Case C-666/23

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:

EL

CM

BT

JF

DS

Defendant:

Volkswagen AG

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 refused on the grounds

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

   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 the vehicle manufacturer who supplied a software update liable to pay compensation to the vehicle owner if the latter suffers a loss or damage as a result of a prohibited defeat device within the meaning of Article 5(2) of Regulation (EC) No 715/2007 installed with the software update?

3. 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 VW T6 Multivan Comfortline 2.0 TDI was put on the market by the defendant with a type EA288 diesel engine. Exhaust gas recirculation is reduced in the vehicle outside of what is called a 'temperature window' based on falling ambient temperatures. That results in higher NOx (= nitrous oxide) emissions during vehicle operations outside of the temperature window. The applicant purchased the car from the defendant for EUR 45 944,39. He made a down-payment of EUR 15 000 and took out a loan to finance the rest. In the meantime, he has sold the car.

3 The applicant considers himself to have suffered loss or damage inflicted intentionally and in a manner offending common decency. He considers the temperature window to be a prohibited defeat device and claims that the reduction in exhaust gas recirculation starts at a temperature of +20 °C. The applicant is seeking payment of EUR 8 709.30 (purchase price of EUR 45 944.39 less a benefit of use amounting to EUR 10 245.60 for 66 900 km driven and sales proceeds of EUR 31 000 plus financing costs of EUR 4 010.51), and alternatively payment of EUR 6 891.66 (= 15% of the purchase price).

4 The defendant applies for the action to be dismissed. The defendant pleads that the contractual claims have become time-barred. With regard to the temperature window, the defendant claims that exhaust gas recirculation is gradually reduced once the ambient temperature falls to around +12 °C. The defendant considers the temperature window to be permissible because it is necessary for the safe operation of the vehicle. 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 VW T6 Multivan 2.0 TDI was put on the market with a type EA288 diesel engine manufactured by the defendant. The applicant purchased the vehicle with an odometer reading of 9 350 km for EUR 49 950. It is undisputed that a test bench detection system was present when the applicant purchased the vehicle, but that it was removed in a software update on 10 October 2017. It is also undisputed that a temperature window was (and is) present. That results in higher NOx emissions during vehicle operations outside of the temperature window.

6 The applicant considers himself to have suffered loss or damage inflicted intentionally and in a manner offending common decency due to the existence of prohibited defeat devices. He demands payment of EUR 8 938 (= 20% of the gross purchase price) and alternatively compensation at the discretion of the court, but no less than EUR 6 703.50 (= 15% of the purchase price).

7 The defendant concedes that the originally installed test bench detection system was used by the software to reduce the exhaust gas recirculation rate outside the NEDC upon reaching an operating temperature of 200 °C. However, above that operating temperature, the SCR system contributes significantly to a reduction in NOx which means that the tolerance limits are still complied with. With regard to the temperature window, the defendant contends that a reduction occurs below an ambient temperature ‘of approx. +12 °C’. The defendant considers the temperature window to be permissible because it is necessary for the safe operation of the vehicle. By way of precaution, the defendant asserts an unavoidable mistake of law and relies on a hypothetical approval by the Kraftfahrt-Bundesamt (Federal Office for Motor Vehicles).

8 Third proceedings: the facts of the third proceedings are essentially the same as those in the second proceedings.

9 Fourth 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. The applicant purchased the vehicle with an odometer reading of 107 000 km for EUR 10 000.

10 The applicant considers herself to have suffered loss or damage inflicted intentionally and in a manner offending common decency. She considers the

functionality of the test bench detection system to be prohibited and contends that there is also a prohibited temperature window. The applicant demands payment of EUR 9 258,60 (purchase price of EUR 10 000 less compensation for use amounting to EUR 741,40 for the 14 309 km driven at the time the action was filed) in return for the handover of and transfer of ownership in the vehicle and alternatively compensation amounting to EUR 1 500 (= 15% of the purchase price).

