

**Case C-388/21**

**Request for a preliminary ruling**

**Date lodged:**

23 June 2021

**Referring court:**

Landgericht Erfurt (Germany)

**Date of the decision to refer:**

17 June 2021

**Applicant:**

A

**Defendant:**

B

---

**Landgericht Erfurt (Regional Court, Erfurt)**  
[...]

**Order**

**for reference to the**

**Court of Justice of the European Union**

In the case of

**A** \_\_\_\_\_  
– Applicant –

[...]

v

**B** \_\_\_\_\_  
– Defendant –

[...]

*seeking compensation in relation to the ‘diesel scandal’*

the Eighth Civil Chamber of the Regional Court, Erfurt [...]

[...]

**made the following order:**

- I. The proceedings are stayed.
- II. The following questions on the interpretation of EU law are referred to the Court of Justice of the European Union pursuant to Article 267 TFEU:
  1. Are Articles 18(1), 26(1) and 46 of Directive 2007/46/EC, read in conjunction with Articles 4, 5 and 13 of Regulation (EC) No 715/2007, also intended to protect the interests of individual purchasers of motor vehicles and their assets? Does this also include the interest of an individual purchaser of a vehicle in not purchasing a vehicle which does not comply with the requirements of EU law, and in particular in not purchasing a vehicle equipped with a prohibited defeat device within the meaning of Article 5(2) of Regulation (EC) No 715/2007?
  2. Does EU law, especially the principle of effectiveness, European fundamental rights and the inherent rights of nature, require that the purchaser of a vehicle have a civil claim for damages against the vehicle manufacturer in the event of any culpable – negligent or intentional – act on the part of the vehicle manufacturer in relation to the 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. Facts and main proceedings**

The main proceedings have been initiated in one of the numerous ‘emissions scandal’ cases brought throughout Europe seeking compensation from manufacturers of vehicles or engines fitted with a prohibited defeat device.

The applicant purchased a used Mercedes-Benz GLK 200 CDI passenger car from a car dealer in July 2017. The vehicle was fitted with an OM 651 diesel engine made by the defendant, which is subject to the Euro 5 emissions standard.

By his action, the applicant seeks an order that the defendant pay EUR 8 457.47 and release him from loan liabilities in the amount of EUR 15 528.32, against return of the vehicle.

The vehicle’s exhaust gas recirculation is controlled in a temperature-dependent manner; that is to say it is reduced at cooler outside temperatures (the ‘temperature window’), which leads to higher NO<sub>x</sub> (nitrogen oxide) emissions.

## **B. Applicable provisions of German law**

The following provisions of German law are material for the purpose of resolving the dispute:

*Paragraph 823 of the Bürgerliches Gesetzbuch (German Civil Code; 'the BGB')  
Liability in damages*

*(1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.*

*(2) The same duty is held by a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault.*

*Paragraph 826 of the BGB Intentional damage contrary to public policy*

*A person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage.*

## **C. Relevance of the questions referred to the decision**

According to the referring court's preliminary assessment, the 'temperature window' of the vehicle at issue is a prohibited defeat device within the meaning of Article 5(2)(a) of Regulation (EC) No 715/2007, read in conjunction with point 10 of Article 3 thereof. The use of such a defeat device raises the question of whether it follows from EU law – by means of a protective or direct effect – that the purchaser of the vehicle has a civil claim even in the event of a merely negligent breach of EU law on the part of the vehicle manufacturer. The success of the present action will depend on the answer to this question, as liability for intentional damage contrary to public policy within the meaning of Paragraph 826 of the BGB should be excluded. The Court of Justice has not yet ruled on this question. Nor is it *acte clair*.

### **1. The first question referred**

The first question seeks to ascertain whether EU law is also intended to protect the individual purchaser of a vehicle containing a prohibited defeat device. In that case, German law grants, on the basis of Paragraph 823(2) of the BGB, a right to compensation in principle.

