



**According to Advocate General Rantos, the installation of software that alters the level of pollutant gas emissions of vehicles based on the outside temperature and the altitude is contrary to EU law, and such a vehicle is not in conformity with the contract of sale within the meaning of Directive 1999/44**

*Such a device cannot be justified by the protection of the engine from damage or accident and safe operation of the vehicle if its principle purpose is to protect components such as the EGR valve, the EGR cooler and the diesel particulate filter*

Increased awareness of the significance of environmental protection within the European Union is reflected, inter alia, in the intention to limit pollutant emissions. Accordingly, motor vehicles have been the subject of increasingly restrictive legislation, in particular with the adoption of Regulation (EC) No 715/2007<sup>1</sup> on type approval of motor vehicles.

These three cases concern the purchase of motor vehicles equipped with software which, on the basis of certain temperature and driving altitude conditions, limits the reduction of nitrogen oxide (NOx) emissions.

In the case of the vehicle in the first case (C-128/20), following an update of the software installed in the electronic engine controller, the purification of exhaust gas is deactivated at an outside temperature of below 15 °C and above 33 °C, and at driving altitude above 1 000 m ('the temperature window'). Outside this temperature window, per 10 °C, and above an altitude of 1 000 m, per 250 m of altitude, the rate decreases in a linear way down to zero, meaning that NOx emissions increase beyond the limit values laid down in Regulation No 715/2007.

The vehicles in the second (C-134/20) and third (C-145/20) cases also contain software operating the exhaust gas recirculation system according to the temperature window.

It is against that background that the Landesgericht Klagenfurt (Regional Court, Klagenfurt, Austria), the Landesgericht Eisenstadt (Regional Court, Eisenstadt, Austria) and the Oberster Gerichtshof (Supreme Court, Austria) decided to ask the Court of Justice, in essence, whether such software constitutes a 'defeat device' within the meaning of Regulation No 715/2007. If it does, those courts ask whether that software may be permitted on the basis of the exceptions to the prohibition on defeat devices, as provided for in that regulation.

In today's Opinion, Advocate General Athanasios Rantos notes, first of all, that by its judgment of 17 December 2020,<sup>2</sup> the Court ruled for the first time on the interpretation of that provision. The case which gave rise to that judgment concerned motor vehicles equipped with software intended to distort the results of type-approval tests for emissions of gaseous pollutants, in particular NOx. In that judgment, the Court held that a device which detects any parameter related to the conduct of the approval procedures provided for by Regulation No 715/2007 in order to improve the performance of the emission control system during those procedures, and thus to obtain approval

<sup>1</sup> 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)

<sup>2</sup> Judgment of the Court of 17 December 2020, *CLCV and Others (Defeat device on diesel engines)*, [C-693/18](#) (see also PR [170/20](#)).

of the vehicle, constitutes a 'defeat device', even if such an improvement may also be observed, occasionally, under normal conditions of vehicle use.

In order to determine whether the software at issue constitutes a 'defeat device', within the meaning of Regulation No 715/2007, the Advocate General examines the operation of the software during the 'normal use' of the vehicles concerned which, in his view, refers not to the conditions provided for in the New European Driving Cycle (NEDC) but rather to real driving conditions.

In that regard, the Advocate General finds that the temperature window is not representative of real driving conditions, since official statistics show that, in Austria and Germany, as in other Member States, the average temperatures for 2017-2019 were significantly lower than 15 °C. In addition, given the topography of Austria and Germany, motor vehicles are very often driven there above an altitude of 1 000 m.

He concludes from this that **the software at issue reduces the effectiveness of the emission control system in normal vehicle operation and use, with the result that it constitutes a 'defeat device' within the meaning of Regulation No 715/2007.**

The Advocate General notes, next, that that regulation provides for exceptions to the prohibition of defeat devices, including where the need for the device is justified in terms of protecting the engine against damage or accident and for safe operation of the vehicle.

In that regard, he notes that the EU legislature has drawn a clear distinction between, on the one hand, the engine and, on the other hand, the pollution control system, which includes the exhaust gas recirculation (EGR) system. Therefore, according to the Advocate General, **a defeat device which serves primarily to protect components such as the EGR valve, the EGR cooler and the diesel particulate filter does not fall within the scope of the exception to the prohibition**, since the functioning of those elements does not affect the protection of the engine.

Moreover, the question of whether such a device is permitted does not turn on whether it was fitted in the vehicle concerned from that vehicle's manufacture or whether it was installed subsequently.

In addition, in the context of an EC type-approval, vehicles must comply with the requirements laid down in EU law, in particular those relating to defeat devices. If they do not, those vehicles do not have an accurate certificate of conformity issued by the manufacturer and may not be sold or registered.

Therefore, according to the Advocate General, **since an average consumer who is reasonably well informed and reasonably observant and circumspect can expect that the regulatory requirements are satisfied, the vehicle concerned is not in conformity with the contract of sale within the meaning of Directive 1999/44,**<sup>3</sup> even in the absence of specific contractual terms. In the absence of an accurate certificate of conformity, the vehicle concerned does not comply 'with the description given by the seller', is not 'fit for any particular purpose for which the consumer requires [it]' and is not 'fit for the purposes for which goods of the same type are normally used', within the meaning of Directive 1999/44, even if the vehicle is covered by a valid EC type-approval.

Lastly, **a lack of conformity consisting in the presence, in the vehicle concerned, of a prohibited defeat device cannot be classified as 'minor', even if, assuming that the consumer had been aware of the presence and the operation of that device, he would nevertheless have purchased that vehicle.** Accordingly, the consumer is not denied the right to seek rescission of the contract under Directive 1999/44.

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**NOTE:** The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are

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<sup>3</sup> 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).

responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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*The full text of the Opinion (cases [C-128/20](#), [C-134/20](#) and [C-145/20](#)) is published on the CURIA website on the day of delivery.*

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*Pictures of the delivery of the Opinion are available from "[Europe by Satellite](#)" ☎ (+32) 2 2964106*