Case C-251/23

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:

19 April 2023

Referring court:

Landgericht Duisburg (Germany)

Date of the decision to refer:

5 April 2023

Applicant:

OB

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 manipulation in diesel-powered passenger vehicles

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

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. 1-16) (‘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')

Commission Regulation (EC) No 692/2008 of 18 July 2008 implementing and amending Regulation (EC) No 715/2007 of the European Parliament and of the Council 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 2008 L 199, p. 1) ('Regulation No 692/2008')

Council Directive 80/1268/EEC of 16 December 1980 on the approximation of the laws of the Member States relating to the fuel consumption of motor vehicles (OJ 1980 L 375, p. 36) ('Directive 80/1268/EEC')

Commission Directive 1999/100/EC of 15 December 1999 adapting to technical progress Council Directive 80/1268/EEC relating to the carbon dioxide emissions and the fuel consumption of motor vehicles (OJ 1999 L 334, p. 36) ('Directive 1999/100/EC')

Questions referred for a preliminary ruling

The case is to be referred to the Court of Justice of the European Union ('Court of Justice') pursuant to Article 267 TFEU with a request, however, that Questions 2 to 5 below be answered only if Question 1 is to be answered in the negative:

1. Is a diesel-powered passenger vehicle to which the Euro 5 emissions standard applies contrary to the rules of European law, irrespective of whether a switching device that is to be classified conceptually as a defeat device within the meaning of Article 3(10) of Regulation No 715/2007 is installed in its control system, if it is clear from the outset, on the basis of its design and the control system for the installed functions, that after the engine has warmed up it emits more than 180 mg of nitrogen oxide per km in the 'mix' even if it completes a NEDC test run in that state?

2. 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 results 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 therefore 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 results 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?

3. If Question 2 is to be answered in the affirmative: Under what conditions does the element of design in such a case constitute a defeat device within the meaning of Article 3(10) of Regulation No 715/2007?

4. If Question 2 is to be answered in the affirmative: Are rules of national law which require the purchaser of a vehicle to the full extent to prove the presence of a defeat device within the meaning of Article 3(10) 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 the provisions of Article 18(1), Article 26(1) and Article 46 of Directive 2007/46, which are mentioned in 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), in so far as it follows from those provisions that the purchaser of a vehicle must, in the event that a prohibited defeat device is installed in it, have a right to compensation against its manufacturer (see paragraphs 91 and 93 of that judgment)?

5. If Question 4 is to be answered in the affirmative: What allocation of the burden of proof is provided for under European law in a dispute between the purchaser of a vehicle and its manufacturer regarding the former's right 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? Do the parties each benefit from a lighter burden of proof or are they subject to obligations where applicable and, if so, which? If obligations do apply, what are the consequences of non-compliance?

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 Article 5(1)

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

Regulation No 692/2008, in particular Article 3(9)

Provisions of national law relied on

Bürgerliches Gesetzbuch (Civil Code, BGB)

Facts and procedure

1 The applicant is claiming compensation from the defendant in connection with the acquisition of a vehicle from a car dealer on the ground that the vehicle has

prohibited defeat devices within the meaning of Article 5(2) of Regulation No 715/2007.

2 The applicant acquired the used motor vehicle, a Mercedes Benz GLK 200 CDI ('the vehicle at issue'), for EUR 23 700 by purchase agreement of 25 May 2016, with an odometer reading of 39 000 km. According to the purchase agreement, the vehicle was registered for the first time on 21 November 2012.

3 An OM 651 diesel engine manufactured by the defendant is installed in the vehicle. This engine purportedly complies with the rules for the Euro 5 emissions standard.

4 No selective catalytic reduction catalyst ('SCR catalyst') was installed in the vehicle with the result that there is no exhaust gas aftertreatment by means of a SCR catalyst.

5 On 2 May 2019, a software update was installed in the applicant's vehicle.

6 The applicant asserts that the defendant is liable to pay him compensation. He claims, in essence, that the defendant should be ordered to pay him EUR 23 700 concurrently against delivery and transfer of the vehicle at issue and payment of compensation for use of EUR 953.35. The defendant contends that the action should be dismissed.

– ***Arguments of the applicant***

7 The applicant argues that the OM 651 engine series contains unlawful defeat devices and unlawful temperature windows.

8 In order to lower exhaust gas emissions software was used which detects test operation and then switches to a different operating mode producing lower exhaust gas emissions. The software in the engine series has two different operating modes to control exhaust gas recirculation. In the case of the artificial driving cycle set for testing under laboratory conditions, the software switches to an operating mode with lower nitrogen oxide emissions. This software is used in all OM 651 engines.

