

Case C-308/23

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:

17 May 2023

Referring court:

Landgericht Duisburg (Germany)

Date of the decision to refer:

26 April 2023

Applicant:

YV

Defendant:

Mercedes-Benz Group AG

Subject matter of the main proceedings

Interpretation of Regulation (EC) No 715/2007 with regard to prohibited defeat devices and test bench manipulation in diesel-powered passenger vehicles

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU, in particular

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, pp.1-16) ('Regulation No 715/2007')

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) ('Directive 2007/46')

Questions referred for a preliminary ruling

1. Can an element of design in a vehicle which senses temperature, vehicle speed, engine speed (RPM), transmission gear, manifold vacuum or any other parameter for the purpose of modulating the parameters of the combustion process in the engine depending on the result of the sensing operation reduce the effectiveness of the emission control system within the meaning of Article 3(10) of Regulation No 715/2007 and thus constitute a defeat device within the meaning of Article 3(10) of Regulation No 715/2007 even where the modulation of the parameters of the combustion process effected by the element of design based on the result of the sensing operation increases emissions of a certain harmful substance, such as nitrogen oxide, while at the same time reducing emissions of one or more other harmful substances, such as particulates, hydrocarbons, carbon monoxide and/or carbon dioxide?
2. If Question 1 is to be answered in the affirmative: Under what conditions does the element of design constitute a defeat device in such a case?
3. Can a circuit or controller in a vehicle, which, by modulating the parameters of the combustion process, increases emissions of a certain harmful substance, such as nitrogen oxide, while at the same time reducing emissions of one or more other harmful substances, such as particulates, hydrocarbons, carbon monoxide and/or carbon dioxide, be prohibited under European law from other points of view than that of the presence of a defeat device within the meaning of Article 3(10) of Regulation No 715/2007?
4. If Question 3 is to be answered in the affirmative: Under what conditions is this the case?
5. If Question 1 is to be answered in the affirmative: Under point (a) of the second sentence of Article 5(2) of Regulation No 715/2007 is a defeat device within the meaning of Article 3(10) of that regulation permitted even if, although it is not needed to protect the engine against damage or accident, it is nevertheless needed for the safe operation of the vehicle?
6. If Question 1 is to be answered in the affirmative: Are provisions of national law which place the full burden on the purchaser of a vehicle to prove the presence of a defeat device within the meaning of Article 3(10) of Regulation No 715/2007 and, moreover, also the absence of facts on the basis of which any defeat device in the above sense that may be established is permitted under the exception provided for in point (a) of the second sentence of Article 5(2) of Regulation No 715/2007, even though the vehicle manufacturer does not have to contribute information in this regard in measures of inquiry, contrary to Article 18(1), Article 26(1) and Article 46 of Directive 2007/46/EC cited in the

judgment of the Court of Justice of 21 March 2023 (Case C-100/21), in so far as it follows from the latter provisions that the purchaser of a vehicle must have a right to compensation against its manufacturer in the event that a prohibited defeat device is installed therein (see paragraphs 91 and 93 of that judgment)?

7. If Question 6 is to be answered in the affirmative: What is the allocation of the burden of proof under European law in a dispute between the purchaser of a vehicle and its manufacturer concerning the right of the former to compensation against the latter in respect of the presence of a defeat device within the meaning of Article 3(10) of Regulation No 715/2007 and the existence of facts on the basis of which the latter is permitted under the exception provided for in point (a) of the second sentence of Article 5(2) of Regulation No 715/2007? Do the parties benefit from any relaxations of the burden of proof? If so, which ones? Or do they have any obligations? If so, which ones? If obligations apply: What are the consequences of failing to meet them?

