

Case C-145/20**Request for a preliminary ruling****Date lodged:**

24 March 2020

Referring court:

Oberster Gerichtshof (Austria)

Date of the decision to refer:

17 March 2020

Applicant:

DS

Defendant:

Porsche Inter Auto GmbH & Co KG

Volkswagen AG

[...]

In the matter of the applicant DS [...] versus the first defendant Porsche Interauto GmbH & Co KG, AVEG Linz-Leonding branch, 4060 Linz-Leonding, [...] and the second defendant Volkswagen AG, 38440 Wolfsburg, [...] Germany, [...] in relation to EUR 25 989.58 [...], the Oberster Gerichtshof (Supreme Court, Austria) has issued, in closed session, in relation to the appeal on a point of law brought by the applicant against the judgment of the Oberlandesgericht Linz (Higher Regional Court, Linz), as appeal court, of 4 April 2019, [...] by which the judgment of the Landesgericht Linz (Regional Court, Linz) of 12 December 2018 [...] was confirmed, the following

Order:

[Or. 2]

The following questions are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU:

1. Is Article 2(2)(d) of 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) to be interpreted as meaning that a motor vehicle that falls within the scope 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 (OJ 2007 L 171, p.1) shows the quality which is normal in goods of the same type and which the consumer can reasonably expect if the vehicle is equipped with a prohibited defeat device within the meaning of point 10 of Article 3 and Article 5(2) of Regulation (EC) No 715/2007 but the vehicle type nevertheless has a valid EC type-approval, meaning that the vehicle can be used on the road?
2. Is Article 5(2)(a) of Regulation (EC) No 715/2007 to be interpreted as meaning that a defeat device within the meaning of point 10 of Article 3 of that regulation, which is designed in such a way that the exhaust gas recirculation is fully operational outside of test operation under laboratory conditions and during real-world driving only if outside temperatures are between 15 and 33 degrees Celsius, may be permissible pursuant to Article 5(2)(a) of that regulation, or is the application of the aforementioned exemption provision excluded from the outset for the simple reason that the [Or. 3] full effectiveness of the exhaust gas recirculation is restricted to conditions that exist for only around half of the year in parts of the European Union?
3. Is Article 3(6) of Directive 1999/44/EC to be interpreted as meaning that a lack of conformity consisting in the equipping of a vehicle with a defeat device that is prohibited under point 10 of Article 3 in conjunction with Article 5(2) of Regulation (EC) No 715/2007 must be regarded as minor within the meaning of the aforementioned provision if the purchaser acquired the vehicle even though he was aware of the presence and operation of that device?

Grounds:

A. Facts

The second defendant manufactures vehicles; the first defendant is an independent authorised dealer of the second defendant. The applicant, a consumer, bought a passenger car manufactured by the second defendant from the first defendant on 21 December 2013. It is common ground that the vehicle falls within the scope of Regulation (EC) No 715/2007. It is equipped with an EA 189 diesel engine, which is subject to the EU5 emission standard. In that engine, exhaust gas recirculation took place according to two operating modes via a piece of software in the engine control unit ('switch logic'). In the first mode, which was only used under

laboratory conditions in the emission test procedure, the exhaust gas recirculation rate was higher than in the second mode, which was used under normal driving conditions. EC type-approval was granted for the vehicle type at issue by the competent German authority, the Kraftfahrt-Bundesamt (Federal Motor Transport Authority, 'KBA'). The [Or. 4] 'switch logic' was not disclosed to the type-approval authority. Had the KBA been aware of the 'switch logic', EC type-approval would not have been granted.

The applicant was also aware of the 'manipulation software' when he purchased the vehicle.

On 15 October 2015, the KBA subjected the second defendant to a 'Retroactive Imposition of an Ancillary Provision for EC Type-Approval' pursuant to Paragraph 25(2) of the (German) EG-Fahrzeuggenehmigungsverordnung (Regulation on EC approval for vehicles, 'EG-FGV'), by which it ordered (amongst other things) the removal of the prohibited defeat devices in order to ensure the conformity of the approved units of the EA189 EU5 type engine. By letter dated 20 December 2016, the KBA informed the second defendant that it had been confirmed that the proposed change to the application data was suitable for establishing the conformity of the aforementioned vehicles. As a result, the EC type-approval for the vehicle type at issue in the present case was not withdrawn or revoked.

On 15 February 2017, the applicant had the 'software update' referred to in that communication carried out on the vehicle. The update replaced the 'switch logic' with programming according to which the emission-reducing mode would be used not only in test mode, but also in driving mode, in which, however, it would be fully operational only when outside temperatures were between 15 and 33 degrees Celsius ('temperature window').

