Case C-873/19

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:

29 November 2019

Referring court:

Schleswig-Holsteinisches Verwaltungsgericht (Germany)

Date of the decision to refer:

20 November 2019

Applicant:

Deutsche Umwelthilfe e.V.

Defendant:

Bundesrepublik Deutschland

Joined party:

Volkswagen AG

Subject matter of the main proceedings

Standing of an environmental association to bring proceedings in a dispute concerning the permissibility of defeat devices in diesel engines — Permissibility of a so-called ‘temperature window’ pursuant to Regulation No 715/2007 — Yardstick and criteria concerning the question of whether the need for a defeat device is justified

Subject matter and legal basis of the request

Interpretation of the Aarhus Convention and of EU law, Article 267 TFEU

Questions referred

1. Is Article 9(3) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters — signed in Aarhus on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 — in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, to be interpreted as meaning that it must in principle be possible for environmental associations to challenge before the courts a decision approving the manufacture of diesel passenger cars with defeat devices that are potentially in breach of Article 5(2) of 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?

2. If Question 1 is answered in the affirmative:

(a) Is Article 5(2) of 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 to be interpreted as meaning that the yardstick for determining whether the need for a defeat device is justified in terms of protecting the engine against damage or accident and for safe operation of the vehicle is, in principle, the state of the art, in the sense of what is technically feasible at the time when the EC type approval is granted?

(b) In addition to the state of the art, should account be taken of other circumstances which may lead to the permissibility of a defeat device, even though, according to the current state of the art alone, the ‘need’ for such a device would not be ‘justified’ within the meaning of Article 5(2)(a) of 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?

Provisions of international law cited

UNECE Convention on access to information, public participation in decision-making and access to justice in environmental matters (‘the Aarhus Convention’), Article 9(3)

Provisions of EU law cited

Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters

Charter of Fundamental Rights of the European Union ('the Charter'), Articles 47 and 52(1)

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, Article 5(2)

Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment

Provisions of national law cited

Gesetz über ergänzende Vorschriften zu Rechtsbehelfen in Umweltangelegenheiten nach der EG-Richtlinie 2003/35/EG (Law on supplementary provisions on access to review procedures in environmental matters pursuant to Directive 2003/35/EC) (Umwelt-Rechtsbehelfsgesetz (Law on access to review procedures in environmental matters) — UmwRG), Paragraphs 1, 2 and 3

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), Paragraph 25(1) and (2)

Verwaltungsgerichtsordnung (Code of administrative court procedure; 'the VwGO'), Paragraph 42 and the first sentence of Paragraph 113(1)

Brief summary of the facts and procedure

1 The parties are in dispute over the applicant's standing to bring proceedings and the existence of impermissible defeat devices or the impermissibility of defeat devices in the engines of the VW Golf Plus TDI (2.0 litre) vehicle model manufactured by Volkswagen AG, which has been joined as a party to the proceedings.

2 The applicant is an environmental association recognised as being able to bring legal proceedings pursuant to Paragraph 3 of the UmwRG, and which has as its

purpose, according to its articles of association, the promotion of protection of nature and of the environment as well as health- and environment-related consumer protection, in particular through the provision of information and advice to consumers.

3 The joined party is a German automobile manufacturer and produces the VW Golf Plus TDI (2.0 litre) model, amongst others. The vehicles of this model are fitted with a diesel engine with an EA 189 Euro 5 unit. In the context of the so-called 'diesel scandal', it was revealed that the vehicles of the aforementioned model, amongst others, were fitted with a defeat device by the joined party at the factory. At the time of approval, the engine control unit of this type of engine contained software that made it possible to detect whether the vehicle is performing a driving cycle on a test rig. In this case, a special mode is activated in which the exhaust gas recirculation rate is significantly increased, with the result that the vehicle emits less nitrogen oxide. During real-world driving, this mode is completely deactivated, resulting in significantly higher nitrogen oxide emissions. In the course of the approval procedure at the Kraftfahrt-Bundesamt (Federal Motor Transport Authority; 'the KBA'), this software was not specified by the joined party when it submitted its application. Although on the test rig the nitrogen oxide emissions of the vehicles therefore remain within the permitted levels of the EC type approval granted, during normal road use the nitrogen oxide emissions exceed the values permitted under the EC type approval.

