

Case C-440/20

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:

18 September 2020

Referring court:

Landgericht Stuttgart (Germany)

Date of the decision to refer:

18 September 2020

Applicant:

S.

Defendant:

AD GmbH

Subject matter of the main proceedings

Action against a legal expenses insurance provider for the grant of cover for an action against a car manufacturer against whom damages claims are to be asserted on grounds of manipulation of the exhaust control system of the vehicle purchased by the applicant.

Subject matter and legal basis of the reference

Interpretation of EU law, Article 267 TFEU

Questions referred

1. Interpretation of the concept of ‘defeat device’

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

In the event that Question 1-1 is answered in the negative:

1-2: *Is Article 3 No 10 of Regulation (EC) No 715/2007 to be interpreted and applied as meaning that only the exhaust gas purification system downstream in the engine train (e.g. in the form of diesel oxidation catalytic converters, diesel particulate filters, NO_x reduction catalytic converters) is covered by the emission control system?*

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

2. Interpretation of the concept of ‘normal use’

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

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 concept of ‘normal use’ describes 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) to be interpreted and applied as meaning that the concept of ‘normal use’ describes the actual driving conditions in everyday use on the basis of an average speed of 33.6 km/h and a maximum speed of 120.00 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 in which a component likely to affect emissions is designed in such a way that the exhaust gas recirculation rate is regulated in such a way that a low-emission mode is ensured only between 20 °C and 30 °C and is gradually reduced outside 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 prohibited if it continually operates outside of the temperature window between 20 °C and 30 °C to protect the engine and the exhaust gas recirculation is thereby significantly reduced?*

4. Interpretation of the concept of ‘justified’ within the meaning of the exception

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

If Question 4-1 is answered in the negative:

4-2: *Is point (a) of the second sentence of Article 5(2) of Regulation (EC) No 715/2007 to be interpreted and applied as meaning that there is no justification for the use of defeat devices within the meaning of the provision where the parameters recorded in the engine control device are chosen in such a way that, owing to its pre-defined temperatures, exhaust gas purification is not activated or is activated only to a limited extent for the majority of the year in light of the usual expected temperatures?*

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

5-1: *Is point (a) of the second sentence of Article 5(2) 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 point (a) of the second sentence of Article 5(2) of Regulation (EC) No 715/2007 to be interpreted and applied as meaning that there has been no damage suffered where wearing parts (such as the EGR valve) are affected?*

5-3: *Is point (a) of the second sentence of Article 5(2) 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 intended to be protected against damage or accident?*

6. Legal and punitive effects of infringements of EU law

6-1: *Is the second subparagraph of Article 4(1), the second subparagraph of Article 4(2), Article 5(1) and (2) as well as Article 13 of Regulation (EC) No 715/2007 to be interpreted and applied as meaning that they at least also protect the right of the purchaser of a vehicle to economic self-determination which does not meet the requirements of Regulation (EC) No 715/2007?*

If Question 6-1 is answered in the negative:

6-2: Is the second subparagraph of Article 4(1), the second subparagraph of Article 4(2), Article 5(1) and (2) as well as Article 13 of Regulation (EC) No 715/2007 to be interpreted and applied as meaning that the Member States must, for reasons of effet utile, provide for a system of penalties conferring on the purchasers of vehicles the right to bring an action to enforce compliance with market requirements laid down by EU law?

6-3: a) Is the concept of an ‘effective, proportionate and dissuasive’ measure within the meaning of the second sentence of Article 13(1) of Regulation (EC) No 715/2007 to be interpreted as meaning that damage suffered by the purchaser of the vehicle in accordance with the legislation cannot be offset or reduced by the actual possibility of using a vehicle which does not comply with Regulation (EC) No 715/2007?

b) Does the concept of effet utile inherent in EU law require that the concept of an ‘effective, proportionate and dissuasive’ measure within the meaning of the second sentence of Article 13(1) of Regulation (EC) No 715/2007 be differentiated according to whether the infringement within the meaning of Article 13(2) of Regulation (EC) No 715/2007 was committed intentionally or merely negligently, and only in the latter case justifies offsetting the actual possibility of using the purchased vehicle?

c) Is the concept of an ‘effective, proportionate and dissuasive’ measure within the meaning of the second sentence of Article 13(1) of Regulation (EC) No 715/2007 to be interpreted as meaning that, even if a benefit is offset, the manufacturer of the vehicle must pay financial compensation for the use of the capital derived, namely the consideration, and thus pay interest on it?

d) Is the concept of an ‘effective, proportionate and dissuasive’ measure within the meaning of the second sentence of Article 13(1) of Regulation (EC) No 715/2007 to be interpreted as meaning that the manufacturer of a vehicle which does not comply with Regulation (EC) No 715/2007 must be precluded, at least from the time at which the first serious request for return is made by the purchaser, from offsetting the actual possibility of using the vehicle against the consideration paid?

