

Case C-138/20

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:

13 March 2020

Referring court:

Landgericht Stuttgart (Germany)

Date of the decision to refer:

13 March 2020

Applicant:

O.

Defendant:

P.

Subject matter of the main proceedings

Permissibility of defeat devices in motor vehicles

Subject matter and legal basis of the reference

Interpretation of EU law, Article 267 TFEU

Questions referred

1. Interpretation of the term ‘defeat device’

1-1: *Is point 10 of Article 3 of Regulation (EC) No 715/2007 to be interpreted and applied as meaning that the term ‘element of design’ only covers exclusively mechanical elements of a physical structure?*

If Question 1-1 is answered in the negative:

1-2: *Is point 10 of Article 3 of Regulation (EC) No 715/2007 to be interpreted and applied as meaning that the emission control system only covers the exhaust gas purification installation downstream in the engine system (for example, in the form of diesel oxidation catalysts, diesel particulate filter[s], NO_x reduction catalysts)?*

1-3: *Is point 10 of Article 3 of Regulation (EC) No 715/2007 to be interpreted and applied as meaning that the emission control system covers both engine-internal and engine-external emission reduction measures?*

2. Interpretation of the term ‘normal use’

2-1: *Is Article 5(1) of Regulation (EC) No 715/2007 to be interpreted and applied as meaning that the term ‘normal use’ only refers to the driving conditions in the NEDC cycle?*

If Question 2-1 is answered in the negative:

2-2: *Is the second subparagraph of Article 4(1) in conjunction with [Article] 5(1) of Regulation (EC) No 715/2007 to be interpreted and applied as meaning that manufacturers must ensure that the limits laid down in Annex I to the Regulation are also complied with in everyday use?*

If Question 2-2 is answered in the affirmative:

2-3: *Is Article 5(1) of Regulation (EC) No 715/2007 to be interpreted and applied as meaning that the term ‘normal use’ refers to the actual driving conditions in everyday use?*

If Question 2-3 is answered in the negative:

2-4: *Is Article 5(1) of Regulation (EC) [No 715/2007] to be interpreted and applied as meaning that the term ‘normal use’ refers to the actual driving conditions in everyday use on the basis of an average speed of 33.6 km/h and a maximum speed of 120 km/h?*

3. Permissibility of temperature-dependent emission reduction strategies

3-1: *Is Article 5(1) of Regulation (EC) No 715/2007 to be interpreted and applied as meaning that it is not permissible to equip a vehicle so that a component likely to affect emissions is designed so as to regulate the exhaust gas recirculation rate in such a way that [it] only ensures a low-emission mode between 20° and 30 °C and is gradually reduced outside of that temperature window?*

If Question 3-1 is answered in the negative:

3-2: *Is Article 5(2) of Regulation (EC) No 715/2007 to be interpreted and applied as meaning that a defeat device is nevertheless prohibited if it continually operates outside of the temperature window between 20° and 30 °C to protect the engine and the exhaust gas recirculation is thereby significantly reduced?*

4. Interpretation of the term ‘need’ within the meaning of the exception

4-1: *Is Article 5(2)(a) of Regulation (EC) No 715/2007 to be interpreted and applied as meaning that a need for the use of defeat devices within the meaning of that provision is only to be found if, even using the state-of-the-art technology available when type approval was obtained for the vehicle model in question, the protection of the engine against damage or accident and the safe operation of the vehicle could not be guaranteed?*

If Question 4-1 is answered in the negative:

4-2: *Is Article 5(2)(a) of Regulation (EC) [No 715/2007] to be interpreted and applied as meaning that a need for the use of defeat devices within the meaning of that provision is to be excluded if the parameters set in the engine control unit are selected such that, on account of its predetermined temperature dependency, the exhaust gas purification is not activated or only activated to a limited extent for most of the year due to the temperatures which are usually to be expected?*

5. Interpretation of the term ‘damage’ within the meaning of the exception

5-1: *Is Article 5(2)(a) of Regulation (EC) No 715/2007 to be interpreted and applied as meaning that only the engine is to be protected against damage?*

5-2: *Is Article 5(2)(a) of Regulation (EC) No 715/2007 to be interpreted and applied as meaning that the concept of damage is to be excluded if what are known as wear parts (for example, the EGR valve) are affected?*

5-3: *Is Article 5(2)(a) of Regulation (EC) No 715/2007 to be interpreted and applied as meaning that other components of the vehicle, in particular the components downstream in the exhaust gas system[,] are also to be protected against damage or accident?*

6. Legal and penal consequences of breaches of EU law

6-1: *Are the second subparagraph of Article 4(1), the second subparagraph of Article 4(2), Article 5(1) and (2) and Article 13 of Regulation (EC) No 715/2007 to be interpreted and applied as at least*

also protecting the assets of the purchaser of a vehicle which does not meet the requirements of Regulation (EC) No 715/2007?

