the question set out above is referred for a preliminary ruling.

The proceedings before the referring court are stayed pending the decision of the European Court of Justice. **[Or. 11]**

Klagenfurt Regional Court, Section 21

Klagenfurt, 17 April 2019

[...]