

Anonymised version

Translation

C-527/18 — 1

Case C-527/18

Request for a preliminary ruling

Date lodged:

13 August 2018

Referring court:

Bundesgerichtshof (Germany)

Date of the decision to refer:

21 June 2018

Applicant and appellant on a point of law:

Gesamtverband Autoteile-Handel e.V.

Defendant and respondent on a point of law:

KIA Motors Corporation

BUNDESGERICHTSHOF
(FEDERAL COURT OF JUSTICE)

ORDER

[...]

Made on:
21 June 2018

[...]

In the case

Gesamtverband Autoteile-Handel e. V., [...] Ratingen,

applicant and appellant on a point of law,

...

v

KIA Motors Corporation, [...] Seoul, Republic of Korea,

defendant and respondent on a point of law,

[...]

[Or. 2]

The First Civil Chamber of the Bundesgerichtshof has [...]

made the following order:

- I. The proceedings are stayed.
- II. The following questions are referred to the Court of Justice of the European Union for a preliminary ruling on the interpretation of the first sentence of Article 6(1) of Regulation (EC) 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):
 1. Do manufacturers have to supply the information to be provided to independent operators under the first sentence of Article 6(1) of Regulation (EC) No 715/2007 in a form amenable to onward electronic processing?
 2. Is discrimination against independent operators as prohibited under the first sentence of Article 6(1) of Regulation (EC) No 715/2007 present in the case where a manufacturer, by engaging an information service provider, opens a further channel for information on the sale of original replacement parts by authorised dealers and repairers?

[Or. 3]

Grounds:

- 1 A. The applicant is a trade association representing motor vehicle parts wholesalers. The defendant is a motor vehicle manufacturer established in South Korea. The vehicles manufactured by the defendant are given a vehicle identification number. Details of the components installed in a vehicle are stored, under the vehicle's identification number, in a database maintained by an

undertaking affiliated to the defendant. Users can view the data stored under a vehicle identification number, for a charge, via an internet portal ('KIA Global Service Way'). This read access is granted both to repairers contracted to the defendant and to independent operators. This enables car workshops to determine which original replacement parts they need for a repair.

- 2 The applicant takes the view that the defendant should provide it and its members not only with on-demand read access but also with electronic access to the data behind vehicle identification numbers so that that data can be processed by independent replacement part manufacturers and lists of alternative parts can be made available to repairers via link from the vehicle identification number.
- 3 The applicant claimed that the defendant should be ordered to make the data identifying the parts installed in its vehicles available to independent operators in electronic form so that it can be processed electronically on request, if not for free then certainly for a reasonable and proportionate charge.
- 4 The Landgericht (regional court) found against the defendant, in accordance with the form of order sought [...]. The defendant appealed against that ruling. The applicant defended the judgment at first instance, on condition [Or. 4] that the words 'reasonable and proportionate' be removed from the operative part of that judgment. The appeal court dismissed the action [...]. By its appeal on a point of law, leave to bring which was granted by the appeal court and which the defendant contends should be dismissed, the applicant maintains the form of order it sought on appeal.
- 5 B. The success of the applicant's appeal on a point of law turns on the interpretation of the first sentence of Article 6(1) of Regulation (EC) No 715/2007 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. It is therefore appropriate, before judgment is given on the appeal on a point of law, to stay the proceedings and seek a preliminary ruling from the Court of Justice of the European Union pursuant to point (b) of the first paragraph and the third paragraph of Article 267 TFEU.
- 6 I. The appeal court considered the action to be unfounded and held in this regard:
- 7 The defendant did not infringe the first sentence of Article 6(1) of Regulation (EC) No 715/2007 by granting read access. Acting in accordance with that provision, the defendant provides independent operators with access to vehicle repair and maintenance information in a readily accessible and prompt manner. Read access also satisfies the requirement of unrestricted access in a standardised format. On that basis, the applicant cannot demand access to the raw data via a database interface so as to be able to read the data in full and subject it to onward automated processing. The only requirement on the defendant is to provide access

to the database, which it does via the read facility. There is no discrimination against independent operators. **[Or. 5]**