If Question 6-1 is answered in the negative:

- 6-2: *Are the **second subparagraph of Article 4(1), the second subparagraph of Article 4(2), Article 5(1) and (2) and Article 13** of Regulation (EC) No 715/2007 to be interpreted and applied as meaning that the Member States must provide a penalty mechanism granting purchasers of vehicles, for reasons of *effet utile*, a right of action for the enforcement of market-regulating EU law?*
- 6-3: *Are **Article 18(1) and [Article] 26(1)** of Directive 2007/46/EC to be interpreted and applied as meaning that the manufacturer is in breach of his obligation to issue a valid certificate of conformity under Article 18(1) of Directive 2007/46/EC if he has installed in the vehicle a prohibited defeat device within the meaning of Article 5(2) of Regulation (EC) No 715/2007, and that placing such a vehicle on the market is in breach of the prohibition of sale without a valid certificate of conformity under Article 26(1) of Directive 2007/46/EC?*
- 6-4: *Is it the **purpose and intention** of Regulation (EC) No 715/2007 and of Directive 2007/46/EC that the limits laid down in Annex I to Regulation (EC) No 715/2007 and the certificate of conformity within the meaning of Article 18(1) of Directive 2007/46/EC in conjunction with Regulation (EC) No 385/2009 establish customer-protection rights in such a way that breach of the quality-establishing limits of the Regulation or of approval law prohibits, under EU law, offsetting of benefits of use if the vehicle is returned to the manufacturer?*

Provisions of EU law cited

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 (OJ 2007, L 171, p. 1)

Commission Regulation (EC) No 692/2008 of 18 July 2008 implementing and amending Regulation (EC) No 715/2007 of the European Parliament and of the Council 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 (OJ 2008, L 199, p. 1)

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) (OJ 2007, L 263, p. 1)

Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ 1999, L 171, p. 12)

Provisions of national law cited

Bürgerliches Gesetzbuch (German Civil Code, 'BGB'), Paragraphs 823 and 826

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-FGV'), Paragraphs 6 and 27

Brief summary of the facts and procedure

- 1 On 30 May 2012, the applicant purchased a new 'Porsche Cayenne Diesel Tiptronic' vehicle from the defendant, a German vehicle manufacturer, for a gross purchase price of EUR 71 156.66. According to information provided by the defendant, that vehicle meets the conditions for classification in the 'Euro 5' emission class for diesel vehicles. Whether this is actually the case is in dispute between the parties.
- 2 The applicant has since reached the view that control software in the vehicle which intervenes in the exhaust gas purification in a temperature-dependent manner constitutes a prohibited defeat device within the meaning of Regulation No 715/2007. He therefore asked the defendant, setting a deadline of 14 February 2019, to rescind the purchase contract, but the defendant refused to do so.
- 3 The defendant indisputably uses what is known as engine-internal exhaust gas recirculation. In order to reduce the nitrogen oxide emissions generated in the combustion chamber of the engine, some of the exhaust gas is fed back into the intake system of the engine and again participates in the combustion. However, the exhaust gas recirculation only has its unlimited effect within the temperature window between 20 °C and 30 °C ('thermal window'). At cooler external temperatures, it is reduced or completely deactivated.
- 4 The German Kraftfahrt-Bundesamt (Federal Motor Transport Authority) has not to date ordered a recall in respect of the vehicle at issue and vehicles of the same type.

Principal arguments of the parties to the main proceedings

- 5 The applicant is of the opinion that the use of a thermal window is fundamentally prohibited. The applicant alleges that the defendant uses software which does not comply with the first sentence of Article 5(2) of Regulation No 715/2007 and

controls, according to the ambient temperature, the engine-internal exhaust gas recirculation and the effectiveness thereof. This changes the operation of part of the emission control system within the meaning of Article 3 point 10 of that Regulation, reducing the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use.