9 In order to lower exhaust gas emissions a 'temperature window' was also used. This ensures that exhaust gas recirculation, the purpose of which is to lower nitrogen oxide emissions, is reduced at low outside temperatures. At outside temperatures of 9 °C and below, exhaust gas recirculation is reduced or switched off completely with the result that nitrogen oxide emissions increase significantly. That device is unlawful.

10 The engine has a 'Bit 15' function which switches off exhaust gas cleaning after 26 km. In addition, because of a defeat device the efficiency of exhaust gas cleaning is diminished once the engine has emitted 17.6 grams of nitrogen oxide after being started. Furthermore, after 1 200 seconds the engine control system

also switches to ‘dirty’ mode, an operating mode in which more pollutants are emitted.

11 The software update resulted in a further defect because it did not rectify the original defect of an illegal defeat device. Instead, the software update resulted in a further defect in the vehicle in the form of a deterioration in nitrogen oxide emissions.

12 Fuel consumption and exhaust gas emissions for the engine are above the figures given in the brochure based on measurements in accordance with Directive 80/1268/EEC as amended by Directive 1999/100/EC. The additional consumption in normal operation on the road is on average two litres per 100 km driven and is an indication that a defeat device is present.

13 The defendant took a deliberate decision to use the prohibited defeat device.

14 The deception on the part of the defendant was the cause of the decision to purchase by the applicant, who suffered damage as a result of the acquisition of the vehicle, which does not comply with statutory requirements.

15 Based on a minimum total running distance of 500 000 km and the odometer reading when the action was brought, compensation for use is calculated at EUR 953.35.

– ***Arguments of the defendant***

16 The defendant argues, in essence, that it neither intentionally caused damage to the applicant nor deceived him.

17 The vehicle has a valid EC type approval and can be used without restriction. For that reason there is no damage, especially since the vehicle at issue has already had a software update and a prohibited defeat device can therefore no longer be present. The purchase agreement was not economically disadvantageous for the applicant. There is no reduction in the value of the vehicle on account of the alleged defects. It complies with nitrogen oxide limits in the statutory test. That is the only material factor.

18 In this case there is no test manipulation such as has clearly been found in judicial rulings for vehicles from the VW Group. The vehicle at issue is not fitted with a manipulative switching device which detects the test bench and accordingly produces different emissions performance on the test bench than on the road.

19 Neither the temperature-dependent exhaust gas recirculation control system nor the regulated coolant thermostat in the vehicle constitutes a defeat device.

20 The necessary means of determining the efficiency of an emission control system cannot at the same time be a defeat device.

21 Exhaust gas recirculation must be controlled, in the light of the overall conditions, in order to achieve a sufficient reduction of all relevant emissions, to prevent damage to the engine and the exhaust system and to guarantee the safe operation of the system.

22 A balance must be struck between nitrogen oxide emissions and other emissions from the engine. There is a 'trade-off' between nitrogen oxide emissions and particulate emissions. The trade-off between different pollutants plays a central role in the design of the emission control system. The European legislature has expressly recognised the idea of a trade-off by laying down combined limits.

23 The emission control system behaves differently in different operating conditions as a result of technical and physical factors. Emission levels for cold and warm engines are not meaningfully comparable. The basic technical configuration of the emission control system is in any event not a defeat device if the design is based on technical factors, that is to say, it constitutes a technically reasonable design of the emission control system and the conflict of aims in lowering the emissions in question has been resolved in an acceptable manner.

24 Assessing the basic design of an emission control system by reference to the prohibition of defeat devices would produce the absurd result that manufacturers would refrain from running emission control systems in optimal conditions with increased efficiency as, on that basis, operation with lower efficiency would always constitute a defeat device requiring justification, which, in the applicant's view, would have to be justified by narrowly construed grounds related to engine protection.

25 The statements made by the applicant regarding the temperature-dependent exhaust gas recirculation control system do not indicate that a prohibited defeat device is present. The legislature did not envisage that the emission control system must function with the same effectiveness in all temperatures.

26 The fact that different exhaust gas recirculation rates actually apply in the case of a warmed-up engine than during the warming-up of the engine, for example, is due to technical and physical factors and does not indicate manipulation. The efficiency of the emission control system is in fact determined only by the temperature-dependent exhaust gas recirculation control system.

27 The regulated coolant thermostat is not a prohibited defeat device because it operates in the same way in principle on the test bench and on the road. In the case of a warmed-up engine, the regulated coolant thermostat does not influence the effectiveness of the emission control system in accordance with Article 3(10) of Regulation No 715/2007.

