

**Case C-667/23**

**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:**

9 November 2023

**Referring court:**

Landgericht Ravensburg (Germany)

**Date of the decision to refer:**

27 October 2023

**Applicants:**

Gruß Verwaltungs-GmbH

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**Defendant:**

Volkswagen AG

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**Subject matter of the main proceedings**

Regulation (EC) No 715/2007 – Diesel-powered vehicle – Exhaust gas recirculation – Temperature window – Hypothetical approval – Compensation – Calculation

**Subject matter and legal basis of the request**

Interpretation of EU law, Article 267 TFEU

## Questions referred for a preliminary ruling

1. Can the vehicle purchaser's right to compensation against the vehicle manufacturer for the negligent placing on the market of a vehicle equipped with a prohibited defeat device within the meaning of Article 5(2) 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)] be denied on the grounds

a) that there was an unavoidable error as regards the wrongful nature of the act on the part of the manufacturer?

if the answer is yes:

b) that the error as regards the wrongful nature of the act was unavoidable for the manufacturer because the authority responsible for EC type-approvals or for subsequent measures actually authorised the installed defeat device?

if the answer is yes:

c) that the error as regards the wrongful nature of the act was unavoidable for the manufacturer since the vehicle manufacturer's legal interpretation of Article 5(2) of Regulation (EC) No 715/2007 would have been confirmed by the authority responsible for EC type-approvals or for subsequent measures (hypothetical approval)?

2. Is it compatible with EU law if, in the case of a right to compensation against the vehicle manufacturer for the negligent placing on the market of a vehicle equipped with a prohibited defeat device within the meaning of Article 5(2) of Regulation (EC) No 715/2007

a) the purchaser of the vehicle must allow the offsetting of the benefits derived from the use of the vehicle against the amount of compensation in their claim for '*minor* compensation', where the benefits derived from the use, together with the residual value, exceed the purchase price paid less the amount of compensation?

b) the vehicle purchaser's claim for '*minor* compensation' is limited to a maximum of 15% of the purchase price paid?

### **Provisions of European Union law relied on**

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), in particular Article 5(2)

### **Provisions of national law relied on**

Bürgerliches Gesetzbuch (German Civil Code, 'the BGB'), particularly Paragraphs 276, 823, 826

Verordnung über die EG-Genehmigung für Kraftfahrzeuge und ihre Anhänger sowie für Systeme, Bauteile und selbstständige technische Einheiten für diese Fahrzeuge (EG-Fahrzeuggenehmigungsverordnung) (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], 'the EG-FGV'), particularly Paragraphs 6 and 27

### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 The request for a preliminary ruling is based on five different cases which, although not identical, only differ in terms of certain nuances.
- 2 First proceedings: the vehicle VW T6 Caravelle 2.0 TDI was put on the market with a type EA288 diesel engine manufactured by the defendant. The applicant purchased the vehicle as a new EU car at a price of EUR 38 185. It is undisputed that a temperature window was in place when the vehicle was purchased. Outside of the window, the exhaust gas recirculation rate is gradually reduced. That results in higher NOx (= nitrous oxide) emissions during vehicle operations outside of the temperature window.
- 3 The applicant considers herself to have suffered loss or damage inflicted intentionally and in a manner offending common decency. She considers the temperature window to be a prohibited defeat device and claims that there is also a prohibited test bench detection system. The applicant claims payment of compensation at the discretion of the court, but at least EUR 9 546,25 (= 25% of the purchase price), and alternatively payment of EUR 5 727,75 (= 15% of the purchase price).
- 4 The defendant applies for the action to be dismissed. She disputes the existence of a test bench detection system. As regards the temperature window, the defendant finally submits that it extends over a range of +12 °C until approx. +39 °C. By way of precaution, the defendant asserts an unavoidable error as regards the

wrongful nature of the act and relies on a hypothetical approval by the Kraftfahrt-Bundesamt (Federal Office for Motor Vehicles, Germany).