6-4: Is Articles 18(1) and 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 pursuant to Article 18(1) of Directive 2007/46/EC if he has installed in the vehicle an unauthorised defeat device within the meaning of Article 5(2) of Regulation (EC) No 715/2007 and the placing on the market of such a vehicle is contrary to the prohibition on sale without a valid certificate of conformity under Article 26(1) of Directive 2007/46/EC?

6-5: Is it the purpose and intention of Regulation (EC) No 715/2007 and of Directive 2007/46/EC to ensure that the limits laid down in Annex I to Regulation

(EC) No 715/2007 or the certificate of conformity as defined in Article 18(1) of Directive 2007/46/EC together with Regulation (EC) No 385/2009 establish rights protecting purchasers in such a way that, under EU law, the infringement of the quality-defining limits laid down by the Regulation or the infringement of the right to registration prohibits the offsetting of usage benefits upon reversal of the vehicle purchase transaction vis-à-vis 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: Article 3 No 10, Article 4(1) and (2), Article 5(1) and (2), Article 13;

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: Article 3 No 6 and No 9;

Regulation (EC) No 595/2009 of the European Parliament and of the Council of 18 June 2009 on type-approval of motor vehicles and engines with respect to emissions from heavy-duty vehicles (Euro VI) and on access to vehicle repair and maintenance information and amending Regulation (EC) No 715/2007 and Directive 2007/46/EC and repealing Directives 80/1269/EEC, 2005/55/EC and 2005/78/EC: Article 2(1), Article 3 No 8, Article 5(3)

Commission Regulation (EC) No 385/2009 of 7 May 2009 replacing Annex IX to Directive 2007/46/EC of the European Parliament and of the Council establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive): Annex IX.

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): Article 18(1), Article 26(1)

Provisions of international law cited

Regulation 83 of the United Nations Economic Commission for Europe (UN/ECE) – Uniform provisions concerning the approval of vehicles with regard to the emission of pollutants according to engine fuel requirements [2015/1038] (OJ 2015, L 172, p. 1): Point 2.16

National legislation cited

Bürgerliches Gesetzbuch (German Civil Code, ‘the BGB’): Paragraphs 823, 826, 849, 249;

Verordnung über die EG-Genehmigung für Kraftfahrzeuge und ihre Anhänger sowie für Systeme, Bauteile und selbstständige technische Einheiten für diese Fahrzeuge (EG-Fahrzeuggenehmigungsverordnung – EG-FGV) (Regulation on EC approval for motor vehicles and their trailers, and for systems, components and separate technical units intended for such vehicles (EC Vehicle Approval Regulation, ‘EC VAR’): Paragraph 6(1)).

Brief summary of the facts and procedure

- 1 On 15 March 2012, the applicant purchased a BMW X3 XDrive 25D Euro 5. The vehicle was first registered in March 2012. Legal expenses insurance cover is in place between the defendant and the applicant.
- 2 By letter dated 27 March 2019, the applicant informed the defendant that she intended to assert claims arising from the manipulation of the exhaust control system of the vehicle she had purchased and requested a confirmation of cover. By letter dated 2 May 2019, the defendant refused to provide the confirmation of cover on the grounds that no test cycle detection had been identified in the engines of BMW AG but only a thermal window, which is permissible under current German and/or European law.
- 3 This led to a decision made by an expert arbitrator (*Stichtentscheid*), which was not, however, accepted by the defendant. She argued, inter alia, that there had neither been an official product recall of the applicant’s vehicle, nor was such product recall imminent. The applicant subsequently instituted proceedings against the defendant with a view to obtaining cover.

