

Case C-592/23

**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:

26 September 2023

Referring court:

Oberster Gerichtshof (Austria)

Date of the decision to refer:

6 September 2023

Applicants:

LK

AK

Defendant:

Volkswagen AG

Subject matter of the main proceedings

Payment of EUR 20 532, plus interest and costs, in exchange for the return of a vehicle on account of the presence of a prohibited defeat device or compensation

Subject matter and legal basis of the request for a preliminary ruling

Interpretation of EU law and UNECE Regulation No 83; Article 267 TFEU

Questions referred for a preliminary ruling

1. Must Article 2(6) of and Annex III, section 3.13.4 to Implementing Regulation (EC) No 692/2008 (in conjunction with Article 3(10) of Regulation (EC) No 715/2007) be interpreted as meaning that a pollution control device (control programme for the regeneration of the storage catalyst in the preparation cycle), which is deemed to be a continuously regenerating system because

regeneration (cleaning process) occurs at least once per type 1 test, and the device has already regenerated at least once during the vehicle preparation cycle (Precon or preconditioning), is a defeat device within the meaning of Article 3(10) of Regulation (EC) No 715/2007?

2. (a) Must Article 5(2)(c) of Regulation (EC) No 715/2007 (in conjunction with Article 3(10) of Regulation (EC) No 715/2007 and Article 2(6) of and Annex III, section 3.13.4 to Implementing Regulation (EC) No 692/2008) be interpreted as meaning that (if so) such a defeat device is permissible because the conditions are, in essence, included in the relevant emissions test procedure?

(b) Must Article 5(1) of Regulation (EC) No 715/2007 (in conjunction with Article 3(10) of Regulation (EC) No 715/2007 and Article 2(6) of and Annex III, section 3.13.4 to Implementing Regulation (EC) No 692/2008) be interpreted as meaning that (if so) such a defeat device is permissible if the emission-related operation it exhibits in the test procedure (approval test) is present in 80% of cases, even in normal use (in real-life operation)?

3. Must paragraph 2.20 of and Annex 13, paragraph 3 to the UNECE Regulation (in conjunction with Annex III, section 3.13.1 to and Article 2(6) of Implementing Regulation (EC) No 692/2008) be interpreted as meaning that the arrangement laid down in the second sentence of Annex 13, paragraph 3 to the UNECE Regulation, in accordance with which the switch (to prevent or permit the regeneration process) may be activated during preconditioning cycles only in order to prevent regeneration, applies only to the special test procedure provided for in Annex 13 to the UNECE Regulation and thus to the emissions testing of a vehicle with a periodically regenerating system and not also in respect of a vehicle with a continuously regenerating system?

Provisions of Community law relied on

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 2(6) and Annex III, sections 3.13.1 and 3.13.4.

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(10) and Article 5(1) and (2)(c)

Provisions of national law relied on

Allgemeines Bürgerliches Gesetzbuch (Austrian Civil Code, ‘the ABGB’), Paragraphs 874 and 1295(2)

Provisions of international law relied on

Regulation No 83 of the Economic Commission for Europe of the United Nations (UNECE) – Uniform provisions concerning the approval of vehicles with regard to the emission of pollutants according to engine fuel requirements (‘the UNECE Regulation’); paragraph 2.20 and Annex 13, paragraph 3