4 By a definitive decision of 15 October 2015, which is not at issue in the present case, the KBA ordered the joined party, inter alia, to remove impermissible defeat devices and to take appropriate measures to restore compliance with the regulatory requirements. According to the decision, specific solutions had to be approved by the KBA before being implemented in practice.

5 The joined party subsequently developed a software update that was intended to remedy the defects that had become known in the exhaust systems of the vehicles.

6 By approval notification of 20 June 2016, the KBA informed the joined party that, after the software update developed by the joined party had been installed in the VW Golf Plus TDI (2.0 litre) model vehicles, there were no longer any impermissible defeat devices; the KBA deemed the defeat devices that were still present to be permissible.

7 According to the defendant's findings also, even after the software had been applied the vehicle at issue has a so-called 'temperature window' in which the exhaust gas recirculation rate is controlled as a function of the ambient temperature. According to the information supplied by the joined party, the exhaust gas recirculation rate is 0% at temperatures below -9°C, 85% between -9°C and 11°C, and then it rises as from 11°C until it finally reaches 100% at an ambient temperature of 15°C.

8 The applicant challenged that decision by an objection lodged on 15 November 2016, on which a decision has yet to be taken. It therefore instituted proceedings on 24 April 2018 and requests, in particular, that the approval notification of 20 June 2016 be annulled in so far as it states that no impermissible defeat devices had been identified and that existing defeat devices are considered to be permissible.

Principal arguments of the parties in the main proceedings

9 The applicant takes the view that the defeat devices deemed to be permissible by the KBA also had to be assessed as being prohibited within the meaning of the first sentence of Article 5(2) of Regulation No 715/2007 because the defeat devices installed became active as soon as the average temperatures prevailing in Germany were reached. However, it was possible, in principle, for manufacturers to design and install engines which, from a technical point of view, did not require that the exhaust gas purification systems already be regulated downwards at average temperatures, that is to say under normal conditions.

Brief summary of the basis for the request

The first question: the applicant's standing to bring proceedings

10 The referring court takes the view that, in the present case, the applicant does not have standing to bring proceedings under national procedural law (I.), with the result that the decisive factor is whether it can derive such standing directly from EU law (II.).

I. Standing to bring proceedings under national procedural law

11 The referring court initially examines whether the applicant's standing to bring proceedings arises from Paragraph 2(1), in conjunction with the first sentence of Paragraph 1(1), of the UmwRG. It finds this not to be the case, because the matter does not even come within scope of the UmwRG, which is governed in Paragraph 1(1) of the UmwRG. In order for it to do so, it would have to concern a challenge to an administrative act by which a 'project' is permitted. However, type approval for passenger cars and approval as a modification of the type approval, such as is at issue here, constitute a case of product approval and do not concern a project. Nor can a broad interpretation of the concept of 'project' or an analogous application of the provisions of the UmwRG be contemplated in the present case.

12 The applicant cannot directly derive standing to bring proceedings from Article 9(3) of the Aarhus Convention either, as that provision is not directly applicable. Rather, the implementation and effect of that provision depend on the adoption of further acts by the Member States (see judgment of the Court of

Justice of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, C-664/15, EU:C:2017:987).

13 Finally, the applicant is also unable to assert any subjective rights of a natural person vis-à-vis public authorities and enforce them in court, since it is not possible to identify any such subjective rights vis-à-vis public authorities in the present case. The referring court takes the view that the infringement of the prohibition on the use of defeat devices laid down in the first sentence of Article 5(2) of Regulation No 715/2007, which is the only conceivable infringement in the present case, does not confer a subjective right on a natural person, since that provision does not serve to protect individual citizens.

II. Standing to bring proceedings arising directly from EU law

14 In the view of the referring court, the crucial question for the decision in the present case is therefore whether the applicant can derive standing to bring proceedings directly from EU law. In the light of the current case-law of the Court of Justice (judgment of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, C-664/15, EU:C:2017:987), such standing could arise from Article 9(3) of the Aarhus Convention in conjunction with Article 47(1) of the Charter. In this respect, the facts of the case come within the scope of Article 9(3), and not Article 9(2), of the Aarhus Convention, since, firstly, the approval notification is not a decision to which Article 6 of the Aarhus Convention applies. This is because it is not a proposed activity listed in Annex I pursuant to Article 6(1)(a), nor is Article 6 to be applied in accordance with national law pursuant to Article 6(1)(b), since the decision in question may have a significant effect on the environment — there is no provision in national law under which the article applies to the present case. Secondly, the case does not concern national legislation within the meaning of the first sentence of Article 9(2) of the Aarhus Convention, pursuant to which other relevant provisions of the Convention are to apply to the present case.

