

**Case C-808/19**

**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice**

**Date lodged:**

4 November 2019

**Referring court:**

Landgericht of Gera (Germany)

**Date of the decision to refer:**

25 October 2019

**Applicant:**

DS

**Defendant:**

Volkswagen AG

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**Subject-matter of the case in the main proceedings**

Compensation claim seeking rescission of the purchase contract for a used vehicle, in which an impermissible defeat device has been installed — Liability of the manufacturer — Obligation to deliver a certificate of conformity — Protection of end customers — Offsetting of compensation for use against the harm

**Subject-matter and legal basis of the request**

Interpretation of EU law, Article 267 TFEU

**Questions referred**

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 also aimed at protecting the end customer and — in the case of resale on the second-hand market — in particular the subsequent car buyer, including in relation to his freedom of disposal and his assets? Does a car buyer's acquisition of a used vehicle that has been placed on the market without a valid certificate of conformity come within the area of the risks for the prevention of which these standards were adopted?

2. Is Article 5(2) of Regulation (EC) No 715/2007 also aimed at protecting the end customer and — in the case of resale on the second-hand market — in particular the subsequent car buyer, including in relation to his freedom of disposal and his assets? Does a car buyer's acquisition of a used vehicle in which an inadmissible defeat device has been installed come within the area of the risks for the prevention of which this standard was adopted?

3. Are Paragraphs 6 and 27 of the EG-FGV, and/or Articles 18(1), 26(1) and 46 of Directive 2007/46/EC and Article 5(2) of Regulation (EC) No 715/2007, to be interpreted as meaning that, in the event of a breach thereof, the offsetting of compensation for the actual use made of the vehicle against the damage incurred by the end customer is wholly or partially inapplicable (as appropriate: in what manner and to what extent?), if the end customer may demand, and does demand, the rescission of the vehicle purchase contract as a result of that breach? Would that interpretation be different if the breach also involves the 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, and that there has been a breach and deception 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?

### **Provisions of EU law cited**

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): Articles 18(1), 26(1) and 46

Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of 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: Articles 3.10 and 5(2)

Commission Regulation (EC) No 385/2009 of 7 May 2009 replacing Annex IX to Directive 2007/46/EC of the European Parliament and of the Council 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): Annex

### **Provisions of national law cited**

Verordnung über die EG-Genehmigung für Kraftfahrzeuge und ihre Anhänger sowie für Systeme, Bauteile und selbstständige technische Einheiten für diese Fahrzeuge (Regulation on EC approval for motor vehicles and their trailers, and for systems, components and separate technical units intended for such vehicles) (EG-Fahrzeuggenehmigungsverordnung (EC Vehicle Approval Regulation) — EG-FGV): Paragraphs 6, 27

Bürgerliches Gesetzbuch (German Civil Code; BGB): Paragraphs 31, 823(2) and 826

Strafgesetzbuch (German Criminal Code; StGB): Paragraph 263(1)

### **Brief summary of the facts and procedure**

- 1 On 26 August 2010 the applicant bought from a car dealer a second-hand VW Golf with an odometer reading of 26,300 for the price of EUR 15 886.
- 2 The car is equipped with an EA-189 engine. The original software of the engine 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 mode 0. The resulting emission values do not correspond to the values indicated by the defendant as the manufacturer of this vehicle in the certificate of conformity.

- 3 The installation of the defeat device was carried out 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 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.
- 4 The applicant, who was correspondingly deceived (by the other contracting party 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 she known that the material approval requirements were not met and that there was therefore a risk that she 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.

#### **Principal arguments of the parties in the main proceedings**

- 5 The applicant is demanding that the defendant repay the purchase price for the car. She is of the opinion that no compensation for use for the kilometres which she has driven should be deducted from the purchase price.
- 6 The defendant argues that the software which it installed is a purely engine-internal measure. Furthermore, the limit values in actual driving operation are irrelevant, as the legislature has decided in favour of ascertaining the limit values under laboratory conditions.

#### **Brief summary of the basis for the request**

- 7 The referring court is examining whether the defendant is liable in tort under Paragraph 823(2) BGB, in conjunction with Article 5(2) of Regulation (EC) No 715/2007, under Paragraph 823(2) BGB, in conjunction with Paragraphs 6(1) and 27(1) of the EG-FGV, and Paragraph 826 BGB.
- 8 It firstly finds that an impermissible defeat device within the meaning of Article 5(2) and Article 3.10 of Regulation 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.
- 9 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) and Article 26(1) of Directive 2007/46, depends on the declaratory content and significance of a certificate of conformity, which are matters in dispute in Germany.