Principal arguments of the parties in the main proceedings

- 4 The applicant submits that the use of a thermal window is inherently unlawful. Therefore – so the applicant argues – she is entitled to claims in tort against the vehicle manufacturer under Paragraph 823(2) together with Regulation No 715/2007 and Paragraph 826 of the BGB. The defendant must unconditionally issue the confirmation of cover for these claims. In the event of a reversal of the transaction, the applicant is not required to pay compensation for the time during which the vehicle was actually used since this obligation is contrary to EU law.
- 5 The defendant refers to the fact that the Federal Motor Transport Authority had neither ordered a product recall of the vehicle model in question, nor had the public prosecution service initiated a corresponding investigation. Therefore, cover should be denied. Placing a vehicle on the market whose engine is equipped

with a thermal window does not constitute intentionally inflicted damage contrary to public policy within the meaning of Paragraph 826 of the BGB. Regulation No 715/2007 is not a protective provision within the meaning of Paragraph 823(2) of the BGB. Moreover, since the emission limits of the Euro standards are linked to detailed standardised test conditions, it is irrelevant which emission performance the vehicle has outside the relevant test conditions, i.e. in everyday use.

- 6 The concept of justification within the meaning of Article 5(2) of Regulation No 715/2007 must be interpreted as meaning that it covers any measures to prevent engine components against damage, which must be considered *ex ante*. The operating-point-dependent exhaust gas recirculation ('EGR') at issue in the present case, which is reduced according to ambient air temperature, is justified for reasons of protecting components.
- 7 In any event, according to the case-law of the highest courts, the use by the applicant should be taken into account to mitigate the damage.

Brief summary of the basis for the reference

- 8 The referring court starts by setting out the technical principles of exhaust gas purification in diesel engines, and in particular the thermal window. In that regard, it observes that all known new diesel engines have at least one EGR route.
- 9 During EGR, a proportion of the intake air mass of the engine is replaced by exhaust gases. This supply occurs via the EGR valve. Since the hot, recirculated exhaust gases meet cooled fresh air from the intercooler, there is a general risk of sooting or varnish formation. This may result in a failure of the EGR valve. The risk of sooting increases at cooler ambient temperatures, while exhaust gas recirculation develops its full effect at ambient temperatures between 20 °C and 30 °C.
- 10 To prevent this risk, only part of the exhaust gases is recirculated. Since it is not possible to comply with limits on the basis of internal engine measures alone, secondary measures in the form of exhaust aftertreatment systems are used. In addition to an oxidation catalytic converter and a diesel particulate filter, NO_x storage catalytic converters and SCR catalytic converters (selective catalytic reduction) are usually used as exhaust aftertreatment components. The vehicle at issue does not have an SCR catalytic converter installed.
- 11 With regard to the dispute before it, the referring court starts by pointing out that, under the legal expenses insurance contract concluded between the parties, a legal expenses insurance policy is generally obliged to grant legal protection by making the insurance payments necessary for policyholders to assert their legal interests, provided that the protection of those interests has sufficient prospect of success. There must therefore be at least an equal probability of a positive outcome of the dispute for the policyholder. It must also appear possible that the policyholder will

be able to prove the facts for which he bears the burden of proof by means of permissible and suitable evidence. However, when examining the prospects of success, the assessment of the chances of discharging the burden of proof must not involve an anticipated evaluation of evidence.

- 12 In the present case a probability forecast can only be carried out after the matter has been referred to the Court of Justice. In the proceedings on the question of insurance cover it is relevant to the decision whether the nature of Regulation 715/2007 or Directive 2007/46 is such that they protect third parties. Furthermore, it must be clarified whether a thermal window is generally compatible with Regulation No 715/2007 and whether a possible infringement of the Regulation can lead to a claim for damages according to Paragraph 823(2) of the BGB in conjunction with Paragraph 6(1), Paragraph 27(1) EC VAR or Article 5 of Regulation (EC) No 715/2007.
- 13 According to the referring court, the use of thermal windows in diesel engines is generally unlawful. It is irrelevant in that regard, whether the Federal Motor Transport Authority has ordered a product recall or not. The *effet utile* demands that the vehicle purchaser be provided with a penalty mechanism whose effectiveness does not depend on whether the Federal Motor Transport Authority reacts to legal infringements by issuing a product recall.
- 14 The applicant bases her claim for damages, for the enforcement of which she seeks cover, on the fact that she was induced by the manufacturer of the vehicle to enter into an unwanted obligation and that, from the outset, she was not provided with a vehicle that met the legal requirements for registration. Whether the claim for damages is successful depends on the interpretation of Regulation No 715/2007, namely on the question whether the nature of that Regulation is such that it protects individuals and therefore constitutes a protective law within the meaning of Paragraph 823(2) of the BGB.
- 15 The referring court refers to recital 17 and considers the nature of Regulation No 715/2007 to be such that it offers individual protection. While recital 17 does not expressly refer to NO_x emissions, it is unlikely that the legislator wanted to ensure that consumers and users received objective and precise information on carbon dioxide emissions while at the same time wanting to allow that non-compliance with the limits of the Regulation on nitrogen oxide emissions may be concealed from them. The assumption that the Regulation protects individuals also fits into its scope of liability, and in particular Article 13 of the Regulation.
- 16 Neither Regulation No 715/2007 nor Regulation No 692/2008 lay down any specific technical requirements regarding the functioning of the emission control system. It is up to the manufacturers to decide which technical solution ensures compliance with the limits.
- 17 It is for manufacturers to show that, as far as its emissions are concerned, a vehicle meets the inspection requirements as defined, inter alia, in the New