Brief summary of the facts and procedure

- 1 On 3 April 2015, the applicants purchased a new VW Golf Sportsvan Lounge BMT TDI DSG car, manufactured by the defendant, from a car dealer for the purchase price of EUR 26 100. The vehicle is equipped with an EA 288 engine (EU-6 NSC); the vehicle is subject to exhaust emission standard EU 6. Due to its construction and programming equipment, that engine is not affected by the problem linked to the NOx values for the EA 189 (EU 5) engine series. The EU type approval for the vehicle is still valid.
- 2 A low-pressure exhaust gas recirculation system (LP-EGR) is installed in the vehicle for pollution control. The exhaust gas recirculation is used to reduce nitrogen oxide emissions within the engine. The vehicle has a temperature window for outside temperatures between – 24 °C and + 70 °C. It is technically necessary to implement that temperature window for the durability of the EGR valve, the EGR cooler and the EGR cooling flaps, as well as for the diesel particulate filter and the turbocharger.
- 3 In that regard, it is not disputed that this is not a defeat device which, within the meaning of Article 5(2)(a) of Regulation (EC) No 715/2007 is in any case prohibited (irrespective of the question of engine protection in the case in question), because it is in operation for most of the year due to the prevailing outside temperature.
- 4 The continuous reduction in EGR within the temperature window necessarily increases the NOx values within the engine. In order to keep those pollutant emissions as low as possible, a NOx storage catalyst (NSC) is installed in the vehicle. That catalytic converter can chemically store between 50 and 70% of nitrogen oxides during normal driving conditions. It must be regenerated regularly by combustion to maintain its functionality. Regeneration lasts approximately 3 to 10 seconds and takes place at intervals of approximately 5 to 10 km when the engine is running continuously, depending on the manufacturer. In the case of the applicants’ vehicle, regeneration takes place approximately every 5 km or when

the catalytic converter is completely saturated. During regeneration there is a short-term increase in NOx emissions (over a period of 3 to 10 seconds).

- 5 In the vehicle at issue, a ‘Precon’ (preconditioning) with driving curve recognition is implemented. That control programme recognises when the vehicle is being prepared for the exhaust gas measurement on the test bench. In that event, regeneration is triggered regardless of the distance travelled since the last regeneration and regardless of the degree of saturation of the catalytic converter. This means that the actual test cycle always starts with a regenerated catalyst.
- 6 When testing the exhaust gas values on the test bench, in accordance with the European test regulations, a specific driving behaviour of the vehicle is simulated by means of a standardised test cycle (NEDC), which corresponds to phases of acceleration, driving at a constant speed and deceleration in urban and extra-urban areas over a period of 1 180 seconds and a distance of approximately 11 km. Due to the Precon, regeneration of the catalytic converter and the associated short-term increase in pollutants always occurs twice and never three times during a simulated journey. This does not always correspond to the sequence in real-life operation since a journey of more than 11 km can also start with an almost saturated catalytic converter. In purely mathematical terms, in real-life operation regeneration occurs 2.2 times over a distance of 11 km at regeneration intervals of 5 km. Without the driving curve recognition in the Precon, regeneration could also take place three times during a test cycle, which in purely mathematical terms would occur in one out of five cases.
- 7 The applicants claimed (first) payment EUR 20 532 plus interest and costs in exchange for the return of the vehicle. The engine installed is said to be equipped with a prohibited defeat device.
- 8 The court of first instance upheld the claim in part. It found that the EA 288 engine type at issue does not contain a prohibited defeat device. However, the driving curve recognition (Precon) implemented on the test bench had to be assessed differently since the differentiation in the regeneration in test mode, on the one hand, and in real-life operation, on the other, independent of driving behaviour, does not serve to guarantee safety, even if nothing was ‘switched off’ from a purely technical point of view.
- 9 The appeal court dismissed the claim in its entirety. It found that there was no prohibited defeat device.
- 10 The Precon programme considered in isolation could be deemed to be a (prohibited) defeat device because the regeneration of the catalytic converter prior to the test would change a parameter of the emission control system in such a way that its effectiveness ‘could’ be reduced. A reduction to that effect is by no means necessary, because a regeneration of the catalytic converter could also actually take place at the end of the last journey carried out before the test, with the result that the subsequent real journey is also started with a cleaned catalytic converter,

which corresponds to a test journey after the Precon on the test bench. In that case, the conditions would be exactly the same as for the test cycle, as both have started with a cleaned catalytic converter.

- 11 However, from a legal point of view, the decisive factor is that Article 2(6) of the implementing regulation applicable to the present case (in conjunction with Annex III, section 3.13 to that implementing regulation and Annex 13, paragraph 3 to the UNECE Regulation) provides for both a periodically regenerating system and a continuously regenerating system; the latter does not require a special test procedure. Those provisions show that the implementation of such systems is authorised, which is applicable specifically to regeneration in the context of preparing the vehicle for the test cycle, provided that further regeneration takes place at least once during the test. Regeneration in the Precon ensures that no additional NOx values stored in the catalytic converter from a previous journey are recorded in the test cycle in addition to the emissions emitted during that process, as this would distort the values recorded.
- 12 The applicants' appeal on a point of law is directed against that decision and seeks to have the claim upheld.
- 13 In its response to the appeal on a point of law, the defendant contends that the other party's appeal should be dismissed or, in the alternative, that the appeal must fail.

