Case C-178/21

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:

22 March 2021

Referring court:

Landgericht Ravensburg (Germany)

Date of the decision to refer:

9 March 2021

Applicants:

GL

DV

UK

Defendants:

Volkswagen AG

Audi AG

Audi AG

Subject matter of the main proceedings

Defeat devices in diesel vehicles – Compensation – Offsetting of benefits from the actual use made of the motor vehicle – Right of a single judge to request a preliminary ruling

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Questions referred for a preliminary ruling

1. Are Articles 18(1), 26(1) and 46 of Directive 2007/46/EC, read in conjunction with Article 5(2) of Regulation (EC) No 715/2007, also intended to protect the interests of individual purchasers of motor vehicles?

If so:

2. 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?

Irrespective of the answers to Questions 1 and 2:

3. Is it incompatible with EU law if a purchaser who has unintentionally purchased a vehicle placed on the market by the manufacturer with a prohibited defeat device within the meaning of Article 5(2) of Regulation (EC) No 715/2007 is able to assert civil claims for damages against the vehicle manufacturer on the basis of tortious liability – including, in particular, a claim for reimbursement of the purchase price paid for the vehicle against return and transfer of ownership of the vehicle – only in exceptional cases where the vehicle manufacturer has acted intentionally and in a manner contrary to accepted principles of morality?

If so:

4. Does EU law require that the purchaser of a vehicle has a civil claim for damages against the vehicle manufacturer on the basis of tortious liability 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?

Irrespective of the answers to Questions 1 to 4:

5. Is it incompatible with EU law if, under national law, the purchaser of a vehicle must accept offsetting the benefit of the actual use made of the motor vehicle where he or she seeks, by way of compensation based on tortious liability, reimbursement from the manufacturer of the purchase price of a vehicle placed on the market by the manufacturer with a prohibited defeat device within the meaning of Article 5(2) of Regulation (EC) No 715/2007 against return and transfer of ownership of the vehicle?

If not:

6. Is it incompatible with EU law for that benefit of use to be calculated on the basis of the full purchase price without any deduction being made for the reduction in value of the vehicle resulting from its being equipped with a prohibited defeat device and/or in view of the purchaser's unintentional use of a vehicle which does not comply with EU law?

Irrespective of the answers to Questions 1 to 6:

7. Inasmuch as it also refers to orders for reference in accordance with the second paragraph of Article 267 TFEU, is Paragraph 348(3), point 2, of the Zivilprozessordnung (German Code of Civil Procedure; 'the ZPO') incompatible with the right conferred on the national courts to request a preliminary ruling pursuant to the second paragraph of Article 267 TFEU and must it therefore not be applied to orders for reference?

Provisions of EU law relied on

Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive) (OJ 2007 L 263, p. 1), in particular Article 18(1), Article 26(1) and Article 46

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'), in particular Paragraph 823(2) (Duty to provide compensation in the event of an infringement of a provision of law intended to protect another person) and Paragraph 826 (Duty to provide compensation in the event of damage caused intentionally and in a manner contrary to accepted principles of morality)

Zivilprozessordnung (German Code of Civil Procedure; 'the ZPO'), in particular Paragraphs 348 and 348a (Competence of the single judge)

Grundgesetz (German Basic Law; 'the GG'), in particular the second sentence of Article 101(1) (Right to be heard by a court or tribunal established in accordance with the law)

Succinct presentation of the facts and procedure in the main proceedings

1 The present request for a preliminary ruling is based on three different sets of facts.

2 In the first case, the applicant purchased a used vehicle from a car dealership at a price of EUR 31 800 on 16 September 2016. The vehicle was an Audi A5 Cabrio 2.0 TDI Quattro S-Line with an EA189 diesel engine, manufactured by one of the defendants, of emission class EU5. The vehicle was equipped with software that detects the passage of the New European Driving Cycle (NEDC) on the test bench and then switches to an exhaust gas recirculation mode with low nitrogen oxide emissions, whereas, off the test bench, it switches to an exhaust gas recirculation mode in which nitrogen oxide emissions are higher and exceed the limits of the EU5 standard.

3 On 15 October 2015, the competent German authority ordered the defendant to remove the software described above. On 25 November 2015, the defendant publicly announced that it would implement updates to remove the software objected to from the relevant vehicles with EA189 engines. The update was approved by the authority and installed in the vehicle on 12 July 2016, that is to say, before the applicant acquired the vehicle.

