

Case C-390/21

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:

25 June 2021

Referring court:

Landgericht Köln (Germany)

Date of the decision to refer:

10 June 2021

Applicants:

ADPA European Independent Automotive Data Publishers Association, internationale Vereinigung ohne Gewinnerzielungsabsicht (international not-for-profit association, IvoG) – Belgian law

Gesamtverband Autoteile-Handel eV

Defendants:

Automobiles PEUGEOT SA

PSA Automobiles SA

Subject matter of the main proceedings

Action brought against the fee charged by the defendants to the publishers of technical information for access to vehicle repair and maintenance information.

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

This request for a preliminary ruling under Article 267 TFEU concerns the interpretation of Article 61(1) and Article 63(1) of Regulation (EU) 2018/858 and of Article 6(1) and Article 7(1) of Regulation (EC) No 715/2007 as regards the detailed rules for access granted by the manufacturer to repair and maintenance information and the fees payable to it in return for said access.

Questions referred for a preliminary ruling

1. Do the provisions of Chapter XIV of Regulation (EU) 2018/858 (Article 61 et seq., including Annex X) also apply to those vehicle models which were type-approved for the first time before 1 September 2020, under Regulation (EC) No 715/2007?

If this question is answered in the negative, additionally:

Does Chapter III of Regulation (EC) No 715/2007 and, in relation to the calculation of fees, specifically Article 7 of Regulation (EC) No 715/2007, still apply in relation to these ‘used vehicles’?

2. Does the concept of ‘access’ to that information, which the manufacturer is required to grant under Article 61(1) of Regulation (EU) 2018/858, include giving the publishers of technical information pursuant to Article 3(45) of Regulation (EU) 2018/858 the authority to use this information for tasks associated with their business in the aftermarket supply chain, or does a right of exploitation of this kind require a separate agreement in the form of an exploitation and republishing licence, which then does not fall within the scope of Article 63 of Regulation (EU) 2018/858 as regards the fees claimed by the manufacturer in this respect?

If the first question referred is answered in the negative, and Chapter III of Regulation (EC) No 715/2007 applies to used vehicles, additionally:

Does the concept of ‘access’ to that information, which the manufacturer is required to grant under Article 6(1) of Regulation (EU) No 715/2007, include giving the publishers of technical information pursuant to Article 3(15) of Regulation (EU) No 715/2007 the authority to use this information for tasks associated with their business in the aftermarket supply chain, or does a right of exploitation of this kind require a separate agreement in the form of an exploitation and republishing licence, which then does not fall within the scope of Article 7 of Regulation (EU) 715/2007 as regards the fees claimed by the manufacturer in this respect?

3. Is the concept of ‘reasonable and proportionate fees’ in the first sentence of Article 63(1) of Regulation (EU) 2018/858 to be interpreted as meaning that the manufacturer must treat all independent economic operators pursuant to Article 3(45) of Regulation (EU) 2018/858 equally when calculating fees, irrespective of their commercial activity?

If the first question referred is answered in the negative, and Chapter III of Regulation (EC) No 715/2007 applies to used vehicles, additionally:

Is the concept of ‘reasonable and proportionate fees’ in the first sentence of Article 7(1) of Regulation (EU) No 715/2007 to be interpreted as meaning that the manufacturer must treat all independent economic operators

pursuant to Article 3(15) of Regulation (EU) No 715/2007 equally when calculating fees, irrespective of their commercial activity?

If the third question referred is answered in the negative:

4. Is the concept of ‘reasonable and proportionate fees’ in the first sentence of Article 63(1) of Regulation (EU) 2018/858 to be interpreted as meaning that the fee should generally only cover the manufacturers’ costs?

If the first question referred is answered in the negative, and Chapter III of Regulation (EC) No 715/2007 applies to used vehicles, additionally:

Is the concept of ‘reasonable and proportionate fees’ in the first sentence of Article 7(1) of Regulation (EC) No 715/2007 to be interpreted as meaning that the fee should generally only cover the manufacturer’s costs?

Provisions of EU law relied on

Recitals 50 and 52, points 2 and 45 of Article 3, Article 61(1), Article 63(1) and points 2.5 and 6.1 of Annex X of Regulation (EU) 2018/858;

Recital 8, Article 3(15), Article 6(1) and (2), Article 7(1) and Article 10 of Regulation (EC) No 715/2007;

Point 2.1 of Annex XIV of Implementing Regulation (EC) No 692/2008.