11 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 (=NOx storage catalytic converter) regenerates completely before a test drive and regenerates at precisely defined points within the NEDC. In addition, the temperature of the NSCC within the NEDC is increased immediately before the first NSCC regeneration. However, none of that has any measurable effect on NOx emissions. Even if the NOx emissions were increased without that functionality, the tolerance limits would not be exceeded. The defendant considers the temperature window to be permissible. In that regard, the defendant claims that the exhaust gas recirculation is 100% active between -24 °C and +70 °C due to the very advanced exhaust gas recirculation system. By way of precaution, the defendant asserts an unavoidable mistake of law and relies on a hypothetical approval by the Kraftfahrt-Bundesamt (Federal Office for Motor Vehicles).

12 Fifth proceedings: the vehicle VW Sharan 2.0 TDI was put on the market with a type EA288 diesel engine manufactured by the defendant. The engine was equipped with a prohibited defeat device (test bench detection system with a ‘switch logic’). By orders dated 14 and 15 October 2015, the Kraftfahrt-Bundesamt (Federal Office for Motor Vehicles) ordered the defendant to remove that prohibited defeat device in the vehicles it had placed on the market. The applicant purchased the vehicle with an odometer reading of 14 915 km for EUR 32 000. A software update developed by the defendant and approved by the Kraftfahrt-Bundesamt (Federal Office for Motor Vehicles) was installed in the vehicle on 7 March 2017. By way of the update, a temperature window was installed in the vehicle. That leads to higher NOx emissions during vehicle operation outside of the temperature window.

13 The applicant considers himself to have suffered loss or damage caused by the defendant intentionally and in a manner offending common decency. He demands payment of compensation at the discretion of the court, but no less than EUR 4 800 (= 15% of the purchase price), and for the court to find that the defendant shall compensate the applicant for the loss and damage suffered by the applicant as a result of the installation of a temperature-controlled defeat device.

14 The defendant applies for the action to be dismissed. By way of precaution, the defendant pleads that the claim has become time-barred. With regard to the temperature window, the defendant claims that exhaust gas recirculation is only reduced below +10 °C. It claims that is necessary for the safe operation of the vehicle. The defendant further argues that, although the judgment of the Court of

Justice of 14 July 2022, *GSMB Invest*, C-128/20, EU:C:2022:570, assumed a temperature range of the temperature window of between +15 °C and +33 °C 'ambient temperature' for vehicles of the defendant with an identical temperature window (following an update of the engine control unit for the engine type EA189). In the view of the defendant, however, that is due to binding findings of fact by the referring courts, which do not reflect the actual circumstances. By way of precaution, the defendant asserts an unavoidable mistake of law and relies on a hypothetical approval by the Kraftfahrt-Bundesamt (Federal Office for Motor Vehicles).

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

15 Introductory remarks: in each of the first, second and third 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 fifth proceedings, a prohibited defeat device was installed by way of the update. In the fourth proceedings, the test bench detection system is a strong indication of the existence of a prohibited defeat device.

16 In the case of the vehicles in the first, second, third and fifth proceedings, exhaust gas recirculation is reduced no later than once the ambient temperature falls to +10 °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.

17 Furthermore, in the first, second and third 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.

18 In the fourth 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.

19 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.

20 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.

21 In the first, second, third and fifth proceedings, the defendant is in breach of European emissions law in the form of a prohibited temperature window, and in the fourth proceedings there is strong evidence of that in the form of a test bench detection system.

22 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.

23 In the fifth proceedings, the right to compensation due to the defeat device (the test bench detection system with 'switch logic'), which was present when the vehicle was placed on the market and purchased, has become time-barred. However, after installation of the update supplied by the defendant in the form of the temperature window, the vehicle is equipped with a new prohibited defeat device. It is uncertain, whether the vehicle owner is entitled to claim compensation from the manufacturer if they suffer a loss or damage because of a defeat device installed by way of an update. That is the subject matter of the second question referred.

24 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 third question referred.

25 The questions referred in detail: the first question: an exclusion of liability due to an error as regards the wrongful nature of the act only arises in rare exceptional cases. Ignorance does not exempt from liability. Even an incorrect prediction about what a court will find to be negligent in potential liability proceedings does not give rise to an error as regards the wrongful nature of the act that would exclude liability. The tortfeasor must always expect that a court will find that the precautionary measures taken by them to be inadequate. An unavoidable error as

regards the wrongful nature of the act only exists if a reasonable person could not have expected that their behaviour could be judged by a court in the future to be in breach of duty.

