Reports of Cases

OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 23 September 2021 [1] [i]

Cases C-128/20, C-134/20 and C-145/20

GSMB Invest GmbH & Co. KG
v
Auto Krainer Gesellschaft mbH
(Request for a preliminary ruling
from the Landesgericht Klagenfurt (Regional Court, Klagenfurt, Austria))
and
IR
v
Volkswagen AG
(Request for a preliminary ruling
from the Landesgericht Eisenstadt (Regional Court, Eisenstadt, Austria))
and
DS
v
Porsche Inter Auto GmbH & Co. KG,
Volkswagen AG

(Request for a preliminary ruling
from the Oberster Gerichtshof (Supreme Court, Austria))

(Reference for a preliminary ruling – Approximation of laws – Regulation (EC) No 715/2007 – Motor vehicles – Article 3(10) – Article 5(1) and (2) – Diesel engines – Pollutant emissions – Software installed in the electronic engine controller – Exhaust gas recirculation valve – Reduction in nitrogen oxide emissions limited by a 'temperature window' – Defeat device – Authorisation of such a device where the need is justified in terms of protecting the engine against damage or accident – Device installed during the repair of the vehicle – Directive 1999/44/EC – Sale of consumer goods and associated guarantees – Goods in conformity with the contract of sale – Article 2(2)(d) – Presumption of conformity of goods which show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect – Valid EC type-approval – Article 3(6) – Purchase of the vehicle concerned even though the consumer had been aware of the presence of the defeat device at the time of the sale – Minor lack of conformity)

[1] Original language: French.

I. Introduction

1. As Article 11 TFEU states, 'environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development'. Increased awareness of the significance of environmental protection is reflected, inter alia, in the intention of the EU legislature to limit pollutant emissions. [2]

2. Accordingly, motor vehicles have been the subject of increasingly restrictive legislation, [3] in particular with the adoption of Regulation (EC) No 715/2007. [4] Vehicle manufacturers are obliged to adapt to new common technical requirements concerning the type-approval of such vehicles, which can be a source of dispute with the public authorities and consumers.

3. Thus, in the case which gave rise to the judgment of 17 December 2020, *X (Defeat device on diesel engines))* (C-693/18, EU:C:2020:1040, 'the judgment in *X*'), the vehicle manufacturer concerned was alleged to have put into circulation vehicles equipped with software intended to distort the results of type-approval tests for emissions of gaseous pollutants, in particular NOx. [5] In that judgment, the Court interpreted, for the first time, the concept of a 'defeat device', within the meaning of Article 3(10) of Regulation No 715/2007, and determined the extent to which such a device is unlawful in the light of Article 5(2)(a) of that regulation, which provides for exceptions to the prohibition on defeat devices, which include the need to protect the engine against damage or accident and for safe operation of the vehicle.

4. These three cases follow in the wake of that case, in that they concern vehicles equipped with software installed in the electronic engine controller which, on the basis of certain outside temperature and driving altitude conditions, limits the reduction of NOx emissions, which results in the limit values laid down in Regulation No 715/2007 being exceeded. The questions submitted are essentially the following: is software of that type a 'defeat device' within the meaning of Article 3(10) of that regulation? If so, can that software be authorised on the basis of Article 5(2)(a) of the regulation? If the software is not authorised, can its use entail the cancellation of the sale by virtue of a minor lack of the vehicle's conformity with the contract on the basis of Directive 1999/44/EC? [6]

5. In view of the connections existing between the present cases, in particular because the legal issues raised overlap to a great extent, it seemed appropriate to deliver a joint Opinion on them, even though the Court decided not to join them in view of the particular features of each case.

[2] According to the World Health Organization (WHO), air pollution is the biggest environmental risk to health. See the WHO report entitled 'Ambient air pollution: A global assessment of exposure and burden of disease', 13 May 2016, p. 15.

[3] With regard to the successive Euro nitrogen oxide (NOx) emission standards, see the briefing paper produced by the European Court of Auditors entitled 'The EU's response to the "dieselgate" scandal', February 2019, p. 9.

[4] Regulation 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), as amended by Commission Regulation (EC) No 692/2008 of 18 July 2008 (OJ 2008 L 199, p. 1) ('Regulation No 715/2007').

[5] See judgment in *X*, paragraph 27.

[6] Directive of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ 1999 L 171, p. 12).