B. Arguments of the parties

The applicant asserts a claim for damages, a claim against warranty and a claim based on avoidance of contract due to [Or. 5] absence of consent against the first defendant and a claim for damages against the second defendant. He seeks reimbursement of the purchase price against return of the vehicle or, in the alternative, a price reduction or, in the alternative, a declaration that the defendant is liable for damages as a result of having fitted a prohibited defeat device. According to the applicant, the vehicle was defective because the 'switch logic' was a prohibited defeat device within the meaning of Article 5(2) of Regulation (EC) No 715/2007. The software update did not remedy the defect. There was a risk of a future loss of value and consequential losses as a result of the software update.

The defendants took the view that neither the 'switch logic' nor the 'temperature window' was to be regarded as a defeat device within the meaning of point 10 of Article 3 of Regulation (EC) No 715/2007 and they were therefore also not

prohibited. In the proceedings before the Supreme Court they concede that the ‘temperature window’ constituted a defeat device, which, however, was permissible under Article 5(2) of Regulation (EC) No 715/2007, as also concluded by the KBA in its assessment.

C. Previous proceedings

The court of first instance dismissed the forms of order sought.

The court of appeal did not allow the appeal brought by the applicant. It found that the vehicle was not defective, because, due to the application of the update, the applicant had no reason to expect that the authorisation of use would be withdrawn by the authorities. Any defect that may have existed originally had been remedied by the software update. The technology via which exhaust gas recirculation was reduced when outside temperatures were below 15 and above 33 degrees Celsius was permissible under Article 5(2) [Or. 6] of Regulation (EC) No 715/2007 because it was necessary to protect the engine against damage.

The Supreme Court is called upon to rule on an appeal on a point of law brought by the applicant, by which he seeks to have his action allowed.

D. Relevant provisions

Point 10 of Article 3 of Regulation (EC) No 715/2007 defines the term ‘defeat device’, for the purposes of the regulation and its implementing measures, as follows:

‘any element of design which senses temperature, vehicle speed, engine speed (RPM), transmission gear, manifold vacuum or any other parameter for the purpose of activating, modulating, delaying or deactivating the operation of any part of the emission control system, that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use’.

Article 5(1) and (2) of Directive (EC) No 715/2007 read (in extract):

‘1. The manufacturer shall equip vehicles so that the components likely to affect emissions are designed, constructed and assembled so as to enable the vehicle, in normal use, to comply with this Regulation and its implementing measures.

2. The use of defeat devices that reduce the effectiveness of emission control systems shall be prohibited. The prohibition shall not apply where:

(a) the need for the device is justified in terms of protecting the engine against damage or accident and for safe operation of the vehicle; ...’.

The third subparagraph of point 9 of Article 3 of 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) [Or. 7] and on access to vehicle repair and maintenance information (OJ 2008 L 199, p. 1) reads:

'In addition, the manufacturer shall provide the approval authority with information on the operating strategy of the exhaust gas recirculation system (EGR), including its functioning at low temperatures.'

Article 2(1) of Directive 1999/44/EC reads:

'The seller must deliver goods to the consumer which are in conformity with the contract of sale.'

Article 2(2) of Directive 1999/44/EC reads (in extract):

'Consumer goods are presumed to be in conformity with the contract if they: ...

(d) show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling.'

Article 3(6) of Directive 1999/44/EC reads:

'The consumer is not entitled to have the contract rescinded if the lack of conformity is minor.'

Paragraph 922(1) of the Allgemeines Bürgerliches Gesetzbuch (Austrian General Civil Code, 'ABGB') reads:

'Anyone who transfers an item to another person for consideration warrants that the item is in conformity with the contract. He is therefore liable for the fact that the item has the agreed or customarily expected characteristics, that it corresponds to his description, a sample or a model and that it can be used in accordance with the nature of the transaction or the agreement made.' [Or. 8]

Paragraph 932(1) ABGB reads:

'The transferee may demand an improvement (repair or addition of what is defective or missing), exchange of the item, a reasonable reduction in the consideration (price reduction) or termination of the contract (rescission) on the grounds of a defect.'

The first sentence of Paragraph 932(4) ABGB reads:

‘If both improvement and exchange are impossible or would be disproportionately burdensome for the transferor, the transferee shall be entitled to a price reduction or, other than in the case of a minor defect, to rescission of the contract.’

Paragraph 25(2) of the Verordnung über die EG-Genehmigung für Kraftfahrzeuge und ihre Anhänger sowie für Systeme, Bauteile und selbstständige technische Einheiten für diese Fahrzeuge (German 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’) reads:

‘(2) The Kraftfahrt-Bundesamt may also retroactively impose ancillary provisions in order to remedy any defects that have been identified and to ensure the conformity of vehicles, separate technical units or components that are already on the market.’

E. Basis for the reference

1.1. The Supreme Court is examining the existence, at the time of delivery, of a defect in the vehicle purchased by the applicant and the remedying of that defect, as well as the existence of damage caused to the applicant by the second defendant.