- 6 The emission limits provided for in Annex I to Regulation No 715/2007 are to be complied with not only in the scope of the New European Driving Cycle (NEDC), but also in normal use, that is to say in everyday use.
- 7 The defendant does not deny using a defeat device, but considers this to be permissible pursuant to the second sentence of Article 5(2) of Regulation No 715/2007. According to that provision, a manufacturer is allowed to take measures to prevent any damage to components. In the present case, it is necessary to reduce the exhaust gas recirculation according to the ambient temperature, as this is the only way of preventing the risk of a build-up of soot in the diesel engine.
- 8 The vehicle's emissions in everyday use are also irrelevant. The emission limits of the Euro standards are linked with detailed standardised test conditions, which means that only the emissions under those conditions are decisive.

Brief summary of the basis for the reference

- 9 Although the applicant can no longer claim rights under the purchase contract, he may have rights in matters relating to 'tort', firstly pursuant to Paragraph 823(2) BGB in conjunction with Regulation No 715/2007 and/or with Paragraph 6(1) and Paragraph 27(1) EG-FGV, and secondly pursuant to Paragraph 826 BGB.
- 10 The referring court is inclined to take the view that these rights exist. Firstly, Paragraph 823(2) BGB requires the breach of a 'statute that is intended to protect another person'. In the view of the referring court, Regulation No 715/2007 constitutes such a protective statute. Secondly, there also appears to be 'intentional damage contrary to public policy' within the meaning of Paragraph 826 BGB. However, in order to give a final ruling on this point, it is necessary to determine whether the defendant actually uses a defeat device prohibited pursuant to Regulation No 715/2007. Should that be the case, the certificate of conformity required under Article 18 of Directive 2007/46 would be invalid, which would also constitute a breach of the EG-FGV which transposes that Directive into German law.
- 11 Due to the different interpretation practice of the German courts in the handling of the 'diesel scandal', there are doubts regarding the interpretation of Regulation No 715/2007 and Directive 2007/46. These doubts can only be dispelled by a ruling of the Court of Justice.

- 12 The questions referred to the Court of Justice are divided into six groups of themes.

1. Concept of 'defeat device'

- 13 For the referring court, the wording of Article 3 point 10 of Regulation No 715/2007 raises the question of whether the term 'element of design' only covers exclusively mechanical elements in the sense of a physical structure (Question 1-1).
- 14 If the term 'element of design' were to be interpreted in such a narrow manner, an electronic engine control unit and its software would not be covered by the definition. The systematic context in the definition, which lists a large number of parameters from the drive system of passenger vehicles, which are these days predominantly — or at least also — subject to electronic control, clearly runs counter to such a narrowing to mechanical-physical structures. The English-language version, where reference is made before the list of parameters to 'any element of design which senses ...', makes it clear that this also covers the design of the software.
- 15 It must also be clarified whether the term 'emission control system' used in the definition of the 'defeat device' also covers the strategies for limiting emissions at the point of origin, that is to say in the combustion chamber of the engine, by means of exhaust gas recirculation or whether it merely designates the engine-external exhaust gas purification installation in the form of diesel particulate filters and nitrogen oxide reduction catalysts (Question 1-2). Regulation No 715/2007 does not contain a definition of this term.
- 16 In the opinion of the referring court, no distinction should be made between engine-internal and engine-external measures, as the parameters listed in Article 3 point 10 of Regulation No 715/2007 all cover technical processes which affect the production and reduction of emissions, including, with the 'engine speed', a clearly engine-internal factor.
- 17 There also appears to be no particular reason for separating the term 'emission control system' with no legal definition from the context of the definition of the 'defeat device'. By Question 1-3, the referring court seeks clarification as to whether the distinction between engine-internal and engine-external measures is permissible or impermissible against the background of the objectives of Regulation No 715/2007.

2. Concept of 'normal use'

- 18 By Questions 2-1 to 2-4, the referring court seeks clarification as to whether the limits laid down in Annex I to Regulation No 715/2007 apply only in the scope of the test conditions of the 'New European Driving Cycle' (NEDC) or must also be complied with 'in normal use', within the meaning of Article 5(1) of that

Regulation, in everyday life. It should also be clarified whether the concept of ‘normal use’ covers *all* actual driving conditions in everyday life or only those where there is compliance with the speed parameters of the urban and extra-urban NEDC.

