

Case C-668/23

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:

13 November 2023

Referring court:

Landgericht Ravensburg (Germany)

Date of the decision to refer:

27 October 2023

Applicants:

YH

JD

CN

XU

LO

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 denied on the grounds

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

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 purchaser if a prohibited defeat device within the meaning of Article 5(2) of Regulation (EC) No 715/2007 is installed by way of a software update when the vehicle is purchased and the vehicle purchaser suffers a loss or damage as a result?

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', if 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 vehicle VW Crafter 2.0 TDI was put on the market with a diesel engine manufactured by the defendant. It is undisputed that exhaust gas recirculation is reduced in the vehicle outside of what is called a 'temperature window' based on falling ambient temperatures. The reduction starts below +15 °C. That results in higher NO_x (= nitrous oxide) emissions during vehicle operations outside of the temperature window. The applicant, who is entitled to deduct input tax, purchased the vehicle with an odometer reading of 145 726 km for EUR 9 242.86.
- 3 The applicant considers himself to have suffered loss or damage inflicted intentionally and in a manner offending common decency because the vehicle contained prohibited defeat devices. The applicant claims that the engine is of the type EA288. The applicant demands payment of EUR 6 868.91 (purchase price less reasonable compensation for use) in return for the handover of and transfer of ownership of the vehicle. In the alternative, he seeks an amount of compensation at the discretion of the court, at least EUR 1 648.50 (= 15% of the gross purchase price of EUR 10 999), plus financing costs of EUR 203.66, and further a

declaration that the defendant must compensate the applicant for the loss and damage suffered by the applicant as a result of the emissions manipulations.

- 4 The defendant applies for the action to be dismissed. The defendant claims that an EA189 engine is installed in the vehicle, which, unlike the other engines of this type, does not have an ‘active switch logic’ like the other EA189 engines. The defendant believes that the temperature window is permissible. It claims in that regard, that the temperature window is necessary to ensure a safe drive mode. 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 vehicle VW Sharan 2.0 TDI was put on the market with a type EA189 diesel engine manufactured by the defendant. The vehicle 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. An update developed by the defendant and approved by the Kraftfahrt-Bundesamt (Federal Office for Motor Vehicles) was installed in the vehicle on 10 April 2017. After the update, a temperature window exists in the vehicle. The reduction of exhaust gas recirculation starts below +15 °C. That results in higher NO_x (nitrous oxide) emissions during vehicle operations outside of the temperature window. The applicant purchased the vehicle with an odometer reading of 59 600 km for EUR 23 950.
- 6 The applicant considers himself to have suffered loss or damage caused by the defendant intentionally and in a manner offending common decency. The applicant demands payment of EUR 23 950 minus reasonable compensation for use in return for the handover of and transfer of ownership of the vehicle. In the alternative, he seeks compensation of between 5% and 15% of the purchase price at the discretion of the court.
- 7 The defendant applies for the action to be dismissed. The defendant considers the temperature window to be permissible and claims that 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).
- 8 Third proceedings: the vehicle 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 approx. 20 km for EUR 44 647. The vehicle has a temperature window. That results in higher NO_x emissions during vehicle operations outside of the temperature window.

- 9 The applicant considers himself to have been deceived in a manner offending common decency and to have suffered loss or damage due to the existence of prohibited defeat devices. In particular, the applicant claims that the vehicle contains a test bench detection system which ensures on the test bench that the exhaust gas recirculation rate is increased until the SCR catalytic converter reaches an operating temperature of +200 °C. He demands compensation of at least 15% of the purchase price, at the discretion of the court and, in the alternative, compensation of between 5% and 15% of the purchase price, at the discretion of the court.
- 10 The defendant applies for the action to be dismissed. It considers the temperature window to be permissible. In that regard, the defendant finally claims that exhaust gas recirculation is reduced below an ambient temperature of 'approx. +12 °C'. The defendant further claims that, unlike some other T6 vehicles, the engine control unit of the vehicle at issue never contained a test bench detection system; rather, the exhaust gas recirculation rate is reduced when the operating temperature of the SCR catalytic converter reaches +200 °C under all driving conditions. 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. 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).
- 11 Fourth proceedings: the vehicle VW Golf 2.0 TDI was put on the market with a type EA288 diesel engine manufactured by the defendant. The vehicle has a test bench detection system. The applicant purchased the vehicle with an odometer reading of 61 911 km for EUR 13 980.
- 12 The applicant considers herself to have suffered loss or damage inflicted intentionally and in a manner offending common decency. She considers the test bench detection system to be prohibited and contends that there is also a prohibited temperature window. The applicant demands payment of EUR 11 039,09 (purchase price less a benefit of use amounting to EUR 2 940,91) in return for the handover of and transfer of ownership in the vehicle and alternatively compensation amounting to EUR 2 097 (= 15% of the purchase price).
- 13 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 regenerates completely before a test drive and regenerates at precisely defined points within the NEDC. That concentrates the measurement process to those NOx emissions that occur during the NEDC. The defendant considers the test bench detection system to be permissible as the deactivation has no measurable effect on the emissions, but in any event the limit values for the emissions are not exceeded. The defendant also considers the temperature window to be permissible. In that regard, the defendant states 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 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).

- 14 Fifth proceedings: the vehicle VW T5 Multivan 2.0 TDI was put on the market with a type EA189 diesel engine manufactured by the defendant. It is not disputed that a temperature window exists. When the vehicle was placed on the market and purchased by the applicant, the reduction of exhaust gas recirculation began at +18 °C. That leads to higher NOx emissions during vehicle operation outside the temperature window. The applicant, who is entitled to deduct input tax, purchased the vehicle with an odometer reading of 9 350 km for EUR 41 974.79 (net).
- 15 The applicant considers the temperature window to be prohibited. The applicant considers himself to have suffered loss or damage caused by the defendant intentionally and in a manner offending common decency. The applicant demands payment of EUR 41 974.79 less compensation for use yet to be quantified, in return for the handover of and transfer of ownership in the vehicle, alternatively payment of EUR 6 296.22 (15% of the net purchase price).
- 16 The defendant applies for the action to be dismissed. The defendant pleads that the claim has become time-barred. The defendant believes that the temperature window is a permissible defeat device because it is necessary to ensure a safe drive mode. It also invokes the fact that a voluntary and free software update to widen the temperature window has been available since 17 October 2022, with the result that after installing that software, exhaust gas recirculation is only reduced once the temperature falls to +9.76 °C. The defendant believes that the applicant is in breach of his duty to minimise the loss or damage suffered if he fails to install that update.
- 17 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).

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

- 18 Introductory remarks: in each of the first, second, third and fifth 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 fourth proceedings, the test bench detection system is a strong indication of the existence of a prohibited defeat device.
- 19 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 +12 °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.

- 20 Furthermore, in the first 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.
- 21 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.
- 22 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.
- 23 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.
- 24 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.
- 25 The right to compensation also requires that the vehicle manufacturer has acted at least negligently with regard to the defeat device. There is a presumption 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.
- 26 In the second 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 probably 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.

- 27 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 right to ‘*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.
- 28 The questions referred in detail: the referring court’s observations in that regard essentially correspond to the observations on the questions referred in the request for a preliminary ruling C-666/23 (cf. paragraphs 25-47 of the summary of that request for a preliminary ruling).