Provisions of national law relied on

Paragraphs 3(1) and 3a, the first alternative in the first sentence of Paragraph 8(1) and point 2 of Paragraph 8(3) of the Gesetz gegen den unlauteren Wettbewerb (Act Against Unfair Competition, ‘the UWG’);

Succinct presentation of the facts and procedure in the main proceedings

- 1 Applicant 1 is a trade association established under Belgian law for independent publishers of technical information, who receive data from manufacturers and put it into standard formats for their users (such as repair shops). Applicant 2 is a German trade association whose members are wholesalers of replacement parts.
- 2 The defendants are part of automotive group Groupe PSA. They both hold type approvals within the meaning of point 2 of Article 3 of Regulation (EU) 2018/858 and within the meaning of Article 10 of Regulation (EC) No 715/2007 for ‘Peugeot’ brand vehicles.
- 3 The defendants offer access to vehicle repair and maintenance information pursuant to point 2.5 of Annex X of Regulation 2018/858 (formerly Article 6(2) of

Regulation No 715/2007) relating to their type-approved vehicles via a common database that can be accessed via a web portal. The portal is primarily maintained by defendant 1, but this also benefits defendant 2.

- 4 Use of the database is generally offered to independent economic operators in return for a standard fixed fee of varying amounts based on the duration of access, with no other individual variables. In identical circumstances, independent economic operators pay the same fee. In 2019, this was EUR 2 601 for a year's access.
- 5 However, different conditions apply to independent publishers of technical information. The database access agreement, generally concluded annually, grants the respective independent publisher the right to extract the vehicle repair and maintenance information provided and to use it to develop and sell its own information products. In particular, this covers the licensing of information products to undertakings directly or indirectly involved in vehicle repair. The fees charged in return are calculated by the defendants for the respective period for each publisher of technical information individually. The fee is calculated on the basis of the following price formula used by the defendants (the 'Sigma price formula'):

$$y = \sum_{i1}^{i2} \left(\frac{X \times N}{i \times B} \times P \right)$$

- 6 The individual variables are:
- the base price (X), which is the same as the fixed price offered to other independent economic operators;
 - the number of end consumers of the independent publisher of technical information in question ('N');
 - average market share of the vehicle brand over the last 10 years ('P');
 - discount coefficient linked to the number of end users ('i');
 - added value created by processing ('B').
- 7 The price formula ensures that, alongside basic technical and organisational access to the vehicle repair and maintenance information, authorisation of commercial re-use by independent publishers of technical information on the motor vehicle aftermarket is compensated as an additional service. For one independent publisher of technical information, provided as an example, the fee, calculated using the formula, was EUR 137 687.47 for 2019 and EUR 11 000 for 2012 to 2015.

- 8 The applicants dispute the fees charged by the defendants and request that the defendants be ordered to grant publishers of technical information, upon request, access to individually specified categories of repair and maintenance information for use in their own information products in Germany, in return for an annual fee equal to that charged by the defendants to independent repair companies under otherwise identical conditions. In the alternative, they seek access in return for an annual fee, including an appropriate surcharge to be determined at the discretion of the referring court or, as a further alternative, access in return for a fee based on the cost to the defendants of granting access, plus an appropriate surcharge on this cost to be determined at the discretion of the referring court.

Essential arguments of the parties in the main proceedings

- 9 The applicants take the view that they are entitled to a claim for abatement and removal under fair trading laws pursuant to the first alternative in the first sentence of Paragraph 8(1) of the UWG, Paragraphs 3(1) and 3a of the UWG due to an infringement of the provision regulating market conduct in the first sentence of Article 63(1) of Regulation 2018/858 and, where applicable, the first sentence of Article 7(1) of Regulation No 715/2007. The fee calculated by the defendants using the price formula at issue for accessing repair and maintenance information was not reasonable and proportionate within the meaning of the provisions cited.
- 10 Additionally, used vehicles type-approved before 1 September 2020 under Regulation No 715/2007 fell exclusively within the scope of Article 61 et seq. of Regulation 2018/858, and no longer within that of the repealed Article 6 et seq. of Regulation No 715/2007.
- 11 The agreements entered into by the defendants regarding access to their database should in principle be assessed in light of Article 63(1) of Regulation 2018/858, as the fee calculated on the basis of the formula did not cover any service beyond ‘access’ pursuant to Article 61 of Regulation 2018/858. That ‘access’ included a comprehensive legal right of exploitation for independent publishers of technical information, comparable to a ‘compulsory licence’, to be used in tasks associated with their business in the aftermarket supply chain.
- 12 The defendants’ use of the price formula in question also constituted an infringement of Article 63(1) of Regulation 2018/858 and – if applicable – Article 7(1) of Regulation No 715/2007 and thus, in conjunction with Paragraphs 3(1) and 3a of the UWG, an infringement of competition under national fair trading law. This was due, firstly, to the discrimination against independent publishers of technical information in comparison to other independent economic operators, because the former were charged individual fees, specifically based on the individual number of end users, rather than a standard fixed fee. Article 63(1) of Regulation 2018/858 and – if applicable – Article 7(1) of Regulation No 715/2007 required that all independent economic operators be treated equally. Secondly, the fact that the fees charged do not reflect

the actual costs incurred for granting access was also in conflict with those provisions. The link to the individual number of end users was de facto profit sharing, and thus constituted unlawful remuneration for the use of the information. According to Article 63(1) of Regulation 2018/858 and – if applicable – Article 7(1) of Regulation No 715/2007, compensation could only be demanded for the technical and organisational set-up required to provide access. At most, a proportionate profit element, in the form of a surcharge as a percentage of the costs, was compatible with the Regulation.