- 8 II. In accordance with the first sentence of Paragraph 8(1) of the Gesetz gegen den unlauteren Wettbewerb (Law on Unfair Competition, ‘the UWG’), an action is well founded if the conditions for an infringement of Paragraph 4, point 11, of the UWG (old version)/Paragraph 3a of the UWG in conjunction with the first sentence of Article 6(1) of Regulation (EC) 715/2007 are met. The appeal court was right to take the view that the applicant has standing to bring proceedings and that the first sentence of Article 6(1) of Regulation (EC) No 715/2007 is a provision regulating market behaviour (see in this regard section B II(1) and (2)). The success of the applicant’s appeal on a point of law turns on whether the first sentence of Article 6(1) of Regulation (EC) No 715/2007 is to be interpreted as meaning that manufacturers must make available the information to be provided to independent operators under that provision in a form amenable to onward electronic processing (Question 1; see in this regard section B II(3)). The success of the appeal on a point of law also turns on the scope of the prohibition on discrimination laid down in that provision (Question 2; see in this regard section B II(4)).
- 9 1. The appeal on a point of law is not directed against the appeal court’s assumption that the applicant has standing to bring proceedings under Paragraph 8(3)(2) of the UWG. That assessment is not the subject of any concerns in the context of the appeal on points of law.
- 10 2. The appeal court’s assessment that the first sentence of Article 6(1) of Regulation (EC) No 715/2007 is a provision regulating market behaviour within the meaning of Paragraph 4(11) of the UWG (old version)/Paragraph 3a of the UWG, which the appeal on a point of law also accepts as operating in its favour, holds good too. The defendant argues unsuccessfully that [non-]compliance with the duty to provide vehicle repair and maintenance information is a matter for the Member State authorities alone and cannot be prosecuted as an act constituting a breach of law under the legislation on unfair competition. The application of Paragraph 3a of the UWG does not preclude the Member State authorities from imposing penalties for infringements of the Regulation [...] **[Or. 6]**
- 11 3. The success of the applicant’s appeal on a point of law turns on the question, to be answered by reference to EU law, whether the first sentence of Article 6(1) of Regulation (EC) No 715/2007 is to be interpreted as meaning that manufacturers must make available the information to be provided to independent operators under that provision in a form amenable to onward electronic processing (Question 1).
- 12 The first sentence of Article 6(1) of Regulation (EC) No 715/2007 provides that manufacturers are to provide unrestricted and standardised access to vehicle repair and maintenance information to independent operators through websites using a standardised format in a readily accessible and prompt manner, and in a manner

which is non-discriminatory compared to the provision given or access granted to authorised dealers and repairers.

- 13 a) Contrary to the view expressed by the defendant, an infringement of Article 6 of Regulation (EC) No 715/2007 cannot be ruled out on the sole ground that the EC type approval granted under Article 10 of the Regulation legalises the information system operated by the defendant.
- 14 aa) There can be no infringement of a provision regulating market behaviour within the meaning of Paragraph 4(11) of the UWG (old version)/Paragraph 3a of the UWG where the competent administrative authority has adopted an effective administrative act which expressly permits the contested market behaviour ...
- 15 bb) The EC type approval provided for in Article 10 of Regulation (EC) No 715/2007 is not an administrative act which so legalises the market behaviour at issue here. It is true that, in accordance with the first sentence of Article 6(7) of Regulation (EC) No 715/2007, the grant of type approval is subject to proof of compliance with the [Or. 7] provisions on access to vehicle repair and maintenance information. However, non-compliance with those provisions does not preclude the grant of type approval, as is clear from the fact that, pursuant to the second and third sentences of Article 6(7) of Regulation (EC) No 715/2007, the manufacturer has up to six months from the date of type approval to provide that proof. That provision alone shows that the EC type approval cannot have the effect of legalising the position in relation to compliance with the duty to provide information. Such an effect is also ruled out by the fact that, in accordance with the fourth paragraph of point 2.1 of Annex XIV to Regulation (EC) No 692/2008, the information to be provided is to be regularly updated following the grant of the approval.
- 16 b) The success of the appeal on a point of law depends on the answer to the question whether the way in which the defendant chooses to provide information is consistent with the first sentence of Article 6(1) of Regulation (EC) No 715/2007.
- 17 aa) The appeal court accepted that the defendant provides access to vehicle repair and maintenance information to independent operators through websites, as provided for in the first sentence of Article 6(1) of Regulation (EC) No 715/2007. On its website, the defendant makes available to potential users, for a charge, an information portal on which they can search for a vehicle and identify original replacement parts for it by entering the identification number of the vehicle concerned. That assessment is not challenged by the appeal on a point of law and does not support the inference of an error of law.
- 18 bb) The question is whether the defendant provides unrestricted and standardised access in a standardised format, as provided for in the first sentence of Article 6(1) of Regulation (EC) No 715/2007. This raises the question, not unequivocally answerable by reference to EU law, whether the first sentence of

Article 6(1) of Regulation (EC) No 715/2007 is to be interpreted as meaning that the defendant **[Or. 8]** must make available the information to be provided to independent operators in a form amenable to onward electronic processing.