4 In the post-update state of the vehicle, it is common ground that it has what is referred to as a temperature window (reduction of exhaust gas recirculation as a function of the ambient temperature), which leads to higher NOx (nitrogen oxide) emissions. The applicant claims that the reduction of exhaust gas recirculation starts at +20 °C, whereas the defendant does not specify a specific temperature threshold.

5 On 17 July 2019, the applicant sold the vehicle for EUR 19 500. By his action, the applicant asserts a claim for compensation of EUR 8 172.51, since the defendant deceived him intentionally and in a manner contrary to accepted principles of morality. That amount was calculated from the difference between the purchase price and sale price (EUR 31 800 – EUR 19 500 = EUR 12 300), minus compensation for the use made of the vehicle, in the amount of EUR 4 127.49 for the 31 086 km driven by the applicant.

6 The defendant contends that the action should be dismissed. It claims that the temperature window is necessary for engine protection and the safe operation of the vehicle. It argues, in the alternative, that the implementation of a temperature window is not to be regarded as an act contrary to accepted principles of morality. The defendant further contends that the applicant is not entitled to compensation solely on account of the resale, nor did he have to accept a price reduction due to the defeat device when he resold the vehicle. The defendant has also raised a plea alleging that the action is time-barred.

7 In the second case also, the vehicle in question, an Audi Q7 Quattro S-Line Diesel of emission class EU5, was equipped with a so-called temperature window, which

leads to higher nitrogen oxide emissions. The applicant acquired the vehicle with an odometer reading of 108 781 km from a car dealership for EUR 30 150.42 net by purchase agreement of 3 March 2017.

8 The applicant alleges that the vehicle was placed on the market with a prohibited defeat device within the meaning of point 10 of Article 3 of Regulation No 715/2007, read in conjunction with the first sentence of Article 5(2) thereof, and that the defendant deceived him intentionally and in a manner contrary to accepted principles of morality and caused him harm. He therefore seeks compensation in the amount of the net purchase price paid – EUR 30 150.42 – minus compensation to the defendant for benefits derived from the use made of the vehicle, to be determined at the court's discretion, but not exceeding EUR 9 798.01, against transfer of ownership and return of the vehicle.

9 The defendant contends that the action should be dismissed. It submits that the reduction of exhaust gas recirculation at lower ambient temperatures corresponded to the state of the art at the time of placing the vehicle on the market and was necessary to protect the engine. In the alternative, the defendant claims that its actions are not to be regarded as being contrary to accepted principles of morality, since it did not in any event deliberately deceive the applicant, because the legal situation regarding the exemption in Article 5(2)(a) of Regulation No 715/2007 had not been clear. Furthermore, the applicant did not suffer any harm, as the vehicle had been in full working order at all times and, moreover, a reduction in value was not apparent.

10 The third case also concerns a vehicle with a diesel engine of emission class EU5 (Audi A6 Avant 3.0 TDI Multitronic) and a temperature window. The applicant purchased the vehicle with an odometer reading of 109 460 km for EUR 24 580 on 8 December 2015.

11 The applicant considers that the defendant deceived him intentionally and in a manner contrary to accepted principles of morality and caused him harm by placing the vehicle on the market with a prohibited defeat device and he therefore seeks compensation in the amount of the gross purchase price paid of EUR 24 580, offsetting compensation for the use made of the vehicle, calculated on the basis of the following formula: 75% x purchase price x (mileage at the time of the oral procedure minus mileage at the time of purchase): (total mileage to be determined at the court's discretion minus mileage at the time of purchase) against return and transfer of ownership of the vehicle. To justify the fact that the compensation for use is based on a proportion of 75% of the purchase price, he states that the purchase price had been excessive due to the defeat device.

12 The defendant contends that the action should be dismissed. It considers that the conditions for entitlement to compensation have not been met and bases that view on the same arguments as those advanced in the second case. With regard to benefits derived from use, the defendant takes the view that they are to be determined on the basis of the gross purchase price.

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

13 Questions 1 to 4: The referring court's findings on Questions 1 to 4 correspond in essence to those on Questions 1 to 4 of the request for a preliminary ruling in Case C-100/21 (see, by analogy, paragraphs 12 to 24 of the summary of the request for a preliminary ruling in Case C-100/21).