The defendant's liability in tort may arise from a combined reading of Paragraph 823(2) of the BGB, Articles 18(1), 26(1) and 46 of Directive 2007/46/EC and Articles 4, 5 and 13 of Regulation (EC) No 715/2007. That

presupposes that those provisions, taken individually or as a whole, can be regarded as constituting a ‘protective provision’.

As regards the requirements for a protective provision, the Bundesgerichtshof (Federal Court of Justice, Germany) stated, in its request for a preliminary ruling in the ‘breast implants’ case [...]:

*‘It is settled case-law of the Bundesgerichtshof that a provision is to be regarded as a law conferring protection within the meaning of Paragraph 823(2) of the BGB where, from the point of view of its purpose and content, it is at least in part intended to protect individuals or individual groups of persons against the infringement of a particular legal interest. The decisive factor in this regard is not the effect of the law but its content and purpose, as well as whether, in adopting the law, the legislature had as its intention or one of its intentions to afford to individuals or particular groups of persons the very legal protection sought on account of the infringement alleged. It is sufficient that the provision is intended to protect the contested interest of the individual as well, even if it is primarily concerned with the interest of the general public. On the other hand, the scope of laws conferring protection must not be too extensive. It is not therefore sufficient that the protection of the individual may objectively be achieved as an automatic consequence of compliance with the provision; that protection must rather lie within the purview of the provision. Furthermore, the creation of an individual claim for damages must appear to be meaningful and reasonable in the light of the overall scheme of liability law, it being necessary to examine, as part of a comprehensive assessment of the full legislative context in which the provision in question applies, whether the legislature might have intended to make infringement of the protected interest result in the tortious liability of the party infringing that interest and in all the associated easing of the burden of proof operating to the benefit of the injured party.’*

In the present context, the question therefore arises as to whether, in addition to protecting general interests, the entire body of EU law, in particular Article 18(1) and Article 26(1) of Directive 2007/46/EC and Article 5(2) of Regulation (EC) No 715/2007, is also intended to protect the individual purchaser so as to prevent him or her from purchasing a motor vehicle that does not comply with EU law, in particular a motor vehicle with a prohibited defeat device within the meaning of Article 5(2) of Regulation (EC) No 715/2007.

## **2. The second question referred**

The question also arises as to whether a claim for compensation on the part of the vehicle purchaser arises directly from EU law – irrespective of its protective nature. That could be supported by the principle of effectiveness in conjunction with EU fundamental rights and the inherent rights of nature.

a) The **principle of effectiveness** of EU law requires that the objectives pursued by EU law should not be rendered impossible or considerably more difficult.

The objectives and purposes of EU registration and emissions law can only be effective in practice if infringements are penalised and prevented in future (see also Article 46 of Directive 2007/46/EC). An effective and dissuasive penalty is needed in order to guarantee the objectives of a high level of road safety, health protection, environmental protection, energy efficiency, protection against unauthorised use and consumer protection. The national courts must take account of that (see judgment of 3 October 2013, C-32/12, EU:C:2013:637).

However, both of those aspects – the penalisation and the preventive effect – appear to be called into question in Germany. It has been suggested that Germany has insufficient penalties in place and that there are no penalties in German law that comply with the requirements of EU law. Corporate criminal law is lacking.

In order to compensate for this, the principle of effectiveness could require that any culpable (negligent or intentional) act on the part of vehicle manufacturers with regard to the presence of a defeat device be sanctioned by virtue of the purchaser being able to assert a claim for compensation against the manufacturer on the basis of tortious liability.

b) Like the principle of effectiveness, **EU fundamental rights** could also give rise to a genuinely European claim for damages.

The Charter of Fundamental Rights ('the Charter') – as a *living instrument* – is applicable in this case, that is it is binding on and imposes an obligation on the European Union and its Member States (Article 51(1) of the Charter). The applicability of EU law (in this case motor vehicle registration law) includes and entails applicability of the fundamental rights guaranteed by the Charter (judgment of 26 January 2013, C-617/10, EU:C:2013:105, paragraph 21).