- 19 (1) The appellant on a point of law claims that the requirement in the first sentence of Article 6(1) of Regulation (EC) No 715/2007 that information be provided in a standardised format supports the inference that the information must be provided in such a way as to enable onward electronic processing and that the provision of read access on a homepage is inadequate.
- 20 According to its literal meaning, a standardised format is a uniformly structured preparation. Information on a website can be prepared in a uniformly structured manner even if it is not amenable to onward electronic processing. On that basis, the requirement of a standardised format is probably met in the case at issue here.
- 21 (2) The reference to the OASIS format in the second sentence of Article 6(1) and recital 8 of Regulation (EC) No 715/2007 probably does not support the inference of a duty to provide information in a form amenable to onward electronic processing either.
- 22 In accordance with the second sentence of Article 6(1) of Regulation No 715/2007, the information to be provided in a standardised format pursuant to the first sentence of that provision is to be submitted initially in accordance with the technical requirements of the OASIS format. The fifth sentence of recital 8 of Regulation No 715/2007 states that it is appropriate initially to require the use of the technical specifications of the OASIS format.
- 23 The appellant on a point of law submits that the OASIS format presupposes the presence of an exchange of data, and also, therefore, of an interface. The Chamber making this reference shares the view taken by the appeal court, which accepted that OASIS is not concerned with the technical procedure for exchanging data and, **[Or. 9]** in particular, does not stipulate that data must be exchanged by means of an electronic interface.
- 24 The OASIS format is a technical specification for the provision of information by manufacturers on the Internet. To that end, OASIS prescribes the use of metadata terminology so that specific information (concerning, for example, petrol or diesel fuel) can be retrieved by using a standardised term, irrespective of the designation chosen by the manufacturer. According to line 593 et seq. of Section 7 of OASIS Document SC2-D5, to which reference is made in the footnote to the second sentence of Article 6(1) of Regulation (EC) No 715/2007, details of how Internet services are implemented and how messages are formulated, transported and interpreted are outside the scope of the OASIS specification. That specification does not therefore extend to the question of whether an electronic interface must be provided.

- 25 (3) Neither the first sentence of recital 8 of Regulation (EC) No 715/2007 nor recital 12 of Regulation (EU) No 566/2011 provides any clear indication of whether information must be amenable to onward electronic processing.
- 26 According to the first sentence of recital 8 of Regulation (EC) No 715/2007, unrestricted access to vehicle repair information, via a standardised format which can be used to retrieve the technical information, and effective competition on the market for vehicle repair and maintenance information services are necessary to improve the functioning of the internal market, particularly as regards the free movement of goods, freedom of establishment and freedom to provide services. Pursuant to recital 12 of Regulation (EU) No 566/2011, in order to ensure effective competition on the market for vehicle repair and maintenance information services, and in order to clarify **[Or. 10]** that the information concerned also covers information which needs to be provided to independent operators other than repairers, so as to ensure that the independent vehicle repair and maintenance market as a whole can compete with authorised dealers, regardless of whether the vehicle manufacturer gives such information to authorised dealers and repairers directly, further clarifications with regard to the details of the information to be provided under Regulation (EC) No 715/2007 are necessary.
- 27 Those recitals support the inference, first, that the manufacturer's duty to provide information to independent operators is not restricted to repairers but extends to maintenance information services. It does not automatically follow from this, however, that the information must be made available in such a way as to be amenable to onward electronic processing.
- 28 On the other hand, provision of the data in a form amenable to onward electronic processing is likely to have a positive effect on the functioning of the internal market, to which reference is made in the first sentence of recital 8 of Regulation (EC) No 715/2007. Providing information in this form would also promote the objective, referred to in recital 12 of Regulation (EU) No 566/2011, of ensuring effective competition on the market for vehicle repair and maintenance information services. The objectives thus expressed in the aforementioned recitals of the regulation indicate that manufacturers should be required to provide access to information in such a way as to enable independent operators to process it electronically. **[Or. 11]**
- 29 In observations of 30 June 2014 submitted in the complaint procedure initiated by the applicant against the Republic of Ireland (ref. ENTR/B4/ES/ip — [2014]1214326), the European Commission, too, advocates an interpretation of the first sentence of Article 6(1) of Regulation [(EC) No 715/2007] that is in line with the purpose of that regulation. Those observations read as follows:

In summary, the EU legislation on RMI implicitly mandates the access to vehicle component data to be provided in a way that allows for their automatic processing and facilitates the identification of alternative spare

parts by independent operators, so that they can continue to provide competitive products and services to multi-brand and authorised repairers.

