Anonymised version

Case C-759/19

Request for a preliminary ruling

Date lodged:

16 October 2019

Referring court:

Landgericht of Gera (Germany)

Date of the decision to refer:

11 October 2019

Applicant:

PG

Defendant:

Volkswagen AG

Landgericht Gera (Regional Court, Gera)

[…]

Order

In the case of

PG, […] Remda-Teichel

– Applicant –

[…]

v

Volkswagen AG, […] Wolfsburg

– Defendant –

concerning compensation

the Seventh Civil Chamber of the Regional Court, Gera […]

[…] on 11 October 2019 made the following

order:

[Or. 2]

I. The proceedings are stayed.

II. The following questions are referred to the Court of Justice of the European Union for interpretation of Community law pursuant to Article 267 TFEU:

1. Are Paragraphs 6(1) and 27(1) of the EG-Fahrzeuggenehmigungsverordnung (EC Vehicle Approval Regulation; EG-FGV) and/or Articles 18(1) and 26(1) of Directive 2007/46/EC to be interpreted as meaning that the manufacturer is in breach of its obligation to issue a valid certificate pursuant to Paragraph 6(1) of the EG-FGV (and/or of its obligation to deliver a certificate of conformity pursuant to Article 18(1) of Directive 2007/46/EC), if it has installed in the vehicle an impermissible defeat device within the meaning of Articles 5(2) and 3.10 of Regulation (EC) No 715/2007, and that the placing of such a vehicle on the market is in breach of the prohibition on placing a vehicle on the market without a valid certificate of conformity pursuant to Paragraph 27(1) of the EG-FGV (and/or of the prohibition of sale without a valid certificate of conformity pursuant to Article 26(1) of Directive 2007/46/EC)?

If that question is to be answered in the affirmative:

1a. Are Paragraphs 6 and 27 of the EG-FGV and/or Articles 18(1), 26(1) and 46 of Directive 2007/46/EC aimed at protecting another person within the meaning of Paragraph 823(2) of the Bürgerliches Gesetzbuch (German Civil Code; BGB), including in particular in relation to that person's freedom of disposal and assets? Does an end customer's acquisition of a vehicle that has been placed on the market without a valid certificate of conformity come within the scope of the risks for the prevention of which those provisions were adopted?

2. Is Article 5(2) of Regulation (EC) No 715/2007 also aimed in particular at protecting the end customer, including in relation to that customer's freedom of disposal and assets? Does an end customer's acquisition of a vehicle in which an impermissible defeat device has been installed come within the scope of the risks for the prevention of which that provision was adopted?

Grounds:

I.

1. The applicant is demanding, on the basis of liability in tort, that the defendant repay the purchase price for a car manufactured thereby, in the context of what is known as the Volkswagen emissions scandal, minus compensation for use.

2. On the basis of the factual position and the status of the dispute to date, the Chamber is taking account of the following facts: **[Or. 3]**

On 2 December 2012, the applicant bought a new VW Caddy Maxi Trendline 2.0l TDI car from […] for the price of EUR 26 023.03.

The aforementioned car is equipped with an EA-189 engine, the original software of which contributed towards the optimisation of the nitrogen emission values in the official test procedure, in that the engine has an exhaust gas recirculation system with two modes of operation. Mode 1 is a nitrogen-optimised mode with a relatively high exhaust gas recirculation rate, while mode 0 is a particle-optimised mode with a lower exhaust gas recirculation rate. The software of the engine control unit recognises whether the vehicle is in normal road traffic or on a technical test rig for determining the emission values. During the test cycle or rig test, the installed software executes engine programme mode 1 when nitrogen is emitted, resulting in lower nitrogen oxide values and compliance with the legally prescribed exhaust gas values as well as the nitrogen oxide limit values prescribed according to the Euro-5 exhaust gas standard. Under real driving conditions in road traffic, the vehicle is, by contrast, operated in exhaust gas recirculation mode 0. The resulting emission values do not correspond to the values indicated by the defendant as the manufacturer of this vehicle in the EC certificate of conformity.

The defeat device was installed by the defendant with the knowledge and by order, or at least with the approval, of the board, with the purpose of reducing its own costs at the expense of end customers, maximising profits through the massive number of sales of vehicles manipulated in this way and creating a competitive advantage over competing motor vehicle manufacturers. The necessary deception of the unsuspecting approval authorities and of end customers as to the existence of such a defeat device and the actual non-compliance with the statutory exhaust gas provisions formed part of the overall plan.

