

Anonymised version

Translation

C-134/20 — 1

Case C-134/20

Request for a preliminary ruling

Date lodged:

11 March 2020

Referring court:

Landesgericht Eisenstadt (Austria)

Date of the decision to refer:

29 January 2020

Applicant:

JR

Defendant:

Volkswagen AG

[...]

REPUBLIC OF AUSTRIA

LANDESGERICHT EISENSTADT (EISENSTADT REGIONAL COURT)

[...]

ORDER

IN THE MATTER OF:

Applicant

[...]

JR

[...] Vienna

Defendant

[...] Wolfsburg

Concerning:

EUR 22 238.64 [...]

1. The following questions are referred to the Court of Justice of the European Union for a preliminary ruling:

- a) *Is Article 5(1) 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 equipment of a vehicle, within the meaning of Article 1(1) of Regulation No 715/2007, is inadmissible if the exhaust gas recirculation valve (i.e. a component that is likely to affect emissions performance) is designed in such a way that the exhaust gas recirculation rate (i.e. the portion of the exhaust gas being recirculated) is regulated in such a way that the valve ensures a low-emission mode only between 15 and 33 degrees Celsius and only below an altitude of 1 000 m, and, outside this temperature window, per 10 degrees Celsius, and above an altitude [Or. 2] of 1 000 m, per 250 metres of altitude, the rate decreases in a linear way down to zero, meaning that NOx emissions increase beyond the limits of Regulation No 715/2007?*
- b) *Is it relevant to the assessment of Question a) whether the equipment referred to in Question a) is necessary to protect the engine against damage?*
- c) *Furthermore, is it relevant to the assessment of Question b) whether the part of the engine which is to be protected against damage is the exhaust gas recirculation valve?*
- d) *Is it relevant to the assessment of Question a) whether the equipment of the vehicle referred to in Question a) was already installed when the vehicle was produced or whether the regulation of the exhaust gas recirculation valve described in Question a) is to be installed in the vehicle by way of a repair within the meaning of Article 3(2) 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?*

2. The proceedings are stayed pending delivery of the preliminary ruling of the Court of Justice of the European Union [...].

FOUNDINGS:**I. The facts**

In 2013, the **applicant** purchased a VW Touran Comfortline BMT TDI model vehicle ('the vehicle at issue') for a purchase price of EUR 27 600.00. A 1.6l EA 189 diesel engine with an output of 77 kW is installed in the vehicle at issue [...].

The defendant is the parent company of the VW Group, has its registered office in Germany and has been the subject of public discussion on the diesel emissions scandal since autumn 2015.

Specifically, the vehicle at issue [...] has the following (relevant) data: **[Or. 3]**

Make:	Volkswagen VW
[...]	[...]
Propulsion:	Diesel
[...]	[...]
Emission standard:	EURO 5
Exhaust emissions according to:	566/2011F
CO:	0.1354
NOx:	0.1362
(T) HC+NOx:	0.1666
[...]	[...]
Total fuel consumption:	4.5 l/100 km (119 g CO ₂ /km)

The vehicle at issue is equipped with an engine-based or internal pollution control device, namely an exhaust gas recirculation valve ('**EGR valve**'). The vehicle at issue has an exhaust gas after-treatment system in the form of a particulate filter, but does not have such a system for NO_x [...]. The EGR valve recirculates (in very simplified terms) exhaust gas from the engine outlet into the engine intake passage in order to replace part of the fresh air. This reduces the peak temperature during combustion and slows down the combustion process, which in turn reduces NO_x emissions. NO_x emissions are also influenced by the timing and duration of the injection, as well as the design of the engine. However, if the EGR valve is removed or shut down, the vehicle at issue would not be able to comply with the NO_x limit of Regulation No 715/2007. The EGR valve forms part of the engine.

The manufacturer of the vehicle at issue designed it and all other vehicles in that series that have the EA 189 engine in such a way that the software provides for a **mode 0 (drive mode)** and a **mode 1 (NEDC)**. [...]