26 According to the case-law of the Bundesgerichtshof (Federal Court of Justice), the manufacturer's error specifically relating to a defeat device is considered unavoidable if a vehicle manufacturer presents an actual EC type-approval for the prohibited defeat device used in all its relevant details in accordance with Article 5(2) of Regulation No 715/2007. However, the error is also considered unavoidable if it has been established that the manufacturer's incorrect legal opinion regarding the existence of an unauthorised defeat device would have been confirmed by the authority responsible for EC type-approval or for subsequent measures (in Germany, the Kraftfahrt-Bundesamt [Federal Office for Motor Vehicles]), that is to say in the event of a hypothetical approval.

27 It is doubtful that that national case-law is in line with EU law given that the prohibition of defeat devices is governed by EU law. The right of a vehicle purchaser to appropriate compensation for the purchase of a vehicle equipped with a prohibited defeat device is also enshrined in EU law (judgment of 21 March 2023, *Mercedes-Benz Group [Liability of manufacturers of vehicles with defeat devices]*, C-100/21, EU:C:2023:229, paragraph 91). The Member States only lay down the rules under which purchasers may obtain such compensation.

28 The question therefore arises as to what requirements EU law places on the subjective conditions for a right to compensation by the vehicle purchaser against the vehicle manufacturer for infringement of Articles 18(1), 26(1) and 46 of Directive 2007/46; Article 5(2) of Regulation No 715/2007.

29 First of all, it is doubtful whether, when it comes to liability for tort as in the present case, fault is relevant at all. In various areas of EU law, the Court of Justice has already ruled on the requirement of fault in non-contractual liability (see judgments of 8 November 1990, *Dekker*, C-177/88, EU:C:1990:383, paragraphs 22 to 25; of 30 September 2010, *Strabag and Others*, C-314/09, EU:C:2010:567, paragraph 39 et seq.; of 9 December 2010, *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others*, C-568/08, EU:C:2010:751, paragraph 86 et seq.; and of 18 June 2013, *Schenker & Co. and Others*, C-681/11, EU:C:2013:404, paragraph 35).

30 Since the proceedings referred to only concern the liability under civil law of the vehicle manufacturer, there is much to suggest that fault is not relevant. If the right to compensation against the vehicle manufacturer in the event of an infringement of Articles 18(1), 26(1), 46 of Directive 2007/46, Article 5(2) of Regulation No 715/2007 were based on fault, the question would have to be answered as to whether the unavoidability of an error as regards the wrongful nature of the act can be inferred from information or approval by the authority responsible for EC type-approval or for subsequent measures (question 1(b) referred). If the principles of the judgment of 18 June 2013, *Schenker & Co. and*

Others, C-681/11, EU:C:2013:404, were to be applied in that respect, an approval or information from the authority responsible for EC type-approval or subsequent measures would be irrelevant. A manufacturer would have to expect that the Court of Justice would assess the lawfulness of a defeat device under Article 5(2) of Regulation No 715/2007 differently than the competent authority.

31 And even if an approval by the authority responsible for the EC type-approval or for subsequent measures should justify the vehicle manufacturer's good faith that the authority will not take any measures against it, it is unclear whether the manufacturer can also rely on that good faith in relation to the vehicle purchasers. Furthermore, the principle of effectiveness is an argument in favour of the manufacturer not enjoying protection of legitimate expectations in relation to the purchaser. Otherwise, an infringement of EU law by the manufacturer would remain without sanction if the infringement is based on an incorrect assessment by the competent authority. That would be contrary to the requirement that the sanctions for non-compliance with the provisions of the Directive must be effective, proportionate and dissuasive (judgment of 21 March 2023, *Mercedes-Benz Group [Liability of manufacturers of vehicles with defeat devices]*, C-100/21, EU:C:2023:229 paragraphs 85, 88).