- 19 Regulation No 715/2007 does not define how ‘normal use’ is to be understood.
- 20 A literal interpretation, including with reference to other language versions, suggests that this concept, far from including only laboratory conditions, refers to real conditions, that is to say the actual conditions of road use.
- 21 That interpretation is supported by Recital 12 of Regulation No 715/2007, which states that ‘Efforts should be continued ... to ensure that those limits relate to the actual performance of vehicles when in use’.
- 22 At first glance, a different conclusion appears to emerge from Article 3(6) of Regulation No 692/2008, according to which the manufacturer shall ensure that the emissions test results comply with the applicable limit value ‘under the specified test conditions of this Regulation’. However, Recital 3 of Regulation No 715/2007 states that this Regulation lays down ‘fundamental provisions on vehicle emissions’, whereas ‘the technical specifications will be laid down by implementing measures’. Accordingly, Regulation No 692/2008 does not alter the obligations of manufacturers under Regulation No 715/2007, but is merely intended to implement them. The limits laid down in Annex I to Regulation No 715/2007 are therefore to be complied with not only under the conditions of the test procedure, but in a manner independent of temperature.
- 23 However, in the opinion of the referring court, in order to ensure a balance between the standardised measurement results on the roller test bench and in everyday use, it is necessary to take account of the parameters which determine the NEDC, regardless of the predominant ambient temperatures and the duration of the journey. The NEDC consists of an urban part, which is repeated four times, and an extra-urban part. At the beginning of the urban part, the engine is started in the cold state (20°-30 °C). This part is characterised by low speeds and resulting low engine loads and low exhaust gas temperatures. With a maximum speed of 120 km/h, the extra-urban part represents a faster and more dynamic driving state. The average speed when running through the NEDC over a total length of 11.03 km is 33.6 km/h.

3. Permissibility of a temperature-dependent emission reduction strategy

- 24 Neither Regulation No 715/2007 nor Regulation No 692/2008 contains specific technical requirements regarding the functioning of the exhaust gas purification system. However, the first sentence of Article 5(2) of Regulation No 715/2007 prohibits defeat devices that reduce the effectiveness of emission control systems. This raises the question of whether a temperature-dependent emission strategy in

the form of a 'thermal window' is permissible and whether this is even covered by the defeat device prohibition. This is the subject of Question 3-1.

- 25 In this respect, it is instructive to look at the precursor of Article 3 point 10 of Regulation No 715/2007. Section 2.16 of Annex I, amended by Directive 98/69/EC, to Directive 70/220/EEC contains a largely identical definition of a defeat device. Annex VII to Directive 70/220, as amended by Directive 98/69/EC, contains, in Section 6.1.1, an indication of how an 'abnormal emission reduction strategy' was understood by the EU legislature in 1998: According to that provision, any abnormal emission strategy which results in a reduction in the effect of the emission reduction system in normal use at low temperatures and is not covered by the standardised emission tests may be considered a defeat device. According to the preliminary view of the referring court, it is apparent from this overall context that temperature-controlled emission strategies were also fundamentally prohibited long before the adoption of Regulation No 715/2007.
- 26 Question 3-2 is raised should the Court of Justice consider temperature-dependent exhaust gas recirculation to be fundamentally permissible. The referring court thereby seeks clarification as to whether a defeat device which, for engine protection reasons, functions continuously outside the temperature window of 20° to 30 °C is permissible.
- 27 The second sentence of Article 5(2) of Regulation No 715/2007 stipulates, in letters (a) to (c), three groups of exceptions to the prohibition of the use of defeat devices. According to letter (a), the use of defeat devices is 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'. Letter (b) contains further privileging of the use of a defeat device if this 'does not function beyond the requirements of engine starting'. Finally, according to letter (c), the use of defeat devices is permissible if 'the conditions are substantially included in the test procedures for verifying evaporative emissions and average tailpipe emissions'.
- 28 Contrary to the opinion of the defendant, these exception provisions, in particular letters (b) and (c) of the second sentence of Article 5(2) of Regulation No 715/2007, indicate that the use of a defeat device is linked to narrowly defined time windows: on the one hand, the start-up phase of the engine and, on the other, the conditions of the test cycle.
- 29 An interpretation of the variant under letter (a) to the effect that the aspect of engine and component protection without a time limit may be sufficient for circumventing the prohibition cannot be justified without contradiction in consideration of further relevant EU law. The exceptions mentioned are also subject to a time limit through the obligation to produce proof pursuant to Article 3(9) of Regulation No 692/2008 for the area of low ambient temperatures. A further thermal window can therefore not permissibly exist. According to Regulation No 692/2008, manufacturers have to ensure that the NO_x after-

treatment device reaches the temperature ranges required within 400 seconds after a cold start at -7 °C, in order to function properly, that is to say in compliance with the emission limits.