8. If Question 3 is to be answered in the affirmative: Are provisions of national law which place the full burden on the purchaser of a vehicle to prove the presence of a circuit or controller which, although it cannot be qualified as a defeat device within the meaning of Article 3(10) of Regulation No 715/2007, is prohibited for other reasons, even though the vehicle manufacturer does not have to contribute information in this regard in measures of inquiry, contrary to Article 18(1), Article 26(1) and Article 46 of Directive 2007/46/EC cited in the judgment of the Court of Justice of 21 March 2023 (Case C-100/21), in so far as it follows from the latter provisions that the purchaser of a vehicle must have a right to compensation against its manufacturer in the event that a prohibited circuit or controller is installed therein (see paragraphs 91 and 93 of that judgment)?

9. If Question 8 is to be answered in the affirmative: What is the allocation of the burden of proof under European law in a dispute between the purchaser of a vehicle and its manufacturer concerning the right of the former to compensation against the latter in respect of the presence of a prohibited circuit or controller of the type specified in Question 8? Do the parties benefit from any relaxations of the burden of proof? If so, which ones? Or do they have any obligations? If so, which ones? If obligations apply: What are the consequences of failing to meet them?

Provisions of European Union law relied on

TFEU, in particular Article 267 and Article 67(1) and (4)

Regulation No 715/2007, in particular Article 3(10) and point (a) of the second sentence of Article 5(2)

Directive 2007/46, in particular Article 18(1), Article 26(1), Article 46 and Article 3(36)

Provisions of national law relied on

Bürgerliches Gesetzbuch (German Civil Code; ‘the BGB’)

Verordnung über die EG-Genehmigung für Kraftfahrzeuge und ihre Anhänger sowie für Systeme, Bauteile und selbstständige technische Einheiten für diese Fahrzeuge (Regulation on the EC approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles; ‘EG-FGV’)

Facts and procedure

- 1 The applicant seeks compensation in connection with the ‘diesel scandal’.
- 2 On the basis of an order of 14 September 2016 the applicant acquired from the seller, which was not identical to the defendant, a Mercedes Benz vehicle (Mercedes E 220 BlueTec) (‘the vehicle at issue’).
- 3 The vehicle is equipped with an OM 651-type engine intended to meet the requirements of the Euro 6 emission standard. That engine as well as the applicant’s vehicle were developed by the defendant. The vehicle also has a selective catalytic reduction system (‘SCR system’) for exhaust gas aftertreatment.
- 4 The applicant claims, in essence, that the defendant should be ordered to pay him the sum of EUR 21 841.66 plus interest concurrently against transfer and delivery of the vehicle at issue. The defendant contends that the action should be dismissed.

Arguments of the applicant

- 5 The applicant argues, inter alia, that the defendant intentionally caused damage to him and misled him in a manner contrary to public policy and accepted principles of morality. He also has a right derived from Paragraph 823(2) of the BGB in conjunction with Paragraph 6(1) and Paragraph 27 of the EG-FGV, Article 5 of Regulation No 715/2007 and the provisions of Directive 2007/46 vis-à-vis the defendant, because contrary to the certificate of conformity, the applicant’s vehicle does not comply with the applicable law of the European Union.
- 6 At the very least, the vehicle at issue has an illegal defeat device. It detects whether it is on the test bench or in normal use and controls the exhaust gas aftertreatment accordingly. It has a temperature-controlled defeat device, which reacts to the outside temperature. In addition, it detects the NEDC test cycle as opposed to normal driving conditions.
- 7 Based on the different operating conditions detected, the emission aftertreatment is actively enabled or disabled by the engine controller. Defeat devices serve only

to ensure compliance with emission limit values under test conditions in order to obtain type-approval, in particular by altering the exhaust gas recirculation rate.