When the vehicle is started, it is always in mode 1 **[Or. 4]** (NEDC). If the software detects the test situation, i.e. the operation of the vehicle within the limits of the NEDC, the vehicle remains in mode 1. If the software detects that the vehicle is being operated outside the tolerance levels of the NEDC (deviations from the speed profile of +/- 2 km/h or +/- 1 s), the vehicle switches to mode 0

(drive mode). This process is described by the terms ‘**switch logic**’, ‘jump function’ or ‘manipulation software’. In mode 0 (drive mode) the exhaust gas recirculation rate (‘**EGR rate**’), that is to say the proportion of exhaust gas that is recirculated in the engine, is reduced and the injection timing and duration are altered. The vehicle at issue operated in mode 0 in the NEDC does not comply with the NO_x limits of Regulation No 715/2007. Given that the vehicle is almost exclusively in mode 0 (drive mode) when actually being operated, it also fails to comply with the NO_x limits when in drive mode.

The switching logic became public knowledge via a letter of the United States Environmental Protection Agency (‘**the EPA**’) dated 18 September 2015, in which the switching logic in the manufacturer’s vehicles produced for the US market was described and recognised as a violation of the law. It is not possible to establish whether and, if so, how the engines and engine control software of the vehicle at issue differ from the engine design and control software of vehicles produced by the manufacturer for the US market. [...]

The vehicle is technically sound and roadworthy and can therefore (in this respect) be fully used in road traffic.

When purchasing the vehicle, it was important to the applicant to acquire a diesel vehicle with low fuel consumption. [...] Had the applicant known that the vehicle at issue did not comply with statutory provisions due to the manipulation software, he would not have purchased the vehicle at issue.

[...]

By letter sent by the general importer for VW vehicles in Austria, [**Or. 5**] Intercar Austria GmbH, dated 8 October 2015, the applicant was notified that repair work would have to be carried out to the vehicle at issue and that the manufacturer would bear all costs associated with such repair work on the vehicle at issue. From the overall context of these letters, it can be seen that the NO_x values stated in the type approval deviated from the actual values. The applicant was also asked to arrange for an **update** to be installed, which would remove the ‘switch logic’. The update was developed by the manufacturer and installed in the vehicle at issue.

The purpose of the update is to ensure that the EGR valve, that is to say a component likely to affect emissions, is designed so that the EGR rate is regulated in such a way that a low emission mode is ensured only between 15 and 33 degrees Celsius and only below an altitude of 1 000 m and, outside this temperature window, per 10 degrees Celsius, and above an altitude of 1 000 m, per 250 m, the exhaust gas recirculation rate decreases in a linear way down to zero [...] (this process is referred to hereinafter as ‘**temperature window**’). A reduction of the EGR rate to zero leads to an increase of NO_x emissions beyond the limits of Regulation No 715/2007. The update makes further modifications which — compared to before the update — change the exhaust emissions. Owing

to a lack of information on this update, it is not possible to determine what these changes are — with the exception of the temperature window system.

It cannot be found that the temperature window is necessary in order to protect the engine against damage. It cannot be found that consumption, the production of carbon-particulate matter, performance and total mileage are negatively affected by the update. It cannot be found that, in the event that the update is installed without a temperature window, the requirements of Regulation No 715/2007 with regard to the durability of pollution control devices in accordance with Article 4(2) of Regulation No 715/2007 are not (cannot be) complied with. For most of the year, temperatures in Austria are below 15 degrees Celsius. It cannot be found that, after the update has been installed, the vehicle's market value decreases.

The German Federal Motor Transport Authority (Kraftfahrt-Bundesamt, 'the KBA') [...] approved a technical modification — namely the aforementioned update — [...] and (therefore) refrained from repealing the type approval, whereby the KBA found (from a legal point of view to a certain extent) that (i) there is no impermissible defeat device, (ii) the existing defeat devices are considered to be permissible, (iii) the limit values for polluting emissions and the other requirements are complied with, (iv) the fuel consumption values and CO₂ emissions originally specified by the manufacturer have been confirmed by a technical service, [Or. 6] and (v) the engine power referred to so far, the maximum torque, and the existing noise emission values remained unchanged. The KBA has no knowledge of the software used by the manufacturer for the update, because it did not request that it be sent to it. It is not possible to determine what (other) information the KBA had available for the purpose of authorising the update and for making the above findings.