- 30 In a further letter of 15 April 2015 (ref. GROW/G3/ES/ip — [2015]1661999), however, the European Commission concedes that the obligation to provide information in a form amenable to onward electronic processing is only implicit and not explicitly provided for:

Furthermore, in the absence of definitions of the terms “readily accessible” and “prompt manner”, there is no explicit requirement in the EU Regulations that the OBD and the RMI should be provided by vehicle manufacturers in such a way that the data can be “automatically processed” by independent operators.

- 31 (4) The appellant on a point of law further claims that the appeal court failed to take adequate account of the significance of recital 18 of Regulation (EU) No 566/2011 when interpreting the first sentence of Article 6(1) of Regulation (EC) No 715/2007.
- 32 Recital 18 of Regulation (EU) No 566/2011 states that, in the absence of a common structured process for the exchange of vehicle component data, it is appropriate to develop principles for such an exchange of data. That recital goes on to say that a future common structured process on the standardised format of the data exchanged should be developed by the European Committee for Standardisation (CEN) formally, and that that committee’s work should reflect the interests [Or. 12] and needs of vehicle manufacturers and independent operators alike and should investigate solutions such as open data formats described by well defined meta-data to accommodate existing IT infrastructures.
- 33 That recital almost certainly does not support the inference that the duty to provide information under the first sentence of Article 6(1) of Regulation (EC) No 715/2007 must be satisfied by making available an electronic interface. It does, however, show that there is currently no common structured process for the exchange of vehicle component data between vehicle manufacturers and independent operators, and principles for such an exchange of data must first be developed. Furthermore, the appeal court was probably right to assume that the term ‘exchange of data’ says nothing about the technical arrangements for exchanging data.
- 34 (5) Contrary to the view expressed in the appeal on a point of law, the second paragraph of point 2.1 of Annex XIV to Regulation (EC) No 692/2008 does not seem to be capable of supporting the inference of a duty to provide information in a form amenable to onward electronic processing either. According to that provision, information on all parts of the vehicle is to be made available in a database easily accessible to independent operators.
- 35 The fact that information is to be provided ‘in’ a database almost certainly does not support the conclusion — as drawn in the appeal on a point of law — that read

access ‘to’ a database is not in itself sufficient and electronic access ‘within’ the database must be allowed. The legal definition of the term ‘database’ contained in Directive 96/9/EC (Database Directive) does not appear to indicate otherwise. According to Article 1(2) of that directive, ‘database’ is to mean a collection of independent works, data or other materials arranged in a systematic or methodical way and ‘individually accessible by electronic or other means’. **[Or. 13]** It does not follow from that definition that no database is present where — as in the case at issue here — data can be retrieved by read access only.

- 36 (6) The wording of the first and fourth sentences of the first paragraph of point 2.1 of Annex XIV to Regulation (EC) No 692/2008 and the drafting history of point 2.1 of Annex XIV to that regulation might mitigate against an obligation on the part of the manufacturer to make information available in a form amenable to onward electronic processing.
- 37 The wording of the first and fourth sentences of the first paragraph of point 2.1 of Annex XIV to Regulation (EC) No 692/2008 supports the inference that information is to be provided in such a way that it can be viewed and printed but cannot be duplicated or re-published. The first sentence of the first paragraph of point 2.1 of Annex XIV to Regulation (EC) No 692/2008 states that, in the case of vehicle OBD and vehicle repair and maintenance information available through websites, only open text and graphic formats or formats which can be viewed and printed using only standard software plug-ins that are freely available, easy to install, and which run under computer operating systems commonly in use may be used. The fourth sentence of the first paragraph of point 2.1 of Annex XIV to Regulation (EC) No 692/2008 states that those requiring the right to duplicate or re-publish the information should negotiate directly with the manufacturer concerned. Those provisions say nothing about the obligation to provide information in a form amenable to onward electronic processing.
- 38 The drafting history of point 2.1 of Annex XIV to Regulation (EC) No 692/2008 indicates that, as the law currently stands, data does not have to be made available in a form amenable to onward electronic processing. A first draft of Regulation (EU) No 566/2011 of 4 February 2009 (ref. ENTR.F1/KS D[2009]) shows that a form of words was to be inserted at the end of point 2.1 of Annex XIV to Regulation (EC) No 692/2008 **[Or. 14]** to the effect that raw data must be made available in a format which allows independent operators to process it within their own systems. The introduction to a second draft of 23 March 2009 states that raw data on the parts of certain vehicles constitutes essential vehicle repair and maintenance information the use of which by independent operators requires that data to be made available in a consistent format which allows independent operators to process it within their own systems. A further draft of Regulation (EU) No 566/2011 of 1 July 2009 shows that a form of words was to be inserted at the end of point 2.1 of Annex XIV to Regulation (EC) No 692/2008 to the effect that raw data must be made available as ‘bulk data’ in a machine-readable format amenable to onward electronic processing by generally available data processing systems. Those provisions and recitals, which provided for the making available