The applicant, who was accordingly deceived (by his dealer as an agent of the defendant), purchased the vehicle in order to use it on public roads. The applicant would not have purchased it had he known that the material approval requirements were not met and that there was therefore a risk that he might not be able to use the vehicle (in the long term) for that purpose if it were taken out of service.

The applicant has been using the vehicle since purchasing it. On 25 July 2019, the odometer reading was 93 000 kilometres. **[Or. 4]**

II.

Only liability in tort of the defendant pursuant to Paragraph 823(2) of the BGB in conjunction with Article 5(2) of Regulation (EC) No 715/2007 (see 1.), Paragraph 823(2) of the BGB in conjunction with Paragraphs 6(1) and 27(1) of the EG-FGV (see 2.) and Paragraph 826 of the BGB (see 3.) is being considered in the present case.

The respective connecting factors are as follows:

1. An impermissible defeat device within the meaning of Article 5(2) and Article 3.10 of Regulation (EC) No 715/2007 has been used in the construction of the car at issue. The corresponding decision of the Kraftfahrtbundesamt (German Federal Motor Transport Authority) is final and has a binding effect for the civil proceedings in this respect. The Chamber also agrees with, and is adopting, the corresponding statements of the Bundesgerichtshof (Federal Court of Justice; BGH) in the latter's order of 8 January 2019 […].

Contrary to the defendant's opinion, the software which it installed is not a purely engine-internal measure. Functions in the emissions control system are altered by the use of the software. If the vehicle is on the test rig, use is made of exhaust gas recirculation mode 1, in which there is increased exhaust gas recirculation with low nitrogen oxide output. More nitrogen oxides are thereby recirculated into the engine than in exhaust gas recirculation mode 0, which is switched on in normal driving operation. As a result of the altered mode, the nitrogen oxide output achieved by the emissions control system is lower than in normal driving operation. Nitrogen oxides are therefore removed from the measurement. This alters the function of the emissions control system, as the measured values determined there do not correspond to those in normal driving operation.

The defendant's argument that the limit values in actual driving operation are irrelevant, as the legislature has decided in favour of ascertaining the limit values under laboratory conditions, is also immaterial. That submission might be relevant if the different conditions of driving operation were the only factor for the differences in the NOx output. However, this is precisely not the case. Beyond the different conditions of driving operation, with the vehicles concerned there is also, according to the defendant's own submission, the — unlawful — additional factor of the software used, which exerts an influence on the NOx output by altering the mode used. By using the software, the defendant left the realm of what is legally permissible […] [reference to national case-law].

2. To what extent there is also a breach of Paragraphs 6(1) and 27 of the EG-FGV, provisions which are based on Article 18(1) **[Or. 5]** and Article 26(1) of

Directive 2007/46/EC, depends on the declaratory content and significance of a certificate of conformity.

In the opinion of the Oberlandesgericht (Higher Regional Court; OLG) of Braunschweig […], it should not matter whether the specific vehicle meets the legal requirements, but only that the certificate has been issued by the correct manufacturer and assigned to the approved type, that is to say, that the statement meets certain formal requirements, even though it may be incorrect in terms of content. The installation of an impermissible defeat device therefore does not, according to this argument, affect the validity of the certificate of conformity.

According to the opposing view, such a certificate, by contrast, at the same time contains the declaration that the vehicle satisfies all the relevant legislation in force in the European Union […], with the result that, in the case of the presence of an impermissible defeat device, as is the situation here, the certificate of conformity is incorrect and thus invalid and the vehicle has therefore been placed on the market without valid certification (breach of Paragraph 27(1) of the EG-FGV and breach of the manufacturer's obligation to issue a valid certificate pursuant to Paragraph 6(1) of the EG-FGV) […].

It is already apparent from the objective formulated in the Annex to Regulation (EC) No 385/2009, according to which the certificate of conformity is 'a statement delivered by the vehicle manufacturer to the buyer in order to assure him that the vehicle he has acquired complies with the legislation in force in the European Union at the time it was produced', that the formalistic approach is incorrect and that the certificate of conformity has the last-mentioned wider declaratory content.

Although that in itself is not to say that the invalidity of the statement of conformity is accompanied by material inaccuracy as a result of the installation of an impermissible defeat device, this is supported rather than undermined by the aforementioned function description, especially in consideration of interpretation maxims under European law.