14 The referring court considers that the respective applicants could have a potential claim for compensation against the respective defendants pursuant to Paragraph 823(2) of the BGB if Questions 1 and 2 and/or 3 and 4 are answered in the affirmative. There is good reason to believe that such a claim exists in the cases referred.

15 The referring court adds that there is wrongdoing on the part of the defendant because such wrongdoing is subject to an objective standard of care, and there is a duty to stay abreast of the legislation in force. As a matter of principle, it is the obligor itself which bears the risk of being mistaken about the legal situation. This is because the respective defendants had to consider the possibility that their legal view on the temperature window was incorrect. In accordance with the case-law, it is generally the case that an obligor already acts negligently if he or she manifestly operates on the fringes of the legally permissible, whereby he or she must consider the possibility of an assessment of the legal permissibility of the conduct in question which differs from his or her own assessment. The obligated party may not shift the risk of a dubious legal situation to the creditor. Therefore, it can be found that there is negligent conduct in the present cases even if the competent authority granted type approval for a vehicle model or has approved an update and it subsequently emerges that the legal requirements for this were not met.

16 Questions 5 and 6: Should the defendant be liable in principle, the question arises in the second and third cases as to whether and to what extent the benefit of use obtained by the respective applicants is to be offset against the claim for compensation. The findings on Questions 5 and 6 correspond to those on Questions 5 and 6 of the request for a preliminary ruling in Case C-100/21 (see, by analogy, paragraphs 25 to 28 of the summary of the request for a preliminary ruling in Case C-100/21).

17 Should Question 5 be answered in the affirmative, the applicants would not have to accept offsetting of the benefit of use in the second and third cases. Should Question 6 be answered in the affirmative, a reduction in value of the vehicles brought about by the defeat device would have to be determined or estimated and deducted from the sale value. The benefit of use to be offset for the kilometres driven would then have to be based on that value.

18 Question 7: This question, like Question 7 of the request for a preliminary ruling in Case C-100/21, concerns the right of a single judge to refer questions to the

Court of Justice for a preliminary ruling (see also paragraphs 30 to 36 of the summary of the request for a preliminary ruling in Case C-100/21).

19 The referring court states that, pursuant to point 2 of Paragraph 348(3) of the ZPO, in the event that the case has fundamental importance, the original single judge competent in the present case is obliged to refer the case to the chamber, which must then take a decision as to whether it should take over the case. The prevailing view taken in the national case-law and legal literature is that a case has fundamental importance if a referral to the Court of Justice under Article 267 TFEU enters into consideration. The single judge has no discretion in this regard. In the case-law and legal literature, an infringement of Paragraph 348(3) of the ZPO is regarded as an infringement of the constitutional requirement of the right to a tribunal established by law under the second sentence of Article 101(1) of the Grundgesetz (German Basic Law; 'the GG'). If that viewpoint were accepted, the single judge would not have ruled as a tribunal established by law in the present case.

20 Since, on the other hand, the referring court takes the view that, according to the legal situation under EU law, the competent single judge undoubtedly has the right to request a preliminary ruling, it considers that it is necessary that the primacy of Article 267(2) TFEU over point 2 of Paragraph 348(3) of the ZPO be established by the Court of Justice.

21 The reason for this is that the question referred is also of significance for numerous other proceedings pending before single judges in which vehicle owners are seeking compensation from the manufacturer owing to the existence of a defeat device. If the single judge in such cases always had to refer the case to the chamber for a decision as to whether it should take on the case in accordance with point 2 of Paragraph 348(3) of the ZPO, there might never be a referral to the Court of Justice because the chamber could decline to make such a referral on grounds of expediency. The chamber could, for example, decline to make such a referral on the basis of the consideration that it is the Bundesgerichtshof (Federal Court of Justice) at the latest that is obliged to make a referral in accordance with the third paragraph of Article 267 TFEU.

22 Lastly, the referring court points out that all the questions referred are virtually identical to those of the request for a preliminary ruling in Case C-100/21. In addition, Question 1 of the request for a preliminary ruling in Case C-276/20 overlaps in part with Questions 5 and 6 of the present request for a preliminary ruling, with the result that it could be expedient to join the cases for the purposes of the judgment. The requests for a preliminary ruling in Cases C-663/19 and C-138/20, which concerned similar questions, were removed from the register of the Court of Justice as there was no longer any need to adjudicate on them.