- 5 Second proceedings: the vehicle VW Passat Variant Comfortline 2.0 TDI was put on the market with a type EA288 diesel engine manufactured by the defendant. It is undisputed that a test bench detection system was present. The applicant purchased the vehicle with an odometer reading of 93 350 km for EUR 13 930. He financed it with a loan from Volkswagen Bank.
- 6 The applicant considers himself to have suffered loss or damage caused by the defendant intentionally and in a manner offending common decency. He considers the test bench detection system to be prohibited and claims that there is a further prohibited defeat device in the form of a temperature window. The applicant demands payment of EUR 2 089.50 (= 15% of the purchase price) and reimbursement of the financing costs of EUR 409.20.
- 7 The defendant applies for the action to be dismissed. The defendant concedes that the test bench detection system is used by the software to ensure that the NSCC regenerates completely before an NEDC test drive and regenerates at precisely defined points within the NEDC. That focusses the measurement process on the NOx emissions generated during the NEDC and prevents NOx emissions from preceding cycles from being added or NOx emissions generated during the cycle from being disregarded. In addition, the test bench detection system leads to an increase in the temperature of the NSCC in the NEDC immediately before the first NSCC regeneration event, depending on the exhaust gas temperature and the ageing of the NSCC. The defendant argues that the test bench detection system is permissible because it has no measurable influence on NOx emissions and, in any event, no influence that is relevant to the tolerance limit. The defendant also considers the temperature window to be permissible. It claims that exhaust gas recirculation is 100% active between -24 °C and +70 °C. By way of precaution, the defendant asserts an unavoidable error as regards the wrongful nature of the act and relies on a hypothetical approval by the Kraftfahrt-Bundesamt (Federal Office for Motor Vehicles, Germany).
- 8 Third proceedings: the vehicle VW Golf 2.0 TDI was put on the market with a type EA288 diesel engine manufactured by the defendant. It is undisputed that a test bench detection system was present. That results in higher NOx (= nitrous oxide) emissions during normal vehicle operations. The applicant purchased the vehicle with an odometer reading of 20 km for EUR 25 300.
- 9 The applicant considers himself to have suffered loss or damage caused by the defendant intentionally and in a manner offending common decency. He considers the test bench detection system to be prohibited and claims that there is also a further prohibited defeat device in the form of a temperature window. The applicant claims payment of compensation at the discretion of the court, but at least EUR 6 325 (= 25% of the purchase price), and alternatively payment of EUR 3 795 (= 15% of the purchase price).

- 10 The defendant applies for the action to be dismissed. In its defence, it relies on the same arguments as in the second proceedings.
- 11 Fourth proceedings: the vehicle VW New Golf Sportsvan Highline 1.6 TDI was put on the market with a type EA288 diesel engine manufactured by the defendant. It is undisputed that the vehicle has a test bench detection system in place. The applicant purchased the vehicle with an odometer reading of 0 km for EUR 22 500.
- 12 The applicant considers himself to have suffered loss or damage caused by the defendant intentionally and in a manner offending common decency. He considers the test bench detection system to be prohibited and claims that there are also further prohibited defeat devices, including a temperature window. The applicant demands payment of EUR 14 743,22 (purchase price less compensation for use amounting to EUR 7 756,78 for the 120 661 km driven until the action was filed) in return for the handover of and transfer of ownership in the vehicle and alternatively compensation amounting to EUR 3 375 (= 15% of the purchase price).
- 13 The defendant applies for the action to be dismissed. In its defence, it relies on the same arguments as in the second proceedings.
- 14 Fifth proceedings: the vehicle VW Sharan 2.0 TDI was put on the market with a type EA288 diesel engine manufactured by the defendant. It is undisputed that a test bench detection system was present. The applicant purchased the vehicle with an odometer reading of 15 468 km for EUR 42 980.
- 15 The applicant considers himself to have suffered loss or damage caused by the defendant intentionally and in a manner offending common decency. He considers the test bench detection system to be prohibited and claims that there are also other prohibited defeat devices, namely a temperature window and a defeat of exhaust gas purification and the SCR catalytic converter depending on rotation. The applicant demands payment of EUR 27 313,47 (reimbursement of the purchase price less compensation for use amounting to EUR 15 666,53 for the 103 714 km driven until the hearing) in return for the handover of and transfer of ownership in the vehicle. In the alternative, he seeks payment of EUR 6 447 (= 15% of the purchase price) and a declaration that the defendant is obliged to compensate the applicant for future further loss or damage as a result of the prohibited defeat devices.
- 16 The defendant applies for the action to be dismissed. The defendant believes that neither the test bench detection system nor the temperature window qualify as prohibited defeat devices. The defendant concedes that the test bench detection system has the effect that during a test bench drive, after reaching the operating temperature of the SCR catalytic converter of at least 200 °C, an operating mode with an increased exhaust gas recirculation rate is maintained, while an operating mode with a reduced exhaust gas recirculation rate is switched to in road traffic at