- 13 The defendants take the view that the applicants had no claim to abatement and removal, on the basis of several points of law.
- 14 Firstly, Article 61 et seq. of Regulation 2018/858 was not applicable to used vehicles that were type-approved before 1 September 2020 under Regulation No 715/2007. Rather, these vehicles still fell within the scope of Article 6 et seq. of Regulation No 715/2007.
- 15 Furthermore, the price formula at issue should not be assessed in light of the first sentence of Article 63(1) of Regulation 2018/858 and Article 7(1) of Regulation No 715/2007, in so far as it compensated for authorising commercial re-use of vehicle repair and maintenance information by publishers of technical information on the motor vehicle aftermarket. The concept of ‘access’ to be granted by the manufacturer within the meaning of Article 61(1) of Regulation 2018/858 and Article 6(1) of Regulation No 715/2007 did not cover an exploitation and republishing licence of this kind for independent publishers of technical information, meaning that the fee calculated using the price formula related to an additional service that the manufacturer was not legally obliged to provide and for which it could freely set the price.
- 16 Irrespective of that, the price formula must, in any event, be considered ‘reasonable and proportionate’ within the meaning of the respective provision. The manufacturer had a margin of discretion when calculating a reasonable and proportionate fee and could take other criteria beyond the actual costs of granting access into account, in particular the extent of use of the information, associated rights to its intellectual property, the database and the volume of services and data.

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

- 17 The decisive factor in determining whether the applicants have a right to a claim for abatement and removal as claimed in the main proceedings pursuant to the first alternative in the first sentence of Paragraph 8(1) and Paragraphs 3(1) and 3a of the UWG is whether there has been an infringement of the provisions regulating market conduct in the first sentence of Article 63(1) of Regulation 2018/858 and, where applicable, the first sentence of Article 7(1) of Regulation No 715/2007.

- 18 The first sentence of Article 63(1) of Regulation 2018/858 and, where applicable, the first sentence of Article 7(1) of Regulation No 715/2007 set out rules of market conduct within the meaning of Paragraph 3a of the UWG. In principle, infringements may be claimed as a breach of fair trading laws, in order to protect consumers, competitors or other market participants in the public interest of undistorted competition, by way of a claim for abatement and removal pursuant to the first alternative in the first sentence of Paragraph 8(1), Paragraph 3(1) and Paragraph 3a of the UWG. The Bundesgerichtshof (Federal Court of Justice, Germany) has already established this in relation to Article 6(1) of Regulation No 715/2007, the equivalent provision which was replaced by Article 61(1) of Regulation 2018/858. According to the referring court, this assessment can be transferred to the first sentence of Article 63(1) of Regulation 2018/858 and, if applicable, Article 7(1) of Regulation No 715/2007.
- 19 In order to rule on the action, it is first necessary to clarify the scope of application of Regulation 2018/858 as regards used vehicles. Only after this clarification can it be established whether Article 61 et seq. of Regulation 2018/858 or Article 6 et seq. of Regulation No 715/2007 can be used as a basis for the claim for abatement and removal brought. Given that both the legal consequences of organising access and the content of the rules relating to fees are different under the two regulations, the applicants' claims can be decided only after clarifying which provisions apply to used vehicles.
- 20 Recital 50 and Article 86(2) of Regulation 2018/858, as well as the fact that Article 6 et seq. of Regulation No 715/2007 has been repealed, support the argument that Article 61 et seq. of Regulation 2018/858 applies to used vehicles. In addition, the manufacturer's obligation to provide access to vehicle repair and maintenance information should be future-oriented and subject to change, and not be bound to the legal situation at the time of type approval. However, this raises several issues that must be taken into account: the protection of the manufacturer's legitimate expectations, the prohibition on retroactivity of EU law, the potential unreasonableness of increasing the obligations (without compensation) applying to used vehicles and the meaning of Article 6(7) of Regulation (EC) No 715/2007.
- 21 It is also necessary to clarify the extent of the 'access' to be granted by manufacturers, specifically whether it covers authorisation for independent publishers of technical information to use the vehicle repair and maintenance information to develop and sell their own information products. If that were not the case, the right of exploitation granted by the defendants would represent an additional service outside the scope of application of the provisions of EU law at issue.
- 22 The fact that the text of the Regulation draws no distinction between access and exploitation supports the interpretation of 'access' as meaning a compulsory licence for independent publishers of technical information. The wording of the second sentence of the second subparagraph of Article 61(2) of Regulation 2018/858 also supports a right of exploitation, as it makes explicit reference to the

obligation to allow ‘independent operators to carry out the tasks associated with their business in the aftermarket supply chain’.