- 8 The operation of the diesel engine installed in the vehicle at issue is influenced by software which uses data resulting from the measurement of the outside temperature.
- 9 On the test bench the temperature is between 20 °C and 30 °C. If the outside temperature is higher or lower than in the test chamber, the exhaust gas recirculation is reduced or even suspended (temperature window or temperature-controlled defeat device). Accordingly, the nitrogen oxide emissions of the vehicle at issue in normal control mode are considerably higher than reported by the defendant for that series-produced vehicle.
- 10 Furthermore, in the vehicle at issue a 'coolant set-point temperature control' is active on the test bench. That approach ensures that when the NEDC is detected, the engine is kept artificially cooler than under normal operating conditions and thus the limit values for nitrogen oxide are complied with. In contrast, in normal use on the road that function is not active, with the result that the prescribed limit values are exceeded.
- 11 Furthermore, in vehicles fitted with the same engine, the radiator shutter is opened in normal use only when the coolant temperature exceeds 105 °C, but on the test bench it is already opened at a coolant temperature of over 69 °C.
- 12 As the vehicle has an SCR system, AdBlue is added to the exhaust gas via a catalytic converter, which converts nitrogen oxide into harmless substances. During the course of the test cycle the controller detects that the vehicle is on the test bench and a larger quantity of AdBlue is added than during real-life driving.
- 13 Moreover, the defendant has installed the Slipguard, Bit 13, Bit 14 and Bit 15 defeat devices in its vehicle, which also have the effect of ensuring that the vehicle complies with the limit values on the test bench.
- 14 The defendant's board of directors and engineers had known that defeat devices were installed in the engines and that they were then placed on the market by fraudulently obtaining the necessary approvals and authorisations.
- 15 The sales contract for the vehicle at issue is detrimental to the applicant since he has purchased a vehicle that is ineligible to be registered.
- 16 Consequently, taking the kilometres travelled with the vehicle into account, the applicant is entitled to compensation in the amount specified in the form of order sought in the application.

Arguments of the defendant

- 17 The defendant contends, inter alia, that the vehicle has a valid EC type-approval, with no risk of its termination. Nor is there any risk of its de-registration or withdrawal of its national type-approval. The presence of an EC type-approval precludes the assumption of a prohibited defeat device.
- 18 Under the same conditions, all the functions complained of by the applicant work in exactly the same way in normal use on the road as on the test bench.
- 19 Nitrogen oxide emissions, on the one hand, and emissions of other pollutants as well as consumption, on the other hand, are interrelated. Therefore a measure to control emissions leads either to a reduction in nitrogen oxide emissions and, accordingly, at the same time to an increase in other pollutant emissions and consumption, or to an increase in nitrogen oxide emissions, but at the same time also to a reduction in other pollutant emissions and consumption.
- 20 A balance has to be struck between nitrogen oxide emissions and other engine emissions. From a highly simplified point of view, increased nitrogen oxide emissions from the engine are produced at high combustion temperatures, while increased particulate emissions from the engine are produced at low combustion temperatures, which also applies equally to carbon monoxide and hydrocarbon emissions.
- 21 The different conditions for the production of the respective emissions give rise to a trade-off between nitrogen oxide emissions, on the one hand, and emissions of other pollutants and consumption, on the other hand.
- 22 The EU legislature explicitly recognises the trade-off concept by setting combined limit values. Thus for hydrocarbon emissions from diesel vehicles, for example, there is no isolated limit value, but a limit value relating to the sum of the combined hydrocarbon and nitrogen oxide emissions, namely 230 mg/km of hydrocarbon (HC) and nitrogen oxide (NO_x) combined.
- 23 That the emission control system behaves differently under different operating conditions is due to technical and physical reasons, in particular because the trade-off is different when the engine is at operating temperature than when it is warming up.
- 24 The fact that the exhaust gas recirculation system is designed differently for the operating conditions of a ‘cold’ engine and a ‘warm’ engine therefore does not mean, if all emissions limited by limit values are considered, that the effectiveness of the emission control system is reduced in one direction or the other. A comparison of the emissions of a ‘cold’ engine and a ‘warm’ engine is not technically expedient and is therefore not possible.
- 25 When controlling the exhaust gas recirculation rate, the trade-off between particulate and nitrogen oxide emissions must be taken into account.