of data amenable to onward electronic processing, did not, however, find their way into the final version of Regulation (EU) No 566/2011.

- 39 (7) A further factor that appears to militate against the interpretation of the first sentence of Article 6(1) of Regulation No 715/2007 set out in the appeal on a point of law is the Commission's intention to lay down an obligation to provide information in the form of machine-readable datasets amenable to onward electronic processing in the new Type Approval Framework Regulation (see Article 65(1) of the draft of 15 December 2017). In so doing, the Commission might be introducing a new obligation rather than clarifying an existing one.
- 40 (8) If, then, there is no clear rule as to how information is to be provided, there are, in the light of the spirit and purpose of the rule contained in Article 6(1) of Regulation (EC) No 715/2007, sufficient doubts as to interpretation to call for an answer from the Court of Justice of the European Union to the first question referred for a preliminary ruling. **[Or. 15]**
- 41 4. Also requiring an answer is the question of the scope of the prohibition on discrimination laid down in the first sentence of Article 6(1) of Regulation (EC) No 715/2007 (Question 2).
- 42 This states that manufacturers are to provide the access to vehicle repair and maintenance information which that provision requires to be afforded to independent operators in a manner which is non-discriminatory by comparison with the access granted or information made available to authorised dealers and repairers.
- 43 a) The appeal court assumed that the information system put in place by the defendant did not discriminate against independent operators because the defendant also supplies all the information it makes available to its authorised workshops by providing them, for a charge, with read access to the 'KIA Global Service Way'.
- 44 The appellant on a point of law, on the other hand, claims that the defendant makes its original parts catalogue available to the undertaking LexCom, which enables independent workshops to search for original KIA replacement parts, by vehicle identification number, on its internet portal 'partlink24'. This constitutes indirect discrimination against independent operators because the 'partlink24' portal permits only the purchase of original spare parts from authorised dealers, thus giving the defendant's distributors a competitive advantage.
- 45 The respondent on a point of law counters the foregoing by stating that LexCom's role is confined to assistance with the sale of original KIA replacement parts and is therefore different from that of authorised dealers and repairers, by comparison with whom independent operators may not be discriminated against. **[Or. 16]**
- 46 b) This raises the question, to be answered by reference to EU law, whether discrimination against independent operators as prohibited under the first sentence

of Article 6(1) of Regulation (EC) No 715/2007 is present in the case where a manufacturer, by engaging an information service provider, opens a further channel for information on the sale of original replacement parts by authorised dealers and repairers.

- 47 aa) The purpose of the prohibition on discrimination laid down in the first sentence of Article 6(1) of Regulation (EC) No 715/2007 is to prevent independent operators from being discriminated against by comparison with authorised dealers and repairers in the context of the provision of vehicle repair and maintenance information. For that reason, there can be no objection to the appeal court's assumption that, in so far as the defendant shares its database with LexCom, the applicant's members are not discriminated against by comparison with dealers and workshops contracted to the defendant. The applicant has not claimed that the information system operated by LexCom provides authorised dealers and authorised workshops with access to more or better information than that which independent operators can obtain by using the defendant's system.
- 48 bb) What is not sufficiently clear, however, is whether the first sentence of Article 6(1) of Regulation (EC) No 715/2007 also prohibits independent operators from being discriminated against by comparison with authorised dealers and repairers as a result of the fact that, by engaging an information service provider, the manufacturer opens a further channel for information on the sale of original replacement parts. In the view of this Chamber, the prohibition on discrimination appears not to extend beyond guaranteeing independent operators the same access to information as authorised dealers and repairers. The engagement of an information service provider objected to by the appellant on a point of law, on the other hand, is arguably a measure which is neutral from the point of view of the provision of information to independent operators and authorised dealers and **[Or. 17]** repairers, and, as such, not caught by the prohibition of discrimination laid down in the first sentence of Article 6(1) of Regulation (EC) No 715/2007.

...