32 If the approval or information provided by the authority responsible for EC type-approval or for subsequent measures would give rise to a legitimate expectation on the part of the car manufacturer that it is acting lawfully, the question arises as to whether a hypothetical approval has the same effect (question 1(c) referred). In *Schenker*, the Court of Justice ruled that no one can plead breach of the principle of legitimate expectations unless he has been given precise assurance by the competent authority (judgment of 18 June 2013, *Schenker & Co. and Others*, C-681/11, EU:C:2013:404, paragraph 41). In addition, Advocate General Kokott stated in that case that the minimum requirement for the recognition of legitimate expectations is that the administrative or judicial decision must concern exactly the same matters of fact and law in respect of which the undertaking concerned invokes an error as regards the wrongful nature of the act precluding liability and that only statements made by the authority or the court which are expressly contained in the relevant decision may be invoked and not other conclusions which may possibly be inferred implicitly from it (Opinion of Advocate General Kokott in *Schenker and Others*, C-681/11, EU:C:2013:126, point 91). In the case of a hypothetical approval or information, that is to say in the hypothetical case of an enquiry, that requirement would not be met because in that case there is a lack of explicit and precise statements by an authority on a specific set of facts.

33 The principle of effectiveness is another argument against the consideration of a hypothetical approval. If a Member State were to allow the vehicle manufacturers to rely on an unavoidable error as regards the wrongful nature of the act, the injured parties would not receive any compensation. The appropriateness of the amounts of compensation and also a dissuasive effect of the sanctions in the event of infringements, as deemed necessary by the Court of Justice, would not be guaranteed.

34 Questions 1(a) to (c) referred have a bearing on the decision in all the legal disputes referred for a preliminary ruling. If one of the questions in answered in the negative, a hypothetical approval by the Kraftfahrt-Bundesamt (Federal Office for Motor Vehicles) would be irrelevant for the vehicle purchaser's compensation claims under civil law against the manufacturer.

35 The second question: that question only applies to the fifth proceedings. If it is answered in the affirmative, the applicant is, in principle, entitled to claim compensation.

36 It is uncertain whether the vehicle manufacturer who has supplied a software update with a prohibited defeat device in accordance with Article 5(2) of Regulation No 715/2007 must pay compensation to the vehicle owner if the latter suffers loss or damage as a result of the prohibited defeat device installed by way of the update.

37 In those cases, German law denies that a law protecting a third party has been infringed as the infringement lies in the issue of an incorrect certificate of conformity by the vehicle manufacturer. However, no new certificate of conformity is issued on occasion of the update. The update is therefore not a suitable connecting factor for liability of the vehicle manufacturer for compensation pursuant to Paragraph 823(2) of the BGB in conjunction with Paragraphs 6(1), 27(1) of the EG-FGV. Furthermore, it is argued that the loss or damage that gives rise to liability occurs when the unwanted purchase contract is concluded. Any subsequent measures, such as the update, could no longer have been the reason for the purchase decision.

38 Under EU law, however, it may be necessary for the vehicle owner to have a right to compensation in such a case. That is supported by the fact that the manufacturer creates an unlawful situation by supplying and installing the update, which contradicts the certificate of conformity. In the same way as when a vehicle equipped with a prohibited defeat device is placed on the market, an update with a prohibited defeat device may result in a ban on operation by the competent authority. According to the referring court, the manufacturer's attributable conduct that gives rise to liability is the supply and installation of the prohibited temperature window. That is the relevant starting point for liability on the part of the vehicle manufacturer, and not the issue of an incorrect certificate of conformity or a subsequent purchase decision. The inaccuracy of the certificate of conformity is only one inevitable consequence of the installation of the prohibited defeat device, and another possible consequence is the purchase decision of a purchaser in reliance on the accuracy of the certificate of conformity.

39 It cannot be a determining factor that no new certificate of conformity is issued on the occasion of the update. Pursuant to Paragraph 3(6) of the EG-FGV in conjunction with Article 3 no 36 of Directive 2007/46, that certificate is issued by the manufacturer to certify that a vehicle belonging to the series of the type approved in accordance with that Directive complied with all regulatory acts at the

time of its production. The certificate of conformity is valid for the entire service life of the vehicle. If the manufacturer subsequently changes the condition of the vehicle in a prohibited manner, that certificate inevitably becomes inaccurate.

40 The third question: in the event of only negligent loss or damage, the Bundesgerichtshof (Federal Court of Justice), rules out a claim by the purchaser against the manufacturer for reimbursement of the purchase price in return for surrender of the vehicle ('*major* compensation') because the purchaser's right to economic self-determination is only protected in the event of loss or damage inflicted in a manner offending common decency, but not in the event of loss or damage caused by mere negligence. The Bundesgerichtshof (Federal Court of Justice) regards the interest of the purchaser, which is protected under EU law, to be not to suffer a financial loss within the meaning of the 'differential hypothesis' in German civil law (*Differenzhypothese*) and, pursuant to Paragraph 823(2) of the BGB in conjunction with Paragraphs 6(1), 27(1) of the EG-FGV, only grants the purchaser a claim for '*minor* compensation', namely only a monetary claim.