II. Legal context

A. EU law

1. Directive 1999/44

6. Recitals 1 and 8 of Directive 1999/44 state:

‘(1) Whereas Article 153(1) and (3) [EC] provides that the Community should contribute to the achievement of a high level of consumer protection by the measures it adopts pursuant to Article 95 [EC];

…

(8) Whereas, in order to facilitate the application of the principle of conformity with the contract, it is useful to introduce a rebuttable presumption of conformity with the contract covering the most common situations; whereas that presumption does not restrict the principle of freedom of contract; whereas, furthermore, in the absence of specific contractual terms, as well as where the minimum protection clause is applied, the elements mentioned in this presumption may be used to determine the lack of conformity of the goods with the contract; whereas the quality and performance which consumers can reasonably expect will depend inter alia on whether the goods are new or second-hand; whereas the elements mentioned in the presumption are cumulative; whereas, if the circumstances of the case render any particular element manifestly inappropriate, the remaining elements of the presumption nevertheless still apply’.

7. Article 1 of that directive, which is entitled ‘Scope and definitions’, provides, in paragraph 1 thereof:

‘The purpose of this Directive is the approximation of the laws, regulations and administrative provisions of the Member States on certain aspects of the sale of consumer goods and associated guarantees in order to ensure a uniform minimum level of consumer protection in the context of the internal market.’

8. Article 2 of the directive, which is entitled ‘Conformity with the contract’, provides:

‘1. The seller must deliver goods to the consumer which are in conformity with the contract of sale.

2. Consumer goods are presumed to be in conformity with the contract if they:

(a) comply with the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer as a sample or model;

(b) are fit for any particular purpose for which the consumer requires them and which he made known to the seller at the time of conclusion of the contract and which the seller has accepted;

(c) are fit for the purposes for which goods of the same type are normally used;

(d) show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling.

3. There shall be deemed not to be a lack of conformity for the purposes of this Article if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of, the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer.

…'

9. Article 3 of the same directive, which is entitled 'Rights of the consumer', provides:

'1. The seller shall be liable to the consumer for any lack of conformity which exists at the time the goods were delivered.

2. In the case of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity free of charge by repair or replacement, in accordance with paragraph 3, or to have an appropriate reduction made in the price or the contract rescinded with regard to those goods, in accordance with paragraphs 5 and 6.

3. In the first place, the consumer may require the seller to repair the goods or he may require the seller to replace them, in either case free of charge, unless this is impossible or disproportionate.

A remedy shall be deemed to be disproportionate if it imposes costs on the seller which, in comparison with the alternative remedy, are unreasonable, taking into account:

– the value the goods would have if there were no lack of conformity,

– the significance of the lack of conformity, and

– whether the alternative remedy could be completed without significant inconvenience to the consumer.

Any repair or replacement shall be completed within a reasonable time and without any significant inconvenience to the consumer, taking account of the nature of the goods and the purpose for which the consumer required the goods.

…

5. The consumer may require an appropriate reduction of the price or have the contract rescinded:

– if the consumer is entitled to neither repair nor replacement, or

– if the seller has not completed the remedy within a reasonable time, or

– if the seller has not completed the remedy without significant inconvenience to the consumer.

6. The consumer is not entitled to have the contract rescinded if the lack of conformity is minor.'

2. Regulation No 715/2007

10. Recitals 7 and 17 of Regulation No 715/2007 state:

'(7) In setting emissions standards it is important to take into account the implications for markets and manufacturers' competitiveness, the direct and indirect costs imposed on business and the benefits that accrue in terms of stimulating innovation, improving air quality, reducing health costs and increasing life expectancy, as well as the implications for the overall impact on carbon dioxide emissions.

…

(17) A standardised method of measuring fuel consumption and carbon dioxide emissions of vehicles is necessary to ensure that no technical barriers to trade arise between Member States. Furthermore, it is also necessary to ensure that customers and users are supplied with objective and precise information.'

11. Article 1 of that regulation, which is entitled 'Subject matter', states, in paragraph 1 thereof:

'This Regulation establishes common technical requirements for the type approval of motor vehicles (vehicles) and replacement parts, such as replacement pollution control devices, with regard to their emissions.'

12. Article 3 of that regulation, which is entitled 'Definitions', provides, in points 10 and 13 thereof:

'For the purposes of this Regulation and its implementing measures the following definitions shall apply:

…

10. "defeat device" means any element of design which senses temperature, vehicle speed, engine speed (RPM), transmission gear, manifold vacuum or any other parameter for the purpose of activating, modulating, delaying or deactivating the operation of any part of the emission control system, that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use;

…

13. "replacement pollution control device" means a pollution control device or an assembly of such devices intended to replace an original pollution control device and which can be approved as a separate technical unit as defined in Directive 70/156/EEC.[7]'

[7] Council Directive of 6 February 1970 on the approximation of the laws of the Member States relating to the type-approval of motor vehicles and their trailers (OJ 1970 L 42, p. 1).