- 30 By implication, this means that the legislature clearly expects an effective reduction in emissions, including at low external temperatures. If a different interpretation were adopted, the legislative objective of reducing emissions absolutely and improving air pollution control would not be achieved. This objective is set out in Recital 1 and in Recitals 4 to 7 of Regulation No 715/2007.
- 31 It should be noted in this regard that the average monthly temperature at the applicant's place of residence is below 20 °C throughout the year, which means that the reduction in exhaust gas recirculation and therefore the effect on the emission control system constitute the rule and not the exception with regard to operation of the vehicle at issue.

4. Benchmark of need within the meaning of Article 5(2)(a) of Regulation No 715/2007

- 32 For the referring court, the question is raised as to whether the benchmark of need in the second sentence of Article 5(2) of Regulation No 715/2007 is to be determined in an individualised or abstract and normative manner and which technically available standard is to be applied in the latter case. This is the subject of Question 4-1.
- 33 If an individualised approach is taken, it could be sufficient for the need to be affirmed that, in the context of a purely technical, individualised and isolated consideration of the engine in the operation of a vehicle, a situation arises which requires, in that case, the intervention of the defeat device. The vehicle manufacturer could invoke the exception in an individualised manner depending on vehicle model and engine configuration. Depending on the state of development of the engine unit concerned, an older engine could satisfy the exception much earlier than, for example, a powerful engine.
- 34 If an abstract and normative approach is taken as a basis, it would, in contrast, not in itself be sufficient that, in the individual case, technical situations arise in which the defeat device is required for engine protection or safe operation, but would additionally be required, with regard to the reasons leading to that technical situation, that these are inevitable, that is to say generally unavoidable.
- 35 That standard is supported by both the principle of *effet utile* and Recitals 1 and 5 of Regulation No 715/2007. The objective of that Regulation is to ensure a high level of environmental protection. Achieving that objective requires continuing efforts to reduce motor vehicle emissions.

- 36 If the Court of Justice answers Question 4-1 in the negative, the question is raised as to what extent the defeat device may limit the exhaust gas purification, in order to still fall within the scope of the concept of ‘need’.
- 37 If an intervention in the exhaust gas purification may take place in a temperature-related manner, the concept of ‘need’ is to be interpreted in more detail by the Court of Justice, particularly in consideration of the temperatures prevailing in Germany and Europe (Question 4-2).

5. Concept of ‘damage’

- 38 The concept of damage within the meaning of the second sentence of Article 5(2) of Regulation No 715/2007 is not defined in more detail in that Regulation. This raises the question of whether, with reference to engine protection, the use of defeat devices can always be justified if the vehicle manufacturer clearly demonstrates that, without the use of such a device, the engine is at risk of some kind of damage, no matter how minor. It is also debatable whether wear parts, such as an exhaust gas recirculation valve, also fall under the concept of damage.
- 39 A comparison with other language versions of Regulation No 715/2007 contradicts such an interpretation. For example, in the French version, the word ‘dégâts’ is used. According to the *Larousse* dictionary, this is understood as follows: ‘désordre profond, dommage important causé par quelqu’un ou par quelque chose’. In the view of the referring court, this means that a car manufacturer cannot solely invoke the protection of components due to the risk of build-up of soot in order to justify the use of a thermal window. This raises the question of whether the risk of build-up of soot cannot also be reduced through other measures, such as in relation to the material and construction of the vehicle.

6. Legal and penal consequences of breaches of EU law

- 40 With regard to the requirement under Paragraph 823(2) BGB that there must have been a breach of ‘a statute that is intended to protect another person’, the question is firstly raised as to whether it is an objective of Regulation No 715/2007 to protect the assets of the purchaser of a vehicle that does not meet the requirements of that Regulation (Question 6-1). The referring court is inclined to answer that question in the affirmative.
- 41 Even if the assets of the vehicle purchaser were not to be directly protected by that Regulation, the referring court infers from the judgments of the Court of Justice of 17 September 2002, *Muñoz and Superior Fruticola* (C-253/00, EU:C:2002:497, paragraphs 29 to 31), and of 25 July 2008, *Janecek* (C-237/07, EU:C:2008:447, paragraph 42), that the high requirements established by the German case-law in respect of an individual-protection character determining the eligibility under Paragraph 823(2) BGB are to be lowered to the standard of ‘concernment’ set out by the Court of Justice.