15 In a decision delivered in relation to Austrian law, the Court of Justice stated that the interaction of that legislation obliged the Member States to ensure effective judicial protection of the rights guaranteed by EU law, in particular the provisions of environmental law. In particular, criteria laid down in national law should not deprive environmental associations of the possibility of verifying compliance with provisions arising from EU environmental law. Although the Member States enjoy a certain degree of discretion as to the implementation of those requirements, criteria so stringent that it would be effectively impossible for environmental organisations to contest the actions or omissions that are the subject of Article 9(3) of the Aarhus Convention are not permissible. The national courts therefore have to interpret, to the greatest extent possible, procedural law in accordance with both the objectives of Article 9(3) of the Aarhus Convention and the objective of effective judicial protection of the rights conferred by EU law. Should that not be possible, the national court must disapply a procedural rule which is inconsistent with EU law in the case before it.

16 The consequences resulting from that decision in terms of national procedural law have been assessed differently in national case-law.

17 For instance, in a decision of 18 April 2018, the Verwaltungsgericht Berlin (Administrative Court, Berlin) took the view that recognised environmental associations can, in the light of the decision of the Court of Justice of 20 December 2017 [in Case C-664/15], bring judicial proceedings to enforce compliance with purely objective-law environmental legislation that is based on EU environmental law. The relevant German provision, it held, was applicable on the condition that, in order for it to be found that standing to bring proceedings existed, it was sufficient if a recognised environmental association sought compliance with the legislation arising from EU environmental law.

18 The Verwaltungsgericht Düsseldorf (Administrative Court, Düsseldorf) took a different legal view in a decision on 24 January 2018. Article 9(3) of the Aarhus Convention, in conjunction with the first paragraph of Article 47 of the Charter, does not, in its view, require that environmental associations be granted rights of associations to bring proceedings which go beyond the cases provided for by the UmwRG. This is because the national legislature is not required to guarantee access to justice without any restriction whatsoever. This is directly apparent from the Aarhus Convention alone, pursuant to which 'criteria' could be laid down for review procedures. Article 52(1) of the Charter also provides for the possibility of limiting the right to an effective remedy pursuant to the first paragraph of Article 47 of the Charter by law. Under national procedural law, environmental associations generally have broad access to the courts. The fact that, on the other hand, they cannot challenge the authorisation of individual products before the courts does not therefore constitute a disproportionate restriction, since, in themselves, those products are scarcely of any significance in the context of environmental law. Finally, the possibilities for environmental associations to initial review procedures against administrative decisions provided by national [German] law are wider than the possibilities provided for by Austrian procedural law, on which the judgment of the Court of Justice of 20 December 2017 [in Case C-664/15] is based.

19 It is also in the light of that discordant national case-law that the referring court entertains doubts as to whether Article 9(3) of the Aarhus Convention, in conjunction with Article 47 of the Charter, is to be interpreted as meaning that it must also be possible for recognised environmental organisations to challenge an administrative product approval of the kind at issue in the present case by means that go beyond the already existing possibilities of judicial protection under the UmwRG, provided that enforcement of compliance with objective-law provisions of EU environmental law is sought.

20 Pursuant to Article 9(3) of the Aarhus Convention, each party is required to ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures in order to challenge acts and omissions by private persons and public authorities which

contravene provisions of its national law relating to the environment. Thus, the Aarhus Convention also provides that the right of associations to bring proceedings is not unrestricted, but only in so far as environmental associations satisfy certain criteria laid down in national law; Member States therefore have a certain amount of leeway when creating their procedural rules. However, the criteria laid down by the Member States must not be so stringent as to make it effectively impossible for environmental organisations to contest the actions or omissions that are the subject of Article 9(3) of the Aarhus Convention.

21 The referring court firstly has doubts as to whether the 'criteria … laid down in … national law' within the meaning of Article 9(3) of the Aarhus Convention cover only criteria relating to the group of persons entitled to challenge acts and omissions. In that case, the Member States would have leeway only with regard to the question of which environmental associations should also have the right to enforce environment-related general interests in court by way of proceedings brought by an association. The national legislature has laid down such criteria in Paragraph 3 of the UmwRG in a binding manner.