1.2. If a remediable defect does exist, there is firstly a claim for improvement pursuant to Paragraph 932(1) ABGB. The improvement must restore conformity with the contract [...]. In order to meet the claim for improvement, the transferor must assert and demonstrate, as a fact [Or. 9] eliminating the claim, that he has remedied the defect by way of improvement [...].

1.3. A service is deemed to be defective within the meaning of Paragraph 922 ABGB if it qualitatively or quantitatively falls short of the customarily expected or the warranted characteristics [...].

1.4. In the case of passenger cars, Austrian case-law assumes that the official approvals required for use on the road must exist [...].

2.1. According to the Supreme Court’s assessment, the ‘switch logic’ that existed at the time of delivery of the object of purchase to the applicant is to be regarded as a prohibited defeat device within the meaning of point 10 of Article 3 and Article 5(2) of Regulation (EC) No 715/2007 [...]. This is due to the fact that it is an element of design which senses the parameters that determine whether the vehicle is in test rig mode or real-world driving mode and, on that basis, activates either the operating mode with high exhaust gas recirculation or that with low exhaust gas recirculation. This influences the exhaust gas recirculation, which is part of the emission control system. The activation of an operating mode with lower exhaust gas recirculation in real-world vehicle operation also reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use

[Or. 10] (see point 10 of Article 3 of Regulation (EC) No 715/2007). Regarding the ‘switch logic’, the defendant did not assert any facts whatsoever on the basis of which consideration could be given to an exception to the prohibition on defeat devices within the meaning of Article 5(2) of Regulation (EC) No 715/2007.

2.2. The Supreme Court assumes that the vehicle acquired by the applicant was in any event defective within the meaning of Paragraph 922 ABGB because the prohibited defeat device was not disclosed to the authority responsible for granting EC type-approval, thus vitiating the legality of the type-approval granted. This manifested itself in the imposition of ancillary provisions for the EC type-approval by the KBA.

2.3. The subject matter of the first question referred is whether the motor vehicle was furthermore defective because the first defendant was liable to provide a vehicle that was not equipped with a prohibited defeat device within the meaning of point 10 of Article 3 in conjunction with Article 5(2) of Regulation (EC) No 715/2007. If this is the case, it would be necessary to assess whether a prohibited defeat device was still present after the ‘software update’ had been applied. That is the subject matter of the second question referred. The third question asks what the legal consequences would be if the vehicle was still defective even after the ‘software update’ had been applied.

2.4. The assessment of the lack of conformity to the contract is also relevant to the assessment of the liability of the second defendant, because the applicant essentially derives his loss from the acquisition of a vehicle that does not conform to the content of the contract and from the existence of a prohibited defeat device.

[Or. 11]

Question 1:

3.1. The question of whether, in itself, the approval of the software update expressed by the competent EC type-approval authority brought about the improvement of the purchased item depends on the assessment of what the transferor was liable to provide under the contract of sale.

3.2. The applicant takes the legal view that not only was the existence of EC type-approval owed under the contract of sale, but also a vehicle that did not contain a defeat device prohibited within the meaning of point 10 of Article 3 in conjunction with Article 5 of Regulation (EC) No 715/2007.

4.1. Article 2(2) of Directive 1999/44/EC governs the conditions under which consumer goods are presumed to be in conformity with the contract. In the literature, this is understood to mean that the directive expresses a presumption in relation to the content of the contractual agreement on the intended quality of the item sold [...], meaning that if the item falls short of the requirements set out in the directive a lack of conformity can be assumed. The transferor would then have to prove that, in reality, something else had been agreed. Compared to the concept of the ABGB, according to which the transferee must prove not only the deviation

of the item from what is owed under the contract, but also the content of the contract, this would amount to a less onerous burden of proof for the transferee [...]. **[Or. 12]**

4.2. The criterion of ‘reasonably expected’ quality and performance should be considered by reference to the European consumer model [...].

4.3. The referring court takes the view that, in the case of a product such as a motor vehicle, in respect of which it is known that it must satisfy regulatory requirements, this could be understood as meaning that an average consumer who is reasonably well informed and reasonably observant and circumspect (CJEU, 8 April 2003, C-44/01, *Pippig Augenoptik*, ECLI:EU:C:2003:205, paragraph 55; CJEU, 8 February 2017, C-562/15, *Carrefour Hypermarchés*, ECLI:EU:C:2017:95, paragraph 31) must also be presumed to expect compliance with those requirements. It would seem obvious that this connection with the legal system is part of the consumer’s reasonable expectations in this regard. The fact that vehicle types must undergo an approval process does not necessarily preclude Article 2(2)(d) of Directive 1999/44/EC from being understood in the way described above. The question of whether the absence of software such as the ‘switch logic’ was subjectively important to the buyer would therefore not be decisive either.