II. Assessment and relevance of the evidence:

The extent to which further evidence needs to be taken also depends on the legal questions of EU law to be answered. In relation to those questions and their relevance to the national proceedings, the Court of Justice considers that the facts have been clearly established.

[...] [More details regarding the evidence taken]

III. Basis in EU law:

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 ('Regulation No 715/2007') provides, inter alia, as follows:

Recital 15: [Or 7]

The Commission should keep under review the need to revise the New European Drive Cycle as the test procedure that provides the basis of EC type approval emissions regulations. Updating or replacement of the test cycles may be required to reflect changes in vehicle specification and driver behaviour. Revisions may be necessary to ensure that real world emissions correspond to those measured at type approval. The use of portable emission measurement systems and the introduction of the ‘not-to-exceed’ regulatory concept should also be considered.

Article 5:

(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;

(b) the device does not function beyond the requirements of engine starting; or

(c) the conditions are substantially included in the test procedures for verifying evaporative emissions and average tailpipe emissions.

The emission limit values set out in Table 1 (Euro 5) of Annex 1 to Regulation No 715/2007 apply to the vehicle at issue.

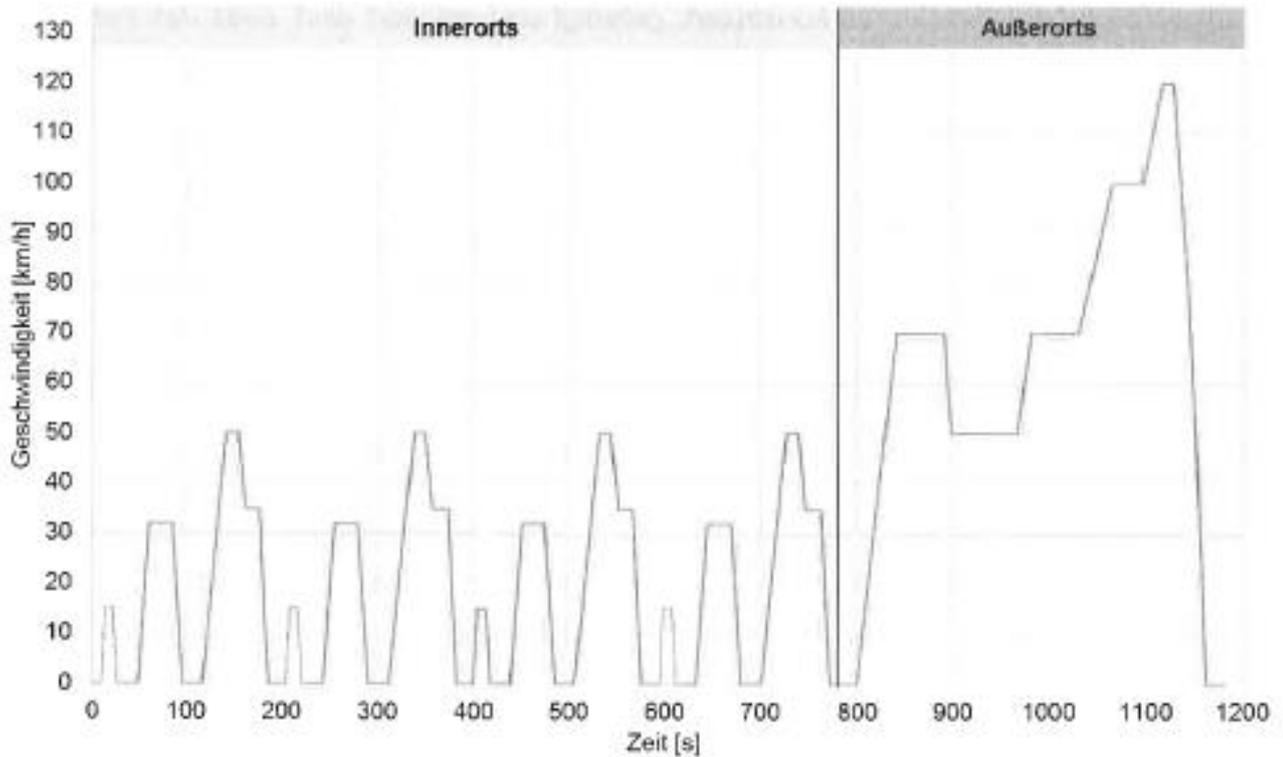
As part of the approval procedure, these values must be determined for the vehicle at issue by means of the so-called type 1 test as defined in Annex III to Commission Regulation (EC) No 692/2008 of 18 July 2008 implementing and amending Regulation (EC) No 715/2007 of the European Parliament and of the 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 (‘Regulation 692/2008’).