Main arguments of the parties to the main proceedings

- 14 The applicants complain that two defeat devices are programmed, namely one is temperature-dependent and one depends on operation on the test bench or operation in real-life. They state that they have been misled by the intentional manipulation by the defendant's representatives, which is why they claim to be entitled to damages by way of compensation in kind. The defendant is also liable in tort for immoral damage.
- 15 The defendant replied that the EA 288 engine at issue is not equipped with a (prohibited) defeat device. The temperature range of the temperature window is therefore so broad that the exhaust gas recirculation operates 100% of the time in Austria. In order to obtain comparable measured values, the driving curve recognition in the Precon has the effect that the regeneration of the NOx storage catalyst take place regularly every 5 km during preconditioning, so that the test cycle itself is representative.

Brief summary of the reasons for the request for a preliminary ruling

- 16 In the appeal on a point of law, the question arises as to whether the implemented Precon with driving curve recognition (control programme for the regeneration of the catalytic converter in the preparation cycle) is a prohibited defeat device

within the meaning of Article 3(10) of Regulation (EC) No 715/2007, in conjunction with Article 5 thereof.

- 17 1.1 Question 1 relates to whether a continuously regenerating system (unlike a merely periodically regenerating system) can be a defeat device at all. The Supreme Court assumes that the Precon at issue is a continuously regenerating system. According to its findings, both the requirements for a continuously regenerating system under Article 2(6) of the implementing regulation and those under Annex III, section 3.13.4 to the implementing regulation are met.
- 18 1.2 Article 2(6) of the implementing regulation (the content of which is identical to the first sentence of paragraph 2.10 of the UNECE Regulation) defines the periodically regenerating system. Annex III, section 3.13.4 to the implementing regulation is linked to that provision; the first sentence corresponds to the second sentence of paragraph 2.10 of the UNECE Regulation. The second sentence (the content of which is identical to the third sentence of paragraph 2.10 of the UNECE Regulation) defines the continuously regenerating system as a particular form of periodically regenerating system and stipulates that no special test procedure is required for a continuously regenerating system.
- 19 A distinction must therefore be made between a periodically regenerating system and a continuously regenerating system. The special feature of a continuously regenerating system is that regeneration occurs at least once per type 1 test and the device has already regenerated at least once during the vehicle preparation cycle.
- 20 As it is laid down that a continuously regenerating system does not require a special test procedure, Annex 13, paragraph 3 to the UNECE Regulation (in conjunction with Annex III, section 3.13.1 to the implementing regulation) is not applicable. The test procedure provided for in Annex 13, paragraph 3 to the UNECE Regulation therefore applies only to vehicles equipped with a periodically regenerating system, and not to vehicles equipped with a continuously regenerating system. Those connections are undoubtedly confirmed by paragraph 2.20 of the UNECE Regulation (the rules of which are identical in content). That provision expressly provides that Annex 13 to the UNECE Regulation does not apply to continuously regenerating systems. The test procedure provided for in Annex 4A to the UNECE Regulation therefore applies to a continuously regenerating system. In that case, the exhaust gas measurements take place only in the actual test cycle. By contrast, for periodically regenerating systems there are further test cycles (preparation cycle; regeneration cycle).
- 21 1.3 On account of the legal fiction under the second sentence of Annex III, section 3.13.4 to the implementing regulation, according to which the particular form of periodically regenerating system described is to be considered as a continuously regenerating system, it must be assumed for the test operation (on the test bench) that the regeneration system is continuously in operation (throughout). The control of the regeneration process must therefore be disregarded for the exhaust gas measurement, with the result that, in the Supreme Court's view, it must be

assumed that the engine functions (and operates) consistently (uniformly) in respect of measurements.