4.4. The consequence of such an interpretation would be that the seller of a motor vehicle would have to warrant not only that the vehicle has the type-approval required for the customarily expected use within the meaning of Paragraph 922 ABGB, but also that it does not contain any prohibited elements of design.

Question 2: [Or. 13]

5.1. If Question 1 is answered in the negative, it can be assumed that the first defendant was liable to deliver a vehicle that was not equipped with a prohibited defeat device within the meaning of point 10 of Article 3 in conjunction with Article 5(2) of Regulation (EC) No 715/2007. In that case, the applicant’s claim for improvement under Paragraph 932(1) ABGB would be aimed at establishing such a state.

5.2. The attempt at improvement made by installing the ‘software update’ would then not be successful simply because the KBA did not revoke or withdraw the EC type-approval granted. Rather, it would be necessary to assess whether or not the vehicle purchased still had a defeat device prohibited under Article 5(2) of Regulation (EC) No 715/2007.

5.3. The decisive factor for that assessment in the present case is whether the existing programming, which contains a ‘temperature window’, can fall within the scope of the exception under Article 5(2)(a) of Regulation (EC) No 715/2007 invoked by the defendant or whether that is excluded from the outset, in line with the view taken by the applicant. The applicant bases that view on the fact that the

‘temperature window’ entailed such extensive use of the defeat device that the rule/exception relationship of Article 5(2) of Regulation (EC) No 715/2007 would be reversed.

6.1. The objective of establishing uniform technical requirements for the type-approval of motor vehicles via Regulation (EC) No 715/2007 is — in addition to guaranteeing the functioning of the internal market — to ensure a high level of environmental protection (recital 1 of Regulation (EC) No 715/2007). A [Or. 14] considerable reduction in nitrogen oxide emissions from diesel vehicles is deemed to be necessary to improve air quality and comply with limit values for pollution (recital 6 of Regulation (EC) No 715/2007).

6.2. The referring court takes the view that these objectives indicate that the exceptions provided for in the second sentence of Article 5(2) of Regulation (EC) No 715/2007 should be interpreted strictly.

6.3. Pursuant to the third subparagraph of point 9 of Article 3 of Regulation (EC) No 692/2008, the manufacturer is to provide the approval authority with information on the operating strategy of the exhaust gas recirculation system, including its functioning at low temperatures. The Supreme Court takes the view that it follows from this provision that the mere presence of ‘low’ temperatures does not provide exemption from the requirement regarding the functioning of the exhaust gas recirculation system.

6.4. The ‘temperature window’ technology makes it possible for exhaust gas recirculation to be controlled in such a way that the emission-reducing mode is fully effective only when outside temperatures are between 15 and 33 degrees Celsius.

6.5. It is well-known that in parts of the European Union, such as Austria, average temperatures are below 15 degrees Celsius for several months of the year (see, for example, <https://www.wien.gv.at/statistik/lebensraum/tabellen/lufttemperatur.html>, accessed on 17 March 2020, according to which average temperatures in Vienna were below 15 degrees Celsius in six of the twelve months of 2018). On average, therefore, the outside temperatures at which exhaust gas recirculation is fully effective in a vehicle type such as that at issue here are not even reached for a considerable part of the year. The defendants therefore enjoy the [Or. 15] benefit, on the basis of an exception (Article 5(2)(a) of Regulation [EC] No 715/2007), of being allowed to deviate from the prohibition on the use of a defeat device for around half the year.

6.2. The principle that exceptions must always be interpreted strictly (see CJEU, 11 December 2014, C-212/13, *Ryneš*, ECLI:EU:C:2014:2428, paragraph 29; Opinion of Advocate General Bot of 20 June 2013, C-309/12, *Gomes Viana Novo and Others*, ECLI:EU:C:2013:419, point 26) and the objective of reducing nitrogen oxide emissions pursued by Regulation (EC) No 715/2007 could militate

in favour of the argument that a defeat device that is used to such a great extent simply cannot be justified under any of the exceptions in the second sentence of Article 5(2) of Regulation (EC) No 715/2007.

Question 3:

7.1. According to Austrian case-law, when examining whether there is a minor defect that excludes rescission within the meaning of Paragraph 932(4) ABGB, the interests of the contracting parties must be objectively weighed against each other on the basis of the specific contract in question and the circumstances of the individual case [...].

7.2. Question 3 concerns the fact that, in the literature regarding the first sentence of Paragraph 932(4) ABGB, the view is taken that a defect is minor (only) if the transferee would have entered into the contract in the knowledge of the defect (here: existence of a defeat device and its effects), even under different conditions [...]. **[Or. 16]**

The referring court takes the view that the wording of Article 3(6) of Directive 1999/44/EC is not clear enough for *acte clair* to apply.

[...]

Vienna, 17 March 2020

[...] [procedural law matters]