- 26 Temperature-controlled exhaust gas recirculation is also necessary to protect the engine from damage.
- 27 The regeneration of the diesel particulate filter is associated with increased nitrogen oxide emissions and generally leads to additional emissions.
- 28 The controlled coolant thermostat may reduce emissions in certain operating modes while the vehicle is warming up. Controlling the coolant thermostat can be used to optimise the emission, performance and consumption behaviour of the engine. Therefore that thermostat strikes a relatively better balance between nitrogen oxide emissions and particulate emissions.
- 29 The lower temperature of the components and the better filling of the cylinder chamber with oxygen at cooler temperatures play the decisive role for the ratio of nitrogen oxide emissions to particulate emissions, which is relatively improved by means of the controlled coolant thermostat when the engine is warming up. Once the engine is warm, those influences cease to apply. Continuous use of the function has practically no significant effect here.
- 30 The radiator shutter installed in the vehicle at issue is not part of the emission control system. The functions of the SCR system are not a prohibited defeat device. The defendant rejects the applicant's submission regarding a Slipguard software function. Furthermore, the functions designated by the applicant as Bit 13, Bit 14 and Bit 15 are not present in the vehicle at issue.
- 31 The vehicle complies with the prescribed nitrogen oxide limit values. In that regard, it is the values on the test bench that are relevant. The Kraftfahrtbundesamt (Federal Motor Transport Authority) did not include the vehicle at issue in the recall, because the function of the controlled coolant thermostat is not decisive for compliance with the nitrogen oxide limit values in the NEDC. Even without the controlled coolant thermostat, the nitrogen oxide limit values would be complied with.

Reasoning in the request for a preliminary ruling

- 32 The case is to be referred to the Court of Justice of the European Union ('Court of Justice') with the request for answers to the questions referred for a preliminary ruling pursuant to Article 267 TFEU, inter alia, in the light of its judgment of 21 March 2023 (*Mercedes-Benz Group (Liability of manufacturers of vehicles fitted with defeat devices)*, C-100/21, EU:C:2023:229).
- 33 In any event, the further handling and resolution of the dispute depends, even when taking that judgment into account, on the answer to the first question referred and, if applicable, to the second question referred. It may also depend on the answer to the third question referred and, if applicable, to the fourth question referred. If the first question referred and/or the third question referred are

answered in the affirmative, it is possible that the answers to the fifth to ninth questions may also be relevant.

- 34 It should be considered that the defendant has an obligation to pay compensation under Paragraph 823(2) and Paragraph 31 of the BGB in conjunction with Article 18(1), Article 26(1), Article 46 and Article 3(36) of Directive 2007/46/EC if, at the very least, the defendant's vehicle were to be fitted with a prohibited defeat device within the meaning of Article 3(10) of Regulation No 715/2007 and/or at the very least a circuit or controller affecting its emissions performance which is prohibited for other reasons.
- 35 In that case, the defendant would have issued an incorrect certificate of conformity within the meaning of Article 3(36) of Directive 2007/46. The certificate of conformity stated, in accordance with that provision, that the vehicle complied with all regulatory acts at the time of its production, which would not be the case. The defendant would thus have infringed Article 18(1), Article 26(1) and Article 46 of that directive.
- 36 In the court's view, the defendant should in any event be ordered to pay compensation to the applicant on the merits if a prohibited circuit or controller affecting the latter's emissions is found to exist in the vehicle at issue.

The first and second questions referred for a preliminary ruling

- 37 In so far as the applicant argues that the radiator shutter is a prohibited defeat device, the content of the further decisions to be taken by the court will depend on the answer to the first question referred and, if applicable, to the second to fourth questions referred.
- 38 If it is assumed that an element of design installed in a vehicle senses various parameters within the meaning of Article 3(10) of Regulation No 715/2007 for the purpose of modulating the parameters of the combustion process in the engine depending on the result of the sensing operation, *always* reduces the effectiveness of the emission control system and thus constitutes a defeat device within the meaning of that provision where the modulation of the parameters of the combustion process effected by the element of design based on the result of the sensing operation increases emissions of a certain harmful substance, such as nitrogen oxide, even if at the same time emissions of one or more other harmful substances, such as hydrocarbons, are thereby reduced, it must therefore be assumed that the control of the opening and closing of the radiator shutter in the vehicle at issue constitutes a prohibited defeat device within the meaning of Article 3(10) of Regulation No 715/2007. The action would then, in any event, be largely well founded. There is no need to carry out measures of inquiry in this case.
- 39 The computer controlling the opening and closing of the radiator shutter installed in the vehicle at issue is an element of design within the meaning of Article 3(10)

of Regulation No 715/2007 (see judgment of the Court of Justice of 17 December 2020, *CLCV and Others (Defeat device on diesel engines)*, C-693/18, EU:C:2020:1040, paragraph 68).