22 However, Article 9(3) of the Aarhus Convention could also be interpreted as meaning that Member States can also make distinctions as to the subject matter of the challenge and may therefore exclude certain administrative decisions from judicial review brought about by environmental associations. Due to the large number of administrative decisions relating to the environment, a limitation to certain decisions that are serious in terms of their environmental impact could make sense. This might support the view that a decision taken by the national legislature to exclude product approvals from the scope of the UmwRG would in principle be in line with Article 9(3) of the Aarhus Convention. Although not all product approvals can be deemed to be of only minor environmental significance, practical considerations also support the argument that Member States must be able, by way of categorising considerations, to avoid subjecting certain individual decisions to the uncertainty of being challenged by third parties which are not yet a party to the dispute, given the large number of individual product approvals, such as the approval of an individual vehicle by the locally competent approval authority. This is all the more true given that the decision will generally not be made known to them and they will therefore not be informed of legal remedies either.

23 In addition, the facts of the *Protect* ruling of the Court of Justice differ from those in the present case. This is because, unlike in that case which has already been decided, under national law environmental associations are also able to have the approval of projects reviewed within the framework of the UmwRG. A total exclusion of the right of associations to bring proceedings does not exist in national law. A comparable gap in legal protection, such as that established by the decision of 20 December 2017 [in Case C-664/15] in relation to Austrian law, therefore does not exist in national [German] procedural law.

The second question

24 In the event that the Court of Justice answers the first question in the affirmative, the referring court requests that the second question referred also be answered. If it is assumed that the applicant also has standing to bring proceedings in the present case, the decision on the legality of the contested approval notification depends crucially on how Article 5(2) of Regulation No 715/2007 is to be interpreted — in particular, what yardstick is to be used in order to determine whether the 'need' to install a defeat device is 'justified'. One of the decisive factors for the referring court's examination as to the legality of the approval notification is whether the default devices disclosed by the joined party are permissible — as assumed by the KBA.

25 It is common ground that, even after the implementation of the software update approved by the KBA in the contested notification, there are still defeat devices in the engine control units of the vehicles concerned. These are in principle prohibited under the first sentence of Article 5(2) of Regulation No 715/2007. Pursuant to Article 5(2)(a) of Regulation No 715/2007, default devices are permissible by way of exception if the need for the device is justified in terms of protecting the engine against damage or accident and for safe operation of the vehicle. Regulation No 715/2007 does not determine the question as to when this is the case.

26 The recitals of Regulation No 715/2007 set out various reasons explaining why it was important for the regulation to be adopted. Recital 1, for example, refers to the fact that the rules adopted are intended, inter alia, to ensure a high level of environmental protection. Recital 6 states that, in particular, a considerable reduction in nitrogen oxide emissions from diesel vehicles is necessary in order to improve air quality and to comply with limit values for pollution. Recital 7 mentions, inter alia, improving air quality, reducing health costs and increasing life expectancy as benefits of the provisions to be taken into account. Against this background, there are serious indications for the referring court to assume a fundamentally narrow concept of a justified need — the protection of high-level legal interests is the focus of Regulation No 715/2007. As a consequence, it could therefore be assumed that motor vehicle manufacturers will primarily have to orient themselves on the current state of the art when it comes to determining whether the need for a defeat device is actually justified in terms of protecting the engine or for safe operation of a motor vehicle.

27 However, recital 7 puts these objectives into perspective with regard to the setting of emission limit values. Pursuant to that recital, account should also be taken of the implications for markets and manufacturers' competitiveness, as well as the direct and indirect costs imposed on business. Here, the legislature could have been expressing that, beyond the objective of achieving the highest possible level of environmental protection, there are other circumstances which were not only identified before the regulation was adopted but could also be taken into account under certain circumstances when it is being interpreted. However, the referring

court takes the view that an exception pursuant to Article 5(2) of Regulation No 715/2007 must in principle not be considered if, for cost reasons, diesel engines are technically designed by the manufacturer in such a way that an effective exhaust gas purification system is not guaranteed during normal operation without engine damage and is therefore largely switched off.

28 However, the question as to whether and, if so, to what extent different considerations influence the interpretation of the concept of justified need is the subject of the interpretation of secondary EU law. This matter is reserved for the Court of Justice of the European Union.