European Driving Cycle (NEDC). The NEDC consists of four repetitions of an urban cycle test and an extra-urban cycle test. In the extra-urban test, a maximum speed of 120 km/h is reached. The average speed is 33.6 km/h over a total length of 11.03 km.

- 18 Defeat devices are not permitted under the first sentence of Article 5(2) of Regulation No 715/2007. The concept of the defeat device is based on the model of the provision in paragraph 2.16 of Regulation No 83 of the Economic Commission for Europe of the United Nations.
- 19 As regards the concept of the defeat device, it is necessary to consider, first of all, the meaning to be given to the terms used in the definition of a defeat device. More specifically, the referring court seeks to know whether a structural component covers solely mechanical elements in the sense of a physical structure and whether the emission control system must be interpreted as covering only the exhaust gas purification system outside and downstream of the engine and not the exhaust gas recirculation measures inside the engine.
- 20 According to the referring court, a distinction between internal and external measures of exhaust gas purification in the emission control system is contrary to the clear wording of the definition of a defeat device.
- 21 In addition, the referring court seeks to know the meaning to be given to the concept of 'normal use'. Taking into account different language versions of Regulation No 715/2007, the referring court assumes that normal use not only covers laboratory conditions but rather conditions that actually occur on the road. Given that Regulation No 692/2008 implements Regulation No 715/2007 and does not modify the obligations laid down therein, it does not have any significance in terms of giving specific expression to Regulation No 715/2007. The limits laid down in Regulation No 715/2007 must therefore be complied with not only under test conditions but regardless of temperature. On the basis of a historical and teleological interpretation and a parallel consideration of the 'sister' Regulation No 595/2009, which applies to heavy goods vehicles but also to particularly heavy passenger vehicles of the category M₁, the referring court is of the view that 'normal use' means the conditions of normal vehicle operation in everyday life and not those of the test procedure. However, the parameters on which the NEDC cycle is based must be taken into account regarding an average speed of 33.6 km/h and a maximum speed of 120 km/h in everyday use.
- 22 Since neither Regulation No 715/2007 nor Regulation No 692/2008 contains specific technical specifications regarding the functionality of the exhaust gas purification system, the referring court raises the question whether a temperature-dependent emission strategy in the form of a thermal window is permissible and whether it is covered by the prohibition of defeat devices at all.
- 23 The use of defeat devices is permitted, in exceptional cases, if the device is necessary to protect the engine against damage or accident and to ensure the safe

operation of the vehicle. There are also exceptions for the engine starting phase and regarding the conditions of the test cycle. On the basis of those exceptions, the referring court assumes that the aspect of motor and component protection does not permit the use of defeat devices for an unlimited period.