- 42 This is because the Member States only take account of the *effet utile* of provisions under EU law when they implement a penalty mechanism whose effectiveness does not depend on an authority — in this case the German Federal Motor Transport Authority — responding to breaches of standard, but on what market participants — in this case vehicle purchasers — can initiate themselves through action before the civil courts (see Question 6-2).
- 43 With regard to the individual-protection character of Directive 2007/46, the referring court assumes on the basis of the judgments of the Court of Justice of 26 February 1986, *Marshall* (C-152/84, EU:C:1986:84, paragraph 24), and of 14 July 1994, *Faccini Dori* (C-91/92, EU:C:1994:292, paragraphs 24 et seq.), that no rights in favour of vehicle purchasers can be directly derived from Directive 2007/46.
- 44 By Question 6-3, the referring court seeks clarification as to whether individual-protection character is nevertheless to be ascribed to the certificate of conformity. That protection appears to result from the description of the functioning of the certificate of conformity set out in Annex IX to Directive 2007/46, as amended by Regulation No 385/2009. This firstly states: ‘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.’ The function of enabling the national authorities to smoothly grant type-approval is only mentioned as a second point.
- 45 The provisions for the approval of vehicles through Directive 2007/46 also aim to ensure a high level of safety and environmental protection. For reasons of *effet utile*, the infringement of those provisions appears to demand that the parties concerned have an independent penalty mechanism by way of private law.
- 46 The last Question 6-4 involves a central question of the main proceedings, namely to what extent the penal consequence of Regulation No 715/2007 and the purpose and intention of Directive 2007/46 prohibit, in the scope of national compensation claims, offsetting compensation for the fact that the purchaser has used the vehicle over a certain period of time.
- 47 According to the second sentence of Article 13(1) of Regulation No 715/2007, penalties must be effective, proportionate and dissuasive. The Court of Justice left the choice of penalty instrument to the Member States in its leading decision, the judgment of 21 September 1989, *Commission v Greece* (C-68/88, EU:C:1989:339, paragraph 24).
- 48 According to the understanding of the referring court, the principle of effectiveness requires that directly applicable EU law and national transposing legislation can be enforced under private law. In its judgment of 17 September 2002, *Muñoz and Superior Fruitícola* (C-253/00, EU:C:2002:497, paragraph 30), the Court of Justice stated that ‘the full effectiveness of the rules on quality

standards [implies] that it must be possible to enforce [them] by means of civil proceedings’.

- 49 In the view of the referring court, the emission limits are value-creating environmental factors. Many vehicle purchasers are prepared to invest more capital for a product in order to thereby contribute towards protecting the environment. The feature of environmental-friendliness is therefore an objective quality feature which also affects the legal sphere of the parties concerned.
- 50 The enforcement of compensation claims only exists on paper and is *de facto* devoid of value if vehicle purchasers must have benefits of use offset on account of increasing duration of proceedings. In the case of an intentional infringement of value-creating factors, in this case the emission limits, the law on damages risks losing its preventative control function if benefits are offset.
- 51 The second sentence of Article 46 of Directive 2007/46 also provides that penalties shall be effective, proportionate and dissuasive.
- 52 The installation of a prohibited defeat device in vehicles leads not only to the loss of type-approval, but also to the lack of valid certificates of conformity in respect of those vehicles. However, a vehicle may only be sold if there is a valid certificate of conformity in respect thereof.
- 53 As regards the question of whether the purchaser of a vehicle without a valid certificate of conformity must have benefits of use offset in his compensation claim against the manufacturer, consideration is to be given to the generalisable principle regarding compensation for use laid down in Directive 1999/44. In its judgment of 17 April 2008, *Quelle* (C-404/06, EU:C:2008:231), the Court of Justice ruled that Article 3 of that Directive precludes national legislation under which a seller who has sold consumer goods which are not in conformity may require the consumer to pay compensation for the use of those defective goods until their replacement with new goods.
- 54 It is true that it can be argued against applying that approach to the present case that Directive 2007/46 does not contain a specific regulation on consequences, as provided for in Article 3(3) of Directive 1999/44 with the arrangement regarding free-of-charge supplementary performance. Nevertheless, the demand for dissuasive penalties requires the recognition of liability in national law which is not impaired in its effectiveness by the compensation claim becoming ‘devoid of value’ on account of compensation for use due to the duration of proceedings and the wilful delay in performance on the part of the manufacturer.