With regard to the technical requirements, paragraph 3.1 of Annex III to Regulation 692/2008 refers to Annex 4 to UN/ECE Regulation No 83. That Annex 4 describes the **[Or. 8]** procedure for the Type I test defined in paragraph 5.3.1 of UN/ECE Regulation No 83, and Appendix 1 to that Annex 4 provides for the test cycle to be adhered to for that test.

This test cycle is commonly referred to as the ‘New European Driving Cycle’ or ‘NEDC’ and is referred to as such in this order. The vehicle test defined in paragraph 5.3.1 of UN/ECE Regulation No 83 takes place on a chassis dynamometer and lasts 19 minutes and 40 seconds (= 1 180 seconds). This

involves driving through the NEDC, which consists of a Part 1, the ‘urban cycle’ (paragraph 5.3.1.2.2. of UN/ECE Regulation No 83) and a Part 2, the ‘extra-urban cycle’ (paragraph 5.3.1.2.3. of UN/ECE Regulation No 83). These two parts of the NEDC can be graphically represented together as follows:

New European Driving Cycle (NEDC)



[...]

Point 9 of Article 3 of Regulation 692/2008 provides as follows:

The Type 6 test measuring emissions at low temperatures set out in Annex VIII shall not apply to diesel vehicles.

However, when applying for type-approval, manufacturers shall present to the approval authority with information showing that the NO_x aftertreatment device reaches a sufficiently high temperature for efficient operation within 400 seconds after a [Or. 9] cold start at -7 °C as described in the Type 6 test.

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

This information shall also include a description of any effects on emissions.

The approval authority shall not grant type-approval if the information provided is insufficient to demonstrate that the after-treatment device actually reaches a

sufficiently high temperature for efficient operation within the designated period of time.

At the request of the Commission, the approval authority shall provide information on the performance of NOx after-treatment devices and exhaust gas recirculation system at low temperatures.

IV. Position under national law/precedent:

1. Contesting the contract due to mistake

Paragraph 871 of the Allgemeines Bürgerliches Gesetzbuch (Austrian General Civil Code, ‘ABGB’) provides that *‘if a party was labouring under a mistake in relation to the content of a declaration given by him or received by the other party, and that mistake affects the essence, or fundamental aspect of that essence, in relation to which the intention of the declaration was principally directed and declared, that party shall not incur any liability, provided that the mistake was caused by the other party, or should have been obvious to him from the circumstances, or was rectified in a timely manner’*.

That provision therefore lays down a number of conditions; if they are met and an appropriate action is brought, the court must rescind the contract *ex tunc* by means of a judgment altering the contractual relationship. Details of the conditions relevant to the preliminary ruling:

1.1 Existence of a mistake:

It is apparent from the facts of the case that the applicant assumed that he was buying a vehicle that complies with statutory (EU-law) provisions. It is also apparent from the facts of the case that the vehicle purchased by the applicant was installed with a ‘switching logic’. This switching logic runs counter to the requirements of Regulation 715/2007, in particular Article 5. This is due to the fact that the EGR valve and [Or. 10] the injection system are both components that are likely to affect emissions performance and were designed so as to enable the vehicle or engine to comply with the requirements of Regulation 715/2007 and its implementing measures solely when performing a type 1 test under Annex III to Regulation 692/2008. When the vehicle is operated under normal conditions of use, those components are each regulated in such a way that such operation does not comply with Regulation 715/2007 and its implementing measures.