28 The technical circumstances in respect of the regulated coolant thermostat, exhaust gas recirculation rates and the cold and warmed-up phases are taken into account in the design of the regulated coolant thermostat in the vehicle at issue. That design complies with the applicable regulatory requirements.

29 Coolant thermostat regulation is a technically reasonable, permitted measure and it therefore does not constitute a defeat device. In any case, however, it is justified from the points of view of the protection of the engine and components and the safe operation of the vehicle to design coolant thermostat regulation in such a way that its scope is limited.

30 The applicant's arguments regarding certain functions are incorrect. Those functions are not active in the vehicle at issue. In particular, there is no function to ensure that exhaust gas cleaning is switched off after 26 km, no function to ensure that exhaust gas cleaning is switched off after 1 200 seconds and no function whereby exhaust gas cleaning is switched off after 17.6 grams of nitrogen oxide have been emitted.

31 The defendant has taken a defensible legal opinion with regard to nitrogen oxide emissions and conformity with the law which rules out intent and breach of accepted principles of morality. It was permitted to consider that temperature-dependent exhaust gas regulation does not constitute a defeat device, but is in any event permitted for reasons related to the protection of the engine.

32 The average expected total running distance of the vehicle at issue is 200 000 km.

33 The court has thus far taken evidence by obtaining a written expert report on the basis of the order relating to measures of inquiry of 12 November 2021.

– ***Reasoning in the request for a preliminary ruling***

34 The case is to be referred to the Court of Justice pursuant to Article 267 TFEU with a request for answers to the questions referred for a preliminary ruling.

35 The outcome of the proceedings depends on the answer to the first question referred. If the first question is answered in the negative, the second and third questions are also relevant. It is possible in practice, but not yet certain, that the answers to the fourth and fifth questions are also relevant.

36 The answers to the questions referred will determine whether it is necessary to find against the defendant and whether and, as the case may be, on which claims measures of inquiry must first be carried out, and furthermore, to whose detriment it is if contested facts relevant to the decision remain unresolved and who is required to pay an advance on any costs incurred in connection with measures of inquiry.

37 The applicant has a right to payment of compensation under Paragraph 823(2) of the BGB in conjunction with Article 18(1), Article 26(1), Article 46 and Article 3(36) of Directive 2007/46 if the vehicle at issue does not comply with the rules of EU law governing its emissions and/or a prohibited defeat device within the meaning of Article 3(10) of Regulation No 715/2007 is installed in the vehicle. In that case the defendant would have issued an inaccurate certificate of conformity within the meaning of Article 3(36) of Directive 2007/46.

38 In the view of the court, the defendant must be ordered, at least in principle, to pay compensation to the applicant if it is contrary to the rules on EU law on exhaust gases that when a NEDC test run is conducted with a warmed-up engine the applicant's vehicle emits more than 180 mg of nitrogen oxide per kilometre in the 'mix' and/or there is a prohibited switching device or control system in the vehicle which affects the vehicle's emissions.

The first question referred for a preliminary ruling

39 The court considers it possible that the vehicle at issue infringes provisions of EU law, in particular Article 5(1) of Regulation No 715/2007, because, according to the measures of inquiry carried out thus far, if the engine is started in an already warmed-up state, it emits more than 180 mg of nitrogen oxide per kilometre even when a NEDC test run is conducted. However, it is not certain of this.

40 The court takes into account, on the basis of the previous judgments of the Court of Justice, that the nitrogen oxide limit in accordance with the Euro 5 emissions standard applies even where a diesel-powered passenger vehicles completes a NEDC test run with an already warmed-up engine, as in this case.

41 First, it is stated in the judgment of the Court of Justice of 14 July 2022 (*GSMB Invest*, C-128/20, EU:C:2022:570) that under Article 5(1) of Regulation No 715/2007 the manufacturer is to equip vehicles so that the components likely to affect emissions enable the vehicle, in normal use, to comply with the emission limits laid down by that regulation and its implementing measures. Because driving after a 'warm start' of the engine is certainly one of the common uses of a diesel-powered passenger vehicle within the territory of the European Union, this could mean that the limit of 180 mg/km for nitrogen oxide emissions for diesel-powered passenger vehicles covered by the Euro 5 emissions standard applies even where they complete a NEDC test run after a warm start of the engine.

42 Second, there were no absolute limits under the Euro 5 emissions standard. Instead, limits were set and compliance was verified in a test run in accordance with NEDC requirements which – at least that is how the limit requirements can be understood – had to be complied with in such a test run only under the conditions in which a NEDC test run was conducted.