that time. The test bench detection system also has the effect that in the NEDC, AdBlue starts to be fed into the SCR catalytic converter at an operating temperature of approx. 130 °C instead of approx. 150 °C in real road traffic operations. The defendant states that none of the above has any measurable influence on NO<sub>x</sub> emissions, and in any event no influence that is relevant to the tolerance limit. With regard to the temperature window, it claims that exhaust gas recirculation is 100% active between -24 °C and +70 °C. By way of precaution, the defendant asserts an unavoidable error as regards the wrongful nature of the act and relies on a hypothetical approval by the Kraftfahrt-Bundesamt (Federal Office for Motor Vehicles, Germany).

### **Succinct presentation of the reasoning in the request for a preliminary ruling**

- 17 Introductory remarks: in the first proceedings, a prohibited defeat device within the meaning of Article 5(2) of Regulation No 715/2007 was probably present when the vehicle was purchased. In the four other proceedings, there is at least a strong indication of that in the form of a test bench detection system.
- 18 In the case of the vehicle in the first proceedings, exhaust gas recirculation is reduced no later than once the ambient temperature falls to +12 °C and, in the view of the referring court, there is therefore a prohibited temperature window that does not fall within the lawful exceptions under Article 5(2)(a) of Regulation No 715/2007.
- 19 Furthermore, in those proceedings, the additional criterion of Article 5(2) sentence 2(a) of Regulation No 715/2007 that a defeat device must not operate for most of the year is probably also not fulfilled given that the exhaust gas recirculation in the vehicles in the aforementioned three proceedings is reduced no later than once the ambient temperature falls to approx. +12 °C. However, the average annual temperatures in Germany are lower than approx. +12 °C.
- 20 In the four other proceedings, it is disputed whether the temperature window and/or the test bench detection system lead to an increase in emissions under normal driving conditions. It is therefore not clear in those proceedings whether they involve a prohibited defeat device within the meaning of Article 3 no 10, Article 5(2) sentence 1 of Regulation No 715/2007 even if the test bench detection system is a strong indication of that.
- 21 A right to compensation under Paragraph 826 of the BGB requires that the tortfeasor has acted intentionally and in a manner offending common decency. However, that is unlikely to apply to the cases referred.
- 22 In the cases referred, however, the vehicle purchaser may have a right to compensation in accordance with Paragraph 823(2) of the BGB. According to recent case-law of the Bundesgerichtshof (Federal Court of Justice, Germany), Paragraph 823(2) of the BGB in conjunction with Paragraphs 6(1), 27(1) of the

EG-FGV protects the interest of a vehicle purchaser not to suffer any financial loss due to an infringement of European emissions law by the manufacturer.

- 23 In the first proceedings, the defendant is in breach of European emissions law in the form of a prohibited temperature window, and in the four other proceedings there is strong evidence of that in the form of a test bench detection system.
- 24 The right to compensation also requires that the vehicle manufacturer has acted at least negligently with regard to the defeat device. It is presumed that the vehicle manufacturer is at fault. The manufacturer may, however, exonerate itself by demonstrating and proving circumstances which, exceptionally, make its conduct appear not negligent. In particular, according to the case-law of the Bundesgerichtshof (Federal Court of Justice), the manufacturer can invoke an unavoidable error as regards the wrongful nature of the act by specifically demonstrating and proving an error as regards the wrongful nature of the act as such and also its unavoidability. That is the subject of the first question referred.
- 25 According to the case-law of the Bundesgerichtshof (Federal Court of Justice), the right to compensation pursuant to Paragraph 823(2) of the BGB in conjunction with Paragraphs 6(1), 27(1) of the EG-FGV is a claim for ‘*minor* compensation’, namely for payment of a sum of money. Reimbursement of the purchase price in return for surrender and transfer of ownership of the vehicle (‘*major* compensation’) cannot be claimed. In addition, the Bundesgerichtshof (Federal Court of Justice) stipulates that the benefits of the use of the vehicle must be taken into account if those, together with the residual value, exceed the purchase price paid less the amount of compensation. Those are the issues raised in the second question referred.
- 26 The questions referred in detail: the referring court’s observations in that regard essentially correspond to the observations on the first and third questions referred in the request for a preliminary ruling C-666/23 (cf. paragraphs 25-34 and 40-47 of the summary of that request for a preliminary ruling).