41 According to the Bundesgerichtshof (Federal Court of Justice), the trial judge must estimate the amount of the differential damage, taking into account all the circumstances, at their own discretion. It should be noted that the estimated loss or damage must be at least 5% of the purchase price paid for reasons of effectiveness under EU law, but may not exceed 15% of the purchase price paid for reasons of proportionality. The benefits of use and the residual value of the vehicle should be taken into account to reduce the loss or damage suffered to the extent that they exceed the value of the vehicle at the time the purchase contract is concluded (purchase price paid less the amount of compensation). In the view of the Bundesgerichtshof (Federal Court of Justice), that is in line with EU law, taking into account the requirement for effective and dissuasive sanctions.

42 However, it is doubtful whether the offsetting of benefits of use against the amount of compensation complies with EU law. If, in accordance with the Bundesgerichtshof (Federal Court of Justice), the injured purchaser had to deduct the benefits of use from the claim for 'minor compensation', they would receive less compensation depending on the intensity of use of the vehicle. There is no objective reason for that. Purchasers do not enrich themselves if they use their own vehicle. It therefore appears to be arbitrary to curtail the loss or damage suffered based on the intensity of use.

43 It is true that it is required under EU law that a purchaser must allow the kilometres driven to be taken into account when asserting a claim for 'major compensation', namely a claim for reimbursement of the purchase price in return for the surrender of the vehicle. Advocate General Rantos considers it necessary in that constellation to offset the benefits of the actual use of the vehicle in question against the reimbursement of the purchase price, since the protection of the rights guaranteed by Directive 2007/46 should not result in an unjust enrichment (Opinion of Advocate General Rantos in *Mercedes-Benz Group*

[Liability of manufacturers of vehicles with defeat devices], C-100/21, EU:C:2022:42061, point 61 et seq.).

44 However, according to the view expressed herein, that cannot apply if the purchaser only claims ‘minor compensation’ because the purchaser retains ownership of the vehicle. The use of the vehicle is for the purchaser’s own account, the vehicle depreciates in value. The purchaser does not enrich themselves by using the vehicle. Offsetting benefits of use against ‘minor compensation’ is also likely to lead to unreasonable results and thus infringes the principle of effectiveness. Advocate General Rantos emphasises that the offsetting must not result in the purchaser ultimately obtaining no compensation for the damage suffered (point 62). However, that would be the case according to the offsetting method used by the Bundesgerichtshof (Federal Court of Justice) if a purchaser had made intensive use of their vehicle at the time of the court decision.

45 Furthermore, the blanket limitation of the differential damage to a maximum amount of 15% of the purchase price according to the case-law of the Bundesgerichtshof (Federal Court of Justice) is likely to be contrary to EU law because it runs counter to the principle of effectiveness as the reduced value of the vehicles due to the installed defeat device will often be higher than 15% of the purchase price. However, the Federal Court of Justice’s schematic upper limit of 15% does not allow national courts to take that into account. It should also be borne in mind that, according to the Bundesgerichtshof (Federal Court of Justice), the purchaser can only demand financial compensation for the loss or damage, but must keep the vehicle. If that monetary claim is then limited to an amount of 15% of the purchase price, the interest of the vehicle purchaser in reasonable compensation cannot be adequately taken into account.

46 If question 3(a) is answered in the negative, then benefits of use, in so far as they exceed the value of the vehicle at the time the purchase contract is concluded (purchase price less amount of compensation), would not be taken into account in the main proceedings. The intensity of vehicle use and the residual value would not be relevant.

47 If question 3(b) is answered in the negative, higher amounts than 15% of the purchase price could be awarded as compensation in the second and fourth proceedings, in which the amount of compensation is left to the discretion of the court. In the first proceedings, in addition to the requested compensation of 15% of the purchase price, the financing costs could be awarded as a further item of loss because financing costs are generally eligible for compensation.