- 10 According to one opinion, 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.
- 11 According to the opposing view, such a certificate 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, 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).
- 12 The referring court infers from the objective formulated in the Annex to Regulation 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 wider declaratory content assumed by the opposing view.
- 13 A breach of Paragraph 27 of the EG-FGV is not excluded on the ground that the applicant bought a used car and that the provision, according to a widespread understanding of its wording, is supposed to relate from the outset only to new cars, since the defendant previously placed the vehicle concerned on the market as a new vehicle, which is why it could subsequently be traded at all on the second-hand market, with the result that liability is linked to this factor which continues to have effect (and not to the later resale).
- 14 The referring court examines the facts both from the perspective of Paragraph 823(2) BGB, in conjunction with a protective provision (here: Article 5(2) of Regulation (EC) No. 715/2007, and/or Paragraphs 6(1) and 27(1) of the EC-FGV), and under Paragraph 826 BGB. It points out that the liability in tort at issue is limited to harm which comes within the scope of protection afforded by the infringed rule or prohibition and that the only persons entitled to compensation are those who are directly harmed due to improper practices or who suffer a loss due to improper practices as third parties directly and not indirectly through the party directly harmed. That is the case if a standard 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. Furthermore, liability exists only for consequential damage coming within the area of the risks for the prevention of which the infringed standard was adopted. In this case, the sense and scope of the infringed standard are to be examined and clarification is required as to whether it

was intended that the harm claimed was supposed to be prevented by that standard.

- 15 The question as to whether liability under Paragraph 826 BGB in situations such as that in the present case is to be corrected from protective purpose perspectives is being discussed as a matter of contention in Germany.
- 16 If the breach — initiated by the defendant — of the first sentence of Article 5(2) of Regulation No 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, 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 by the defendant, it will be material to the decision whether the aforementioned provisions offer protection for 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 area of the risks for the prevention of which the infringed standards were adopted.
- 17 The referring court takes the view that isolated consideration is not possible. Inseparable aspects of a single event and overall plan are involved. The infringement of the exhaust emission standards in this case forms the core of the accusation that proper business practices have been disregarded. Therefore, liability under Paragraph 826 of the BGB can 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 specifically also supposed to be protected against the damage claimed.
- 18 It has to date been a source of heated dispute in German case-law whether Paragraphs 6 and 27 of the EG-FGV and Articles 18(1) and 26(1) of Directive 2007/46/EC and/or Article 5(2) of Regulation No 715/2007 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 the risks for the prevention of which the infringed standards were adopted.
- 19 Some take the view that the aforementioned provisions are not to be regarded as protective legislation, 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.

- 20 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 already mentioned function description in the Annex to Regulation No 385/2009.
- 21 The referring court 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 European Union. In this respect, the Court of Justice, to which the matter is being referred, is asked to make a binding interpretation.
- 22 With regard to the third question referred, the referring court states that, if Questions 1, 1a and/or 2 are answered, the applicant is entitled to be placed in the position in which she would have been had she not concluded the contract relating to the car. She may demand reimbursement of the purchase price in exchange for delivery and transfer of the vehicle.
- 23 However, since the applicant has used the vehicle that she acquired for years after the purchase and continues to do so, this raises the further question – germane to the decision – as to whether she is obliged to pay compensation for that use from the perspective of the balancing of advantages.
- 24 The law governing compensation in Germany is based on the notion that only one settlement of damage takes place and that an injured party may not be enriched as a result of the damage. Among other things, a corresponding offsetting of advantages takes place. According to this, the calculation of the damage is to take any advantages into account, to the extent to which a liability-establishing event has led, by adequate causal link, to advantages for the injured party and the offsetting of those advantages is in line with the meaning and purpose of the obligation to provide compensation, that is to say, it does not unreasonably burden the injured party and does not unjustly ease the burden of the injuring party.
- 25 Whether — particularly in the case of liability under Paragraph 826 of the BGB — an offsetting of advantages takes place in circumstances such as those obtaining here is a matter keenly disputed in Germany.
- 26 Against an offsetting of advantages, the objection is raised that the accusation that the purchase contract was brought about in bad faith is inconsistent with the offsetting of the advantage obtained through use, because the applicant did not want to rent the vehicle but to buy it. The manufacturer that is liable on account of bad faith should also not temporarily realise the added value of the sale of goods

at issue by way of the damage calculation, since this would mean that the liability therefor would make virtually no difference from a purely economic point of view. Effective enforcement of EU law also prohibits compensation for the use made.

- 27 Against this, it is pointed out that an offsetting of advantages is not unjust, because use is taking place and in this way a pecuniary advantage has been gained and the refusal does not have any compensatory effect. The offsetting of the benefits gained does not unjustly ease the burden on the injuring party. It is not, it is argued, the task of the law governing compensation to penalise the conduct of the injuring party in a manner which goes beyond the actual rescission of the contract. The advantage in terms of use gained by the applicant is not one which would have remained with her without the harmful event since, even without the harmful event, the applicant would have driven a motor vehicle and therefore enjoyed the resulting use advantages. In this respect, she has not been placed in a worse position as a result of the defendant's conduct.
- 28 The referring court is inclined towards offsetting the use made, but is unable to determine whether this is partially or wholly prohibited under European law.