The answer to question 1 is therefore relevant for the purpose of determining whether a breach of standard on the part of the defendant even exists in this context as the basis for tortious liability.

3. The placing on the market of a vehicle in which an impermissible defeat device **[Or. 6]** has been deliberately installed, with intentional concealment of the unlawful software programming as well as the associated implied deception of the approval authorities and of end customers into believing that all the conditions for approval have been met and that the use of the vehicle on the roads is permissible without restriction, for the purpose of reducing costs and maximising profits through high sales figures with the simultaneous creation of a competitive advantage at the expense of unsuspecting customers, constitutes deliberate

infliction of harm contrary to proper business practice (Paragraph 826 of the BGB).

In that regard, the fact that the applicant did not purchase the vehicle directly from the defendant does not call into question from the outset the causal link between deception and vehicle acquisition, since by placing the vehicle on the market, the defendant deliberately initiated the causal process through the use of its distribution channel. The manufacturer's implied deception connected with placing the vehicle on the market also continues to have an effect because, with regard to this type of information, the vehicle dealer merely reproduces the manufacturer's account and in this respect the purchaser trusts in the manufacturer's information and — as in the present case — in the integrity of the manufacturer. In this respect, the car vendor is an agent of the indirectly complicit defendant.

The defendant's action also caused the applicant harm which is already to be seen in the conclusion of the unfavourable purchase agreement which would otherwise not have been concluded […] [reference to national case-law].

The subjective conditions of Paragraph 826 of the BGB in conjunction with Paragraph 31 of the BGB are also satisfied. The applicant's sufficiently substantiated assertions in this context have not been effectively contested by the defendant with regard to its secondary burden of explanation […] [reference to national case-law].

III.

Liability in tort pursuant to Paragraph 823(2) of the BGB in conjunction with Article 5(2) of Regulation (EC) No 715/2007 requires, in a manner material to the decision, that the last-mentioned standard is protective legislation. The same applies to liability pursuant to Paragraph 823(2) of the BGB in conjunction with Paragraphs 6(1) and 27(1) of the EG-FGV, in so far as — **[Or. 7]** with the initial condition of preliminary question 1 being answered in the affirmative — there is even a breach of the provision(s) in this respect (see II.2.).

The standard is aimed at protecting others if it is at least also deemed to serve to protect the individual or individual groups of people against the infringement of a certain legally protected interest. In the case of rules and prohibitions, the protected interest, the nature of its infringement and the group of protected persons must be sufficiently identified. The important factor is not the effect, but the content and purpose of the law, and whether, at the time of the adoption of that law, the legislature precisely intended to create legal protection, as claimed with regard to the asserted infringement, in favour of individual persons. It is immaterial if the legal standard additionally or even primarily has the public interest in mind, as long as the protection of individuals is not just a mere indirect result of the standard. The creation of an individual compensation claim must appear to be reasonable and viable at least in the scope of the overall system of

legal liability. Whether this is the case is to be decided by way of comprehensive assessment of the overall regulatory context of the standard […].

In addition, the obligation to provide compensation is limited by the protective purpose of the standard. Liability exists only for equivalent and appropriate consequential damage coming within the area of the risks for the prevention of which the infringed standard was adopted. The damage claimed must be closely connected with the risk situation created by the injuring party; an 'external', as it were 'incidental' connection is not enough. An evaluative consideration is required in this respect. Accordingly, the sense and scope of the infringed standard are to be examined and clarification is required as to whether it was intended that the damage claimed was supposed to be prevented by that standard […].

Whether the aforementioned provisions offer protection to third parties, that is to say, whether they are specifically also intended to protect the freedom of disposal and assets of individual car buyers, and whether the acquisition of a vehicle in which an impermissible defeat device has been installed comes within the area of risks for the prevention of which the infringed standard(s) was/were adopted, has to date been a source of heated dispute in Federal German case-law, whereas — as far as can be seen — an examination with regard to the protective purpose of the standard generally does not occur.

The Higher Regional Court of Braunschweig […] for instance takes the view, with detailed reasoning, that the aforementioned provisions are not to be regarded as protective legislation within the meaning of Paragraph 823(2) of the BGB **[Or. 8]**, as they do not serve to protect the assets of the purchaser of a motor vehicle, but are aimed at achieving a high level of traffic safety, health and environmental protection and efficient energy use.