From a substantive perspective, the right to life (Article 2(1) of the Charter) and the right to physical and mental integrity (Article 3(1) of the Charter) are relevant as an 'ecological human right'. As these fundamental rights are closely interwoven with human dignity (Article 1 of the Charter), they produce a direct effect on third parties or horizontal effect [...]. Therefore, they have binding effect between private individuals in a civil dispute (see judgment of 17 April 2018, C-414/16, EU:C:2018:257, paragraph 76 et seq.). That is particularly true in the case of State-like actors having market power. The principles of health protection (Article 35 of the Charter), environmental protection (Article 37 of the Charter) and consumer protection (Article 38 of the Charter), which lay down optimisation requirements, also apply.

All these fundamental rights and principles impose extensive protection (see also *Gerechthof Den Haag* (Court of Appeal, The Hague), judgment of 9 October 2018, 200178.245/01, 'Urgenda'). Ultimately, and essentially, this concerns the

effectiveness – and effective implementation – of European fundamental rights. Under the second sentence of Article 51(1) of the Charter, the Union and the Member States must promote the application of the fundamental rights and principles of the Charter. The purpose of that express obligation to promote the application is to fully realise the fundamental rights and to *optimise* the protection of fundamental rights.

c) **Inherent rights of nature** are also capable of strengthening protection in the emissions scandal cases [...]. Nitrogen oxides are highly polluting (see also judgment of 3 June 2021, C-635/18, EU:C:2021:437, and Opinion of Advocate General Bobek of 10 June 2021, C-177/19, EU:C:2021:476). The emission of highly polluting nitrogen oxides at a higher than permissible rate violates the rights of nature, such as its right to integrity, arising from the application, *mutatis mutandis*, of Article 3 of the Charter.

Such rights of nature can, for example, be derived from the Charter as well as from the European treaties by way of analogy. The open-ended term ‘person’, which is often used in the Charter, also includes nature or individual ecosystems [...]. It would also be contradictory to grant legal subjectivity to artificial intelligence, as intended at European level, but not to ecosystems.

The *significance and urgency* of the environmental challenges make it necessary to recognise the specific rights of nature through the interpretation and application of existing law. EU law is open to this [...].

In any event, there is a fundamental contradiction here: the interests of capital and property interests have been legally codified and safeguarded for centuries [...] (currently cryptocurrencies), while ecological interests have traditionally been neglected. The intrinsic value of nature and the environment and its value for humans – *conditio sine qua non* for the exercise of all human rights – remain disregarded.

The recognition of the rights of nature is a worldwide trend [...].

Standards have been set by constitutions and courts in the Global South, for example in Ecuador and Colombia. For instance, the Colombian Constitutional Court has granted legal personality to a river, the Atrato River, and to the Amazon region in Colombia. There have been similar developments in many other legal systems. This is the case in New Zealand, and currently in Switzerland and Sweden (see also the decision of the Swiss Federal Supreme Court on fundamental rights for primates, judgment of 16 September 2020, 1C\_105/2019).

The EU legal order is also open to international influences. The dynamic flexibility clause in Article 53 of the Charter makes it possible to continue that legal trend on a global scale [...].

In addition, the guarantee of human dignity under the Charter does not militate against, but in favour of recognising the rights of nature. Indeed, the human

dignity enshrined in Article 1 of the Charter and the responsibilities with regard to the human community and to future generations postulated in the preamble mean that it is absolutely essential to recognise the rights of nature in order that future generations can also live a free and self-determined life in dignity.

This will serve not only the intergenerational and intertemporal protection of freedoms, but also the concept of equality established by the Charter. It is consistent with the requirement of solidarity, which permeates the entire Charter. EU fundamental rights – from the right to life to the right to property – and their protective nature give rise to an obligation to recognise the rights of nature.

Reference is also made to similar matters referred for a preliminary ruling in relation to the ‘diesel scandal’, for example by the Landgericht Ravensburg (Regional Court, Ravensburg) [...].

[...] [entitlement to make a request for a preliminary ruling under national law]

The concerns about the independence of the German judiciary set out in the previous reference of 15 June 2020 (case reference: C-276/20) are maintained.

[...]

WORKING DOCUMENT