- 24 The referring court seeks to know whether the need to protect the engine must be determined on a specific-individual basis or in an abstract-normative manner. It points out in that regard that a specific-individual determination may result in older engines or particularly vulnerable exhaust aftertreatment designs being given priority and therefore advocates a strict and objective standard.
- 25 If a thermal window is permitted, the referring court goes on to ask whether that also applies to a specific use which results in the continuous reduction of exhaust gas purification outside a temperature window of between 20 °C and 30 °C. To that end it points out that the average annual temperatures at the applicant's place of residence mean that a reduction in exhaust gas purification is the rule rather than the exception when operating the vehicle at issue. It is precisely in view of the prevailing temperatures in Germany and Europe that an interpretation of the concept of justification by the Court of Justice is necessary.
- 26 In addition, the referring court also seeks an interpretation of the concept of damage. In that regard, it asks, in particular, whether any even minimal damage, such as the breakdown of the EGR valve – which costs between EUR 40 and EUR 200 – is sufficient. Referring to other language versions of Regulation No 715/2007 and the purpose pursued by it, the referring court is inclined to assume that not all damage satisfies those conditions. It also points out that there is no sooting or varnish formation on the EGR valve at ambient temperatures between 20 °C and 30 °C. The mixture of freshly supplied ambient air and recirculated exhaust gases can be controlled in a constructive way that ensures that the fresh gas supplied to the engine is always in the optimum temperature zone between 20 °C and 30 °C.
- 27 Lastly, the referring court raises questions of interpretation as to the legal and punitive effects of any infringements of EU law that may be found to have been committed. In this context, it is particularly important whether the nature of the relevant provisions is such that they offer individual protection.
- 28 The requirement to apply EU law as effectively as possible and the judgments of the Court of Justice of 17 September 2002, *Muñoz and Superior Fruticola*, C-253/00, EU:C:2002:497, and of 25 July 2008, *Janecek*, C-237/07, EU:C:2008:447, are indicative of the fact that the nature of the provisions is such that they offer individual protection. According to this, the full effectiveness of EU quality standards may require that compliance with those standards can be enforced by means of civil proceedings. Furthermore, it may also be incompatible with the mandatory nature of a directive which seeks to protect public health to exclude, as a matter of principle, the possibility that an obligation imposed by the directive may be asserted by the person concerned.

- 29 Moreover, in the context of the provisions of Paragraphs 6(1), 27 EC VAR, which are based on Articles 18(1) and 26(1) of Directive 2007/46/EC, the question arises as to whether the damage asserted by the applicant against the manufacturer in subsequent proceedings is covered by the material scope of protection of the provision. The European Union legislative instruments adopted in order to completely harmonise the technical requirements for vehicles aim, inter alia, at a high level of road safety, a high level of protection of health and the environment, the rational use of energy and effective protection against unauthorised use. Even if the Bundesgerichtshof (Federal Court of Justice) and a number of appeal courts have denied that the nature of those provisions is such that they protect third parties, the referring court considers that, in view of the legal significance of the certificate of conformity and referring to other language versions of the Directive, there are grounds for assuming that the nature of the stated provisions is such that they protect individuals.
- 30 In so far as the applicant is entitled to damages, the further question of how to calculate the damage arises. It is of particular importance in that regard whether interest is incurred on the purchase price paid by the purchaser and whether the purchaser must pay compensation for use of the vehicle. The scope of the insurance cover to be granted to the applicant, on which the referring court is called upon to rule, depends on the answer to those questions.
- 31 In its judgment of 17 April 2008, *Quelle*, C-404/06, EU:C:2008:231, the Court of Justice made it clear that the Sale of Consumer Goods Directive precludes national legislation under which the seller is entitled to compensation for use of goods delivered in breach of contract until their replacement. In cases where – as in the present case – a vehicle purchase has to be reversed, judicial enforcement of the claims initiated by the vehicle manufacturer can result in the duration of the proceedings reaching the extent of the overall economic life expectancy of the vehicle. This would give the manufacturer unfair relief. Moreover, the *effet utile* of Regulation No 715/2007 suggests the exclusion of an offset of the benefit at least in cases where damage is inflicted intentionally or in contravention of public policy. In addition, the referring court also seeks clarification on whether the requirement for an effective and dissuasive penalty requires that, in the event of a reversal of the transaction, the manufacturer must pay interest on the purchase price to be refunded.
- 32 According to the referring court, the applicant's claim for damages would *de facto* be devalued if the benefits of use which continue to apply were offset and thus would increasingly erode the damages. This would also be a breach of the requirement for dissuasive penalties.
- 33 The grant of insurance cover depends on the clarification of the permissibility of the thermal window and the punitive effect of the EU provisions. The referring court is aware of the fact that, in order for an action for insurance cover to succeed, it is sufficient for there to be at least an equal probability of a positive or negative outcome of the dispute. However, since the questions at issue in this case

have not been referred to the Court of Justice in the past, the referring court considers that it will be able to give a final judgment on probabilities only after the Court of Justice has answered the questions referred for a preliminary ruling.

- 34 It is in the light of the answers to the cascading and interlinked questions referred for a preliminary ruling that it can be determined whether – and, if so, to what extent – the applicant must be granted insurance cover.

WORKING DOCUMENT