43 One of the conditions for a NEDC test run is that it is conducted after a cold start. According to the facts presented, a high combustion temperature is counterproductive for low nitrogen oxide emissions. A warm start has adverse effects on nitrogen oxide emissions because of the resulting increase in combustion temperatures.

44 The question therefore arises whether the nitrogen oxide limit in accordance with the Euro 5 emissions standard must also be complied with if a vehicle completes a NEDC test run after a warm start rather than after a cold start. Even though the findings of the Court of Justice in the judgments of 14 July 2022 (*GSMB Invest*,

C-128/20, EU:C:2022:570, and *Volkswagen*, C-134/20, EU:C:2022:571) could mean that this is the case, the court cannot infer this clearly from the judgments and it is therefore necessary to request a ruling from the Court of Justice.

45 If the first question referred for a preliminary ruling is answered in the affirmative, the vehicle at issue does not comply with the requirements of EU law. In that case, the defendant is liable vis-à-vis the applicant for the resulting damage. There is then no need to answer the other questions set out in the operative part, at least as matters stand at present.

The second, third and fourth questions referred for a preliminary ruling

46 If the first question is answered in the negative, any liability on the part of the defendant vis-à-vis the applicant depends on whether a prohibited defeat device within the meaning of Article 3(10) of Regulation No 715/2007 is installed in the vehicle at issue. The answer to that question is critical for the final assessment of the dispute.

47 The following specific points should be made with regard to the second, third and fourth questions referred for a preliminary ruling.

The question whether the temperature window constitutes a prohibited defeat device

48 The applicant has made the submission, which has not been disputed in essence by the defendant, that in order to lower exhaust gas emissions a prohibited temperature window was used which, at low outside temperatures, reduces or switches off completely exhaust gas recirculation, the purpose of which is to lower nitrogen oxide emissions, with the result that nitrogen oxide emissions increase significantly.

49 The computer which controls the opening of the exhaust gas recirculation valve is an element of design within the meaning of Article 3(10) of Regulation No 715/2007. Exhaust gas recirculation, the operation of which is modulated and, if necessary, activated or deactivated by the extent to which the exhaust gas recirculation valve is open or closed, is a part of the emission control system (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, paragraphs 68 and 90). The amount of exhaust gas fed back to combustion through exhaust gas recirculation is controlled inter alia on the basis of temperature.

50 If it is assumed that an element of design integrated 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 results of the sensing operation *always* reduces the effectiveness of the emission control system and therefore 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 results 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, a defeat device within the meaning of Article 3(10) of Regulation (EC) No 715/2007 must therefore be taken to exist.

51 If, on the other hand, it is assumed that an element of design integrated 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 results of the sensing operation, *does not* reduce the effectiveness of the emission control system *or does so only under certain conditions* and therefore constitutes a defeat device within the meaning of that provision even where the modulation of the parameters of the combustion process effected by the element of design based on the results of the sensing operation increases emissions of a certain harmful substance, such as nitrogen oxide, but at the same time emissions of one or more other harmful substances, such as hydrocarbons, are thereby reduced, it is possible that a defeat device within the meaning of Article 3(10) of Regulation (EC) No 715/2007 cannot automatically be taken to exist.

52 According to the factual submissions made thus far, the combustion temperature is governed by the amount of exhaust gas fed back into combustion. If the combustion temperature rises, the vehicle's nitrogen oxide emissions increase. By contrast, at a higher combustion temperature consumption is reduced, together with carbon dioxide emissions, which are proportional to consumption, as well as emissions of carbon monoxide, hydrocarbons, particulates and climate-damaging methane.

53 According to the expert report, the expert conducted two NEDC test runs. The first test run took place immediately after a cold start of the engine. The second test run took place when the engine had largely warmed up and therefore had a higher combustion temperature.

54 The court infers from the readings taken in those two test runs that if nitrogen oxide emissions are reduced by lowering the combustion temperature, through exhaust gas recirculation for example, one disadvantage in the form of nitrogen oxide emissions is replaced by another disadvantage in the form of higher emissions of carbon dioxide (CO2), carbon monoxide (CO), hydrocarbons (HC), particulates and methane (CH4).

55 The court is not able to assess which of those disadvantages is preferable and in which of the two test runs the effectiveness of the emission control system was higher or lower than in the other. It is for the Court of Justice to make that assessment, which must be carried out on the basis of EU law.

56 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) according to which temperature-based regulation of exhaust gas recirculation, which guarantees compliance with the emission limits laid down in Regulation No 715/2007 only within the temperature window, constitutes a defeat device within the meaning of Article 3(10) of the regulation and is permitted only under strict conditions.

57 It can be stated *mutatis mutandis* on the basis of 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.

58 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.