- 40 The control of the opening and closing of the radiator shutter is also part of the emission control system, as it exerts a targeted influence on vehicle emissions and thus on the NEDC test cycle.
- 41 The defendant is obliged to pay compensation even if the control of the opening and closing of the radiator shutter discussed above does not constitute a defeat device, but is prohibited for other reasons under EU law.
- 42 In view, for example, of the fact that limit values must be complied with for certain emissions, the court cannot, in particular, rule out the possibility, even in the event that the control of the opening and closing of the radiator shutter at issue here does not constitute a defeat device, that from other points of view of EU law, especially provisions relating to limit values for certain emissions, it may nevertheless be prohibited, at least under certain conditions.
- 43 In particular, it is unclear to the court whether, for example, the limit values for nitrogen oxide emissions set for diesel-powered vehicles apply only if a diesel-powered vehicle is operated after a cold start under NEDC test conditions, or whether those limit values must also be complied with if, for example, a diesel-powered vehicle is operated after a warm start under NEDC test conditions, or also, for example, if a diesel-powered vehicle is operated after a cold start at an outside temperature of, for example, 15 °C and also under NEDC test conditions, and therefore a controller or circuit which prevents this is prohibited.
- 44 If, on the other hand, it is assumed that an element of design installed in a vehicle senses various parameters within the meaning of Article 3(10) of Regulation No 715/2007 for the purpose of modulating the parameters of the combustion process in the engine depending on the result of the sensing operation, *does not* reduce the effectiveness of the emission control system *or does so only under certain conditions* and thus constitutes a defeat device within the meaning of that provision where the modulation of the parameters of the combustion process effected based on the result of the sensing by the design element increases emissions of a certain harmful substance, for example nitrogen oxide, at the same time the emissions of one or more other harmful substances, such as particulates, hydrocarbons, carbon monoxide and/or carbon dioxide, are reduced, and that also from other points of view of EU law such an element of design is not prohibited or is so only under certain conditions, then the situation may be different, with the result that it cannot automatically be assumed to be a defeat device within the meaning of Article 3(10) of Regulation No 715/2007.
- 45 According to the defendant's argument, which is also largely borne out by experts' statements that have become known in other proceedings before the court, under otherwise constant conditions, although lowering the combustion

temperature reduces nitrogen oxide emissions, on the one hand, it increases emissions of other harmful substances, on the other hand, while raising the combustion temperature increases nitrogen oxide emissions, but reduces emissions of other harmful substances.

- 46 If, for those reasons, the control of the opening and closing of the radiator shutter were not to constitute a defeat device and if, for other reasons, that control were not to be prohibited either, the defendant could not be ordered to pay compensation to the applicant on account of the functioning of the radiator shutter.

The other questions referred for a preliminary ruling

- 47 The court does not fail to recognise that the answers requested from the Court of Justice to the first and second questions referred for a preliminary ruling may make it possible to finally resolve the dispute.
- 48 However, it considers that it is not in a position to set out conditions under which it can already be reliably determined at this stage that the resolution of the dispute is possible or impossible without the answer to the third question referred and, if applicable, to the fourth question referred. The court therefore considers it necessary additionally to refer the third to ninth questions to the Court of Justice for a preliminary ruling.
- 49 On account of the present request for a preliminary ruling, a procedural delay of at least two years is to be expected before the Court of Justice delivers its judgment. The parties cannot reasonably be expected to wait until a later stage of the proceedings to raise these questions owing to the new delays in the proceedings associated with making a further request for a preliminary ruling to the Court of Justice, which are likely to be at least two years.
- 50 The corresponding questions can easily be answered in the forthcoming judgment of the Court of Justice. It would be incompatible with the effective legal protection which is granted in an area of freedom, security and justice (see Article 67 TFEU) not to raise the third to ninth questions referred for a preliminary ruling in the context of the present request.
- 51 As the third to ninth questions referred may need to be answered, for reasons of procedural economy and effective legal protection it is thus expedient and, in the view of the referring court, also admissible, to already ask them at this stage.