There is also no permissible defeat device within the meaning of Article 5(2) of Regulation 715/2007, because, as correctly argued by the defendant itself, the case does not concern such a device [...]. Rather, the programming is to be specifically viewed in such a way that, in normal driving operation, the vehicle at issue is not equipped in a manner that complies with the requirements of Regulation 715/2007 (in particular Article 5(1)) from the outset, such that the (exceptional)

disconnection of components likely to affect emissions and therefore the deactivation of a mode of operation that complies with those requirements can no longer take place. Rather, the vehicle at issue is only exceptionally in a state (mode 1 [NEDC]) that complies with the requirements.

The vehicle at issue therefore does not comply with the statutory (EU-law) requirements. The applicant was labouring under a mistake in relation to this fact, meaning that this condition is fulfilled.

1.2 Significance of the mistake:

[...] It is only within relatively strict limits that the ABGB provides for the possibility [...] of invoking a mistake [...]. Such a mistake, which leads to the rescission of the contract, is commonly referred to as 'significant'.

[...] In the present case, the applicant expected the vehicle to comply with statutory (EU-law) provisions when he concluded the contract. As established above, the vehicle at issue does not meet these expectations. Specifically, the question is whether this is a characteristic that is tacitly agreed by virtue of the nature of the transaction. [...] **[Or. 11]** [...] [Assessment as to whether the mistake is significant]. The mistake [...] is significant.

1.3 Materiality of the mistake:

A mistake is material if, without the mistake, the declarant would not have concluded the transaction; a mistake is merely insignificant if, without the mistake, the declarant would have concluded the transaction differently [...].

It is apparent from the facts of the case that the applicant would not have purchased the vehicle at issue had he known that it did not comply with statutory provisions due to the manipulation software.

On the basis of the legal situation described above, it must therefore be found that the mistake is material in the sense referred to above; it was a causal factor in the conclusion of the contract. The contract must therefore be rescinded if the other conditions are met.

1.4 Contesting the transaction:

Despite the fact that the conditions in points 1.1 to 1.3 are met, the applicant may contest the transaction only if one of the following conditions is met: (i) the mistake was caused by the other party, (ii) the mistake should have been obvious to the other party, (iii) the mistake was not rectified in a timely manner, or (iv) both parties to the contract were subject to a common mistake [...]. [Assessment as to whether it is possible to contest the error] As a result of the legal assessment, it must therefore be held that the applicant may contest the contract.

1.5 No longer any interest in bringing proceedings:

Under Austrian law, it is considered that the contractual partner of the person labouring under a mistake may prevent the legal consequences of the mistake by putting that person in the position he would have been in if his mistaken belief had been correct, that is to say if he maintains the transaction in the form in which the person labouring under a mistake intended to conclude it. The declarant then no longer has a grievance and therefore no longer has an interest in bringing proceedings. **[Or. 12]**

[...] The defendant observes that, due to the installation of the update, the applicant no longer has any interest in bringing proceedings within the meaning of the aforementioned legal position and that the contract should therefore not be rescinded.

The applicant claims that the installation of the update does not mean that he no longer has any interest in bringing proceedings and bases this, in particular, on the fact that the switching logic is also an unlawful measure.

When delivering its judgment, the national court must therefore clarify the question of whether the status after the update is brought about by a technical solution that complies with the requirements of EU law, in particular Regulation 715/2007 and Regulation 692/2008. It is only if this is the case that the applicant no longer has any interest in bringing proceedings, that the contract should not be rescinded or the price reduced and that the action should therefore be dismissed. [...]

The question asked will therefore constitute a precedent for the present proceedings.

V. Grounds for the question referred:

Each of the questions referred were raised because there is no (established) case-law from the CJEU on the interpretation of Article 5(1) of Regulation 715/2007 in the context of the present case. [...]

The Austrian courts are intensively dealing with this matter. [...] It is also known from the proceedings that courts in other Member States are also dealing with this issue **[Or. 13]**, meaning that these questions are indeed of EU-wide importance.

[...]

Eisenstadt Regional Court,

[...]

Eisenstadt, 29 January 2020

[...]