59 In the present case, unlike the judgments mentioned above, according to the measurement data available to the court, the point at issue is that the reduction of nitrogen oxide emissions through the lowering of the combustion temperature achieved by exhaust gas recirculation is accompanied by an increase in other emissions, for example emissions of carbon monoxide, hydrocarbons, methane and particulates.

60 In its judgments concerning temperature-based 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.

The question whether the coolant thermostat constitutes a prohibited defeat device

61 The regulated coolant thermostat is part of the emission control system within the meaning of Article 3(10) of Regulation No 715/2007. The computer which

activates and deactivates the coolant thermostat and controls its opening and closing at certain temperatures depending on the vehicle's operating conditions constitutes 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, paragraphs 90 and 68).

62 It must be clarified whether that computer constitutes a defeat device as, according to the defendant's submissions, activation of the coolant thermostat keeps the engine temperature and thus also the combustion temperature lower for a longer time, at least in certain circumstances, than when it is deactivated, which produces the opposite effects described above.

63 As is mentioned above and disputed by the defendant, the applicant argues that in order to lower exhaust gas emissions software was used which detects test operation and then switches to a different operating mode producing lower exhaust gas emissions.

64 The purpose of that device can only be to affect the parameters of the combustion process because no exhaust gas aftertreatment system, in the form of a SCR catalyst for example, is installed in the vehicle at issue. Any diesel particulate filter is not relevant in this regard.

65 Consequently, the question arises with regard to the switching device purportedly present whether and to what extent the effectiveness of the emission control system can be reduced by that switching device and it can thus constitute a defeat device.

66 The same holds for the applicant's arguments regarding the 'Bit 15' function, the diminished efficiency of exhaust gas cleaning and the switching of the engine control system to a 'dirty' mode after 1 200 seconds, which, in so far as they exist, constitute switching devices for the purpose of affecting combustion parameters.

67 In this regard, the questions set out in the operative part regarding the necessary understanding of the notion of reduction of the effectiveness of the emission control system also arise for the reasons explained above.

68 Without an answer to the questions referred, it is not possible on the basis of the applicant's submissions either to carry out measures of inquiry or to find against the defendant. Without an answer to the questions referred, it is not possible on the basis of the defendant's submissions to dismiss the action.

The fifth question referred for a preliminary ruling

69 At the current stage of the proceedings, it must be envisaged that ultimately certain conditions for the presence of a defeat device in the vehicle at issue may possibly be neither provable nor refutable. In that case the court must clarify who bears the burden of proof for the conditions in question.

70 The statements made by 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) give cause to examine whether the allocation of the burden of proof in connection with defeat devices under German law is compatible with EU law.

71 Under German law the burden of proof is allocated such that the purchaser of the vehicle must prove to the full extent that all factual conditions for the presence of a defeat device are met. He or she must 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.

72 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.

73 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 without any 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 decide not be assert their rights.

74 It follows from Article 18(1), Article 26(1) and Article 46 of Directive 2007/46 that the purchaser of a vehicle must, in the event that a prohibited defeat device is installed in it, have a right to compensation against the manufacturer (see judgment of 21 March 2023, *Mercedes-Benz Group (Liability of manufacturers of vehicles fitted with defeat devices)*, C-100/21, EU:C:2023:229, paragraphs 91 and 93).

75 It must be clarified whether and to what extent this allocation of the burden of proof under German law is compatible with the principle of effectiveness under EU law and what position is applicable having regard to EU law.

76 At the current stage of the proceedings, it is not yet foreseeable to what extent proof will be required for the parties' submissions and how any measures of inquiry will develop in the present case. It is thus also unclear to what extent the issue described above in connection with the burden of proof will arise.

77 If there are further measures of inquiry, however, the abovementioned questions do arise, in particular the question of whom any high advance on costs is to be claimed from and to whose detriment it is if specific facts requiring proof cannot be established.

78 On account of the present request for a preliminary ruling, a delay in the proceedings of at least two years can be expected before the judgment of the Court of Justice is delivered. The parties cannot reasonably be expected to wait until a later stage of the proceedings to ask these questions on account of 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.

79 The corresponding questions can easily be answered as part of the forthcoming judgment of the Court of Justice. It would not be compatible with the effective legal protection which is granted in an area of freedom, security and justice (see Article 67 TFEU) to refrain from asking the fifth question in the context of the present request.

80 Under Article 267 TFEU, in principle only questions for which the referring court considers an answer to be necessary to enable it to give judgment may be referred. In the present case it is not yet certain whether an answer to the questions is absolutely necessary. Nevertheless, for the reasons set out above the court takes the view that the fifth question is admissible.