The third and fourth questions referred for a preliminary ruling

- 52 The dispute cannot be resolved without the answer to the first question referred for a preliminary ruling and, if applicable, the second to fourth questions referred.

- 53 The court is aware of the case-law of the Court of Justice from the judgments of 14 July 2022 (*GSMB Invest*, C-128/20, EU:C:2022:570, and *Volkswagen*, C-134/20, EU:C:2022:571, see also the judgment of 17 December 2020, *CLCV and Others (Defeat device on diesel engines)*, C-693/18, EU:C:2020:1040), according to which temperature control of the exhaust gas recirculation which ensures compliance with the emission limit values laid down in Regulation No 715/2007 only within the temperature window, constitutes a defeat device within the meaning of Article 3(10) of that regulation and is permitted only under strict conditions.
- 54 It can be inferred, *mutatis mutandis*, from the judgment of the Court of Justice of 17 December 2020 (*CLCV and Others (Defeat device on diesel engines)*, C-693/18, EU:C:2020:1040) that if the operation of the exhaust gas recirculation valve in normal conditions of use had been identical to its operation during the approval procedures, the carbon dioxide emissions of the vehicles would have also been reduced.
- 55 Paragraph 36 of the judgment of the Court of Justice of 14 July 2022 (*GSMB Invest*, C-128/20, EU:C:2022:570) states: ‘Consequently, where it acts on the operation of the emission control system and reduces its effectiveness, such software constitutes an “element of design” within the meaning of that provision’. This same finding appears in the judgments of the Court of Justice of 14 July 2022 (*Volkswagen*, C-134/20, EU:C:2022:571, paragraph 43) and of 17 December 2020, (*CLCV and others (Defeat device on diesel engines)*, (C-693/18, EU:C:2020:1040, paragraph 66)). The judgment of the Court of Justice of 21 March 2023 (*Mercedes-Benz Group (Liability of manufacturers of vehicles fitted with defeat devices)*, C-100/21, EU:C:2023:229, paragraph 58) also concerned defeat devices. The Court of Justice did not address the particular issue that is the subject of the present case in any of those judgments.
- 56 In its judgments concerning temperature-regulated control of exhaust gas recirculation, the Court of Justice has not yet made any findings, at least expressly, on the conditions under which – taking into account the relevant opposite effects on emissions of various harmful substances – the effectiveness of the emission control system within the meaning of Article 3(10) of Regulation No 715/2007 is reduced by a modulation of the operation of a part of the emission control system.
- 57 Accordingly, also taking into account the previous case-law of the Court of Justice, the present request for a preliminary ruling is necessary.
- 58 In view, for example, of the fact that limit values must be complied with for certain emissions, the court cannot, in particular, rule out the possibility, even if the control of the exhaust gas recirculation and of the coolant set-point temperature at issue here does not constitute a defeat device, that from other points of view of EU law it may be prohibited, which could result in the defendant being obliged to pay compensation to the applicant.

- 59 The court therefore also considers it necessary, with respect to the temperature-dependent control of the exhaust gas recirculation carried out in the vehicle at issue, additionally to refer the corresponding third and fourth questions to the Court of Justice for a preliminary ruling.
- 60 The applicant's further submission regarding the addition of AdBlue, the Slipguard, Bit 13, Bit 14 and Bit 15 defeat devices as well as the Slipguard function is not capable of demonstrating the presence of a prohibited defeat device.
- 61 The defendant's argument that the existence of the valid EC type-approval precludes the assumption of a prohibited defeat device does not allow the action to be dismissed without answering the questions referred. The EC type-approval may be revoked, if it does not correspond to the legal situation.