- 22 If the uniform functioning of the engine applies to the test operation due to the legal fiction described, this must also apply to real-life operation, because a meaningful comparison with real-life operation (with adverse legal consequences in the case of emissions-related changes) is possible only if the same starting conditions exist with regard to the functioning of the emission control system. For this reason, it seems obvious to assume that, in the case of a continuously regenerating system and in real-life operation, the regeneration system operates continuously.
- 23 This would mean that, as a result of a continuously regenerating system, the operation of no part of the emission control system is activated, modulated, delayed or deactivated that reduces the effectiveness of the emission control system in real-life operation. If this approach were followed, such a continuously regenerating system would not be a defeat device within the meaning of Article 3(10) of Regulation (EC) No 715/2007.
- 24 2.1 Questions 2(a) and (b) concern the existence of any justification, even if the existence of a defeat device is to be assumed.
- 25 2.2 Article 5(2)(c) of Regulation (EC) No 715/2007 provides for an explicit ground of justification where, despite the defeat device, the conditions are, in essence, included in the test procedure in question. Annex III, section 3.13.4 to the implementing regulation expressly provides for the use of a Precon (control programme for the regeneration of the catalytic converter in the preparation cycle) and stipulates that, under certain conditions, which are evident in the present case, the regenerating system is to be considered as a continuously regenerating system, with the result that a type 1 test must take place. Accordingly, the test conditions at issue here point to the applicability of a particular approval test (type 1), thus during the preparation cycle regeneration of the pollution control device (catalyst) must occur at least once. If this condition is imposed in the standards for the relevant test procedure, the exemption provided for in Article 5(2)(c) of Regulation (EC) No 715/2007 must also apply.
- 26 2.3 Under Article 5(1) of Regulation (EC) No 715/2007, the components which affect emissions must ensure that the vehicle, even in normal use, complies with Regulation (EC) No 715/2007, thus in particular that limit values are observed. In that connection, in its judgment in Case C-693/18, CLCV, paragraph 99, the European Court of Justice held that Article 3(10) of Regulation (EC) No 715/2007 must be interpreted as meaning that software which alters the level of vehicle emissions according to the driving conditions which it detects and ensures compliance with emission limits only where those conditions correspond to those applied during the approval procedures, constitutes a defeat device, even if an improvement in the performance of the emission control system may also be observed, occasionally, under normal conditions of vehicle use. This means, a

contrario, that a defeat device must be permissible where the emissions performance in the test cycle is, for the most part or in the majority of cases, also present in real-life operation.

- 27 This is the case with the Precon at issue. According to the findings, regeneration takes place twice during the actual test cycle, whereas in real-life operation, in pure mathematical terms, regeneration occurs 2.2 times – at the given regeneration intervals of 5 km over a distance of 11 km (comparable to the test cycle). In real-life operation, the regeneration may therefore also occur three times, in pure mathematical terms, in one out of five cases. On that basis, in real-life operation (in comparison to test operation) it can by no means be assumed that regeneration occurs three times. Regeneration on three occasions is indeed possible – depending on the saturation of the catalytic converter – but it is far more common for regeneration to take place only twice, namely in 80% of cases. In the majority of cases and thus also in real-life operation, regeneration of the catalytic converter occurs in such a way that the conditions are the same as in the test cycle.
- 28 In the opinion of the Supreme Court, if the pollution control device (catalyst) operates in the same way in real-life operation as in test operation 80% of the time, it cannot be said that the emission reduction can be observed only occasionally in real-life operation as well.
- 29 3. Question 3 concerns the applicants' objection that the Precon is not a continuously regenerating system since the existing switch to prevent or permit the regeneration process during the preparation cycle is activated to trigger the regeneration of the catalytic converter and not only to prevent it. This is prohibited under Annex 13, paragraph 3 to the UNECE Regulation (see also paragraph 3).
- 30 Although Annex 13, paragraph 3 to the UNECE Regulation applies to a periodically regenerating system (with the special test procedure under Annex 13 to the UNECE Regulation), it does not apply to a continuously regenerating system (type 1 test under Annex 4A to the UNECE Regulation). For a continuously regenerating system, Annex III, section 3.13.4 to the implementing regulation (the content of which is identical to the third sentence of paragraph 2.20 of the UNECE Regulation) expressly provides that regeneration of the catalytic converter must occur at least once in the preparation cycle also. The fact that such regeneration is deliberately triggered and that the actual test cycle thus starts with an empty catalytic converter is therefore prescribed and not harmful.