13. Article 4 of the same regulation, which is entitled 'Manufacturers' obligations', provides, in paragraphs 1 and 2 thereof:

'1. Manufacturers shall demonstrate that all new vehicles sold, registered or put into service in the Community are type approved in accordance with this Regulation and its implementing measures. Manufacturers shall also demonstrate that all new replacement pollution control devices requiring type approval which are sold or put into service in the Community are type approved in accordance with this Regulation and its implementing measures.

These obligations include meeting the emission limits set out in Annex I and the implementing measures referred to in Article 5.

2. Manufacturers shall ensure that type approval procedures for verifying conformity of production, durability of pollution control devices and in-service conformity are met.

In addition, the technical measures taken by the manufacturer must be such as to ensure that the tailpipe and evaporative emissions are effectively limited, pursuant to this Regulation, throughout the normal life of the vehicles under normal conditions of use. …'

14. Article 5 of Regulation No 715/2007, which is entitled 'Requirements and tests', reads, in paragraphs 1 and 2 thereof, as follows:

'1. The manufacturer shall equip vehicles so that the components likely to affect emissions are designed, constructed and assembled so as to enable the vehicle, in normal use, to comply with this Regulation and its implementing measures.

2. The use of defeat devices that reduce the effectiveness of emission control systems shall be prohibited. The prohibition shall not apply where:

(a) the need for the device is justified in terms of protecting the engine against damage or accident and for safe operation of the vehicle;

(b) the device does not function beyond the requirements of engine starting;

or

(c) the conditions are substantially included in the test procedures for verifying evaporative emissions and average tailpipe emissions conditions.'

15. Annex I to that regulation, which is entitled 'Emission limits', lays down the NOx emission limit values, inter alia for Euro 5 generation vehicles, which form the subject of Table 1.

3. Directive 2007/46/EC

16. Directive 2007/46/EC[8] was repealed by Regulation (EU) 2018/858,[9] with effect from 1 September 2020, pursuant to Article 88 of that regulation. However, in view of the date of the facts at issue, that directive remains applicable to the disputes in the main proceedings.

17. Under recital 3 of that directive:

'The technical requirements applicable to systems, components, separate technical units and vehicles should be harmonised and specified in regulatory acts. Those regulatory acts should primarily seek to ensure a high level of road safety, health protection, environmental protection, energy efficiency and protection against unauthorised use.'

18. Article 1 of the same directive, entitled 'Subject matter', stated:

'This Directive establishes a harmonised framework containing the administrative provisions and general technical requirements for approval of all new vehicles within its scope and of the systems, components and separate technical units intended for those vehicles, with a view to facilitating their registration, sale and entry into service within the Community.

…

Specific technical requirements concerning the construction and functioning of vehicles shall be laid down in application of this Directive in regulatory acts, the exhaustive list of which is set out in Annex IV.'

19. Article 3 of Directive 2007/46, entitled 'Definitions', provided, in points 5 and 36 thereof:

'For the purposes of this Directive and of the regulatory acts listed in Annex IV, save as otherwise provided therein:

…

5. "EC type-approval" means the procedure whereby a Member State certifies that a type of vehicle, system, component or separate technical unit satisfies the relevant administrative provisions and technical requirements of this Directive and of the regulatory acts listed in Annex IV or XI;

…

36. "certificate of conformity" means the document set out in Annex IX, issued by the manufacturer and certifying that a vehicle belonging to the series of the type approved in accordance with this Directive complied with all regulatory acts at the time of its production'.

[8] Directive 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), as amended by Commission Regulation (EU) No 214/2014 of 25 February 2014 (OJ 2014 L 69, p. 3) ('Directive 2007/46').

[9] Regulation of the European Parliament and of the Council of 30 May 2018 on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, amending Regulations (EC) No 715/2007 and (EC) No 595/2009 and repealing Directive 2007/46/EC (OJ 2018 L 151, p. 1).

20. Article 4 of that directive, entitled 'Obligations of Member States', provided:

'1. Member States shall ensure that manufacturers applying for approval comply with their obligations under this Directive.

2. Member