The fifth question referred for a preliminary ruling

- 62 In so far as the chamber concludes, on the basis of the answers requested from the Court of Justice to the first and second questions referred for a preliminary ruling, that a defeat device is installed in the applicant's vehicle, the question arises as to whether it is prohibited.
- 63 The defeat device may not be prohibited if the temperature-dependent control of the exhaust gas recirculation is necessary, with the result that the fifth question referred for a preliminary ruling is raised.
- 64 The court understands the reasoning of the Court of Justice in the judgments of 14 July 2022 (*GSMB Invest*, C-128/20, EU:C:2022:570, paragraph 61, and *Volkswagen*, C-134/20, EU:C:2022:571, paragraph 73) to mean that a defeat device is not permitted even if, although it is not needed to protect the engine against damage or accident, it is nevertheless needed for the safe operation of the vehicle.
- 65 The specific background to the question raised by the court arises from the fact that, according to statements by experts in another court case, the excessive formation of soot particles can, in very rare cases, lead to the diesel particulate filter igniting during the regeneration process and to a vehicle catching fire. As the diesel particulate filter is not a component of the engine, a negative answer to the fifth question referred would mean that this aspect would not need to be further addressed when examining whether any defeat device in the vehicle at issue in the present case is permissible.

The sixth to ninth questions referred for a preliminary ruling

- 66 The reasoning of the Court of Justice in its judgment of 21 March 2023 (*Mercedes-Benz Group (Liability of manufacturers of vehicles fitted with defeat devices)*, C-100/21, EU:C:2023:229, paragraph 93) calls for an examination of

whether the allocation of the burden of proof provided for under German law in connection with defeat devices is compatible with EU law.

- 67 Under German law the burden of proof is allocated in such a way that the purchaser of the vehicle has to prove to the full extent that all factual conditions for the presence of a defeat device are met. He or she has to prove the existence of damage as well as the breach of a rule conferring legal protection. Both presuppose, if the first question referred for a preliminary ruling is answered in the negative, that a defeat device is installed. Moreover, the provisions of Directive 2007/46 at issue, which offer individual protection to any purchaser of a vehicle for which a certificate of conformity must be issued, constitute such a rule conferring legal protection.
- 68 Without submission of documentation and disclosure of programming, in respect of which the defendant is not in principle under any obligation under German law, the presence of a defeat device can be proven only by actual tests based on the ‘trial and error’ principle, which are very expensive.
- 69 Measures of inquiry with regard to the presence of a defeat device are expected to cost at least EUR 10 000. If the measures of inquiry have to be expanded, they may become much more expensive. Purchasers who do not have legal expenses insurance will often be unable to raise the advances on costs which are required under the German law of civil procedure for carrying out measures of inquiry, or are able to do so only with difficulty, and may refrain from asserting their rights.
- 70 If measures of inquiry have to be carried out even in respect of a defeat device which is exceptionally permitted under point (a) of the second sentence of Article 5(2) of Regulation No 715/2007, in many cases, the purchaser will certainly be unable to adduce proof to the contrary in practice, required of the purchaser under German law, in particular if he or she does not have any documents and the programming is not known.
- 71 This means that, in a significant number of cases in any event, it is to be expected that purchasers may not be able to exercise the rights deriving from Article 18(1), Article 26(1), Article 46 and Article 3(36) of Directive 2007/46 to which they are entitled under the case-law of the Court of Justice (judgment of 21 March 2023, *Mercedes-Benz Group (Liability of manufacturers of vehicles fitted with defeat devices)*, C-100/21, EU:C:2023:229).
- 72 If there should be further measures of inquiry, however, the questions arise as to from whom the advance on costs for the measures of inquiry, which is likely to be high, is to be claimed and to whose detriment, if any, it is if specific facts requiring proof cannot be established.