- 23 However, it is also possible to argue, on the contrary, that the provisions cited deliberately leave exploitation rights and the remuneration derived therefrom unregulated, and that these are to be negotiated individually between manufacturers and independent publishers. In this case, Article 61 of Regulation 2018/858 and, if applicable, Article 6 of Regulation No 715/2007 would be deemed to provide solely for the technical configuration of access. The wording of point 6.1 of Annex X of Regulation 2018/858 and, if applicable, point 2.1 of Annex XIV of Implementing Regulation No 692/2008 allows for various different interpretations. It is therefore conceivable that the technical provision of the information alone is to be ‘negotiated directly with the manufacturer concerned’ but the fee to be paid is nevertheless governed by the first sentence of Article 63(1) of Regulation 2018/858. The concept of ‘the right’ may also be understood as meaning that individual negotiation covers all the methods of providing information, including an individual fee for use that can be freely negotiated. Furthermore, it is unclear whether ‘duplicate or republish’ also includes developing a new information product or merely producing simple, identical copies of the database.
- 24 Assuming that independent publishers of technical information have a right to exploitation would be consistent with the objective behind the obligation to provide access to vehicle repair and maintenance information, set out in recitals 50 and 52 of Regulation 2018/858 and recital 8 of Regulation No 715/2007, to create effective competition in the market for vehicle repair and maintenance services and to further develop the internal market for vehicle repair and maintenance services. Allowing manufacturers, as the only source of original information and thus to whom there is no alternative, to freely set their prices might be detrimental to this competition. On the other hand, the Court of Justice has already stated that the regulation’s objectives cannot be achieved by the manufacturer alone (judgment of 19 September 2019, *Gesamtverband Autoteile-Handel*, C-527/18, EU:C:2019:762, paragraph 36).
- 25 Lastly, the question arises as to whether all independent economic operators should always be treated the same way when calculating the fees, irrespective of their commercial activity. The fact that the relevant provisions classify all independent operators as access beneficiaries in a uniform and indiscriminate manner, with the duration of access the only criterion for differentiation, supports the argument for such an equal treatment requirement. However, the ‘reasonable and proportionate’ wording could be said to oppose this view, as it suggests that fees should be calculated on a case-by-case basis. The ‘extent to which the independent operator uses [the information]’, as referred to in the second sentence of Article 63(1) of Regulation 2018/858 and, if applicable, the second sentence of Article 7(1) of Regulation No 715/2007, suggests that an individual assessment criterion should be applied, especially in light of the fact that use under the business model of a publisher of technical information is likely to be more

intensive than, for example, use by independent repair shops which only access the information selectively. Point 6.1 of Annex X of Regulation 2018/858 and, if applicable, point 2.1 of Annex XIV of Implementing Regulation No 692/2008 can be understood as meaning that independent publishers of technical information may be subject to individual terms and conditions, unlike other independent economic operators.

- 26 In so far as the applicants cannot rely on equal treatment compared to other independent economic operators, the question is whether Article 63(1) of Regulation 2018/858 and, if applicable, Article 7(1) of Regulation No 715/2007, require the fee to be calculated in relation to covering costs. The wording of the relevant provisions – ‘the manufacturer may charge [reasonable and proportionate] fees for access’ – implies that the fee is intended to compensate solely for the technical and organisational set-up required to provide access, and would cover neither the economic value of the vehicle repair and maintenance information, nor a share of the respective independent publisher’s commercial success.
- 27 However, it is unclear how relevant the ‘extent to which the independent operator uses [the information]’ is to the calculation of the fees. This could be seen to provide for a restrictive exemption from a fee strictly based on costs for independent economic operators which have a particularly limited range of activity, or for a fee based in principle on the extent of use. The wording ‘reasonable and proportionate’ could also suggest a more flexible approach to fee calculation and is open to interpretation.
- 28 The objective of the regulations, to ensure effective competition on the market for vehicle repair and maintenance information services, militates against the interpretation that Articles 61 and 63 of Regulation 2018/858 are intended to create a source of revenue beyond covering costs. It could also be argued in this regard that commercial success is based primarily on the performance of the independent publisher. The provision of information is intended to facilitate initial entry to the motor vehicle aftermarket and to create equal opportunities for independent and authorised market operators. It is only on that market itself that profits must be made within the framework of effective competition. However, this argument would severely encroach on the manufacturer, as the latter would be deprived of the opportunity to realise the value of its vehicle repair and maintenance information, without any compensation.