By contrast, it is argued that it is immaterial if the infringed standard is primarily supposed to serve the public interest, if the individual protection — which is to be assumed in the present case — is not a mere indirect result, but is to be assigned to the scope of functions of the standard […]. In the area of standards under European law, it is also to be noted that, for the purpose of effective implementation of European law, compensation claims are also to be allowed where the infringed standards do not pursue an individualised protective purpose […]. Furthermore, individual protection also results from the function description, already mentioned above (II.2.), in the Annex to Regulation (EC) No 385/2009 […].

The Chamber is unable to assess which interpretation is correct, particularly with regard to an adequate implementation of Articles 18(1), 26(1) and 46 of Directive 2007/46/EC, in consideration of maxims under European law and made in the light of the Charter of Fundamental Rights of the EU, especially since the arguments put forward on both sides are quite considerable, but ambivalent in certain points.

IV.

Liability in tort under Paragraph 826 of the BGB is also limited from the outset to damage which comes within the scope of protection afforded by the infringed rule or prohibition […]. The only persons entitled to compensation are those who are directly harmed through due to improper practices or who suffer a loss due to improper practices as third parties not just indirectly through of the party directly injured […].

The question as to whether liability in situations such as that in the present case is to be corrected from protective purpose perspectives is still being discussed as a matter of contention, with different responses being given.

If the breach of the first sentence of Article 5(2) of Regulation (EC) 715/2007 and of Paragraphs 6 and 27 of the EG-FGV is not directly taken up in this respect, but the behaviour constituting an improper practice is exclusively established through the ongoing deception of (in particular) the end customer that is connected with the fact that the vehicle has been placed on the market, a correction from the point of view of protection will not be necessary, **[Or. 9]** because the deceived party must be protected without restriction and compensated for all damage caused to him as a result of the deception […]. If, by contrast, emphasis is conclusively placed on the fact that a vehicle using an impermissible defeat device has been placed on the market, there is a high degree of congruence with the questions raised under III. […].

However, isolated consideration is not possible. Inseparable aspects of a single event and overall plan are ultimately involved. Just as placing the vehicles equipped with an impermissible defeat device on the market (on a massive scale) in order to achieve the intended objectives was not possible without deceiving the approval authorities and end customers, fraud without manipulation as the object of the deception is inconceivable, since beyond the question of (non-)compliance with the exhaust emission regulations, the deception had no further declaratory content. In this case and accordingly in the view of the Chamber, the infringement of the exhaust emission standards forms the core of the accusation that proper business practices have been disregarded. In consideration thereof, liability under Paragraph 826 of the BGB can likewise be established only if the purpose of the exhaust emission standards was not merely the indirect protection of the respective end customer and the latter was precisely also supposed to be protected against the damage claimed.

The answers to questions 1a. (provided that preliminary question 1 is answered in the affirmative) and 2. therefore also decisively affect the decision as to whether there is a claim pursuant to Paragraph 826 of the BGB, namely whether the aforementioned provisions offer the required protection to third parties and the acquisition by an end customer of a vehicle in which an impermissible defeat device has been installed and/or which has been placed on the market without a

valid certificate of conformity comes within the scope of the risks for the prevention of which the infringed standard(s) was/were adopted.

V.

Questions 1, 1a and 2 do not cease to be relevant to the decision because the action is already successful because the applicant has a claim pursuant to Paragraph 823(2) of the BGB in conjunction with Paragraph 263(1) of the Strafgesetzbuch (German Criminal Code; StGB), since this is not the case.

Apart from protective purpose considerations which also arise here, there are insufficient arguments concerning the satisfaction of the factual requirements for such a claim. **[Or. 10]**

Paragraph 263 of the StGB is a criminal law standard which criminalises a specific action or omission on the part of a particular natural person. A criminal charge cannot be levelled against a legal person. Therefore, the applicant would in particular have to state, in a substantiated manner, which board member, which representative or which vicarious agent committed which specific deception, as well as the place and time of that deception, or in respect of whom an order is supposed to have been made. The fact that he is unable to do so due to lack of insight into the processes within the defendant's company is irrelevant at this point. Unlike in the area of Paragraph 826 of the BGB, which involves a charge under civil law, an applicant who levels criminal charges against employees of a legal person based on the liability thereof under civil law does not benefit from the principles of the secondary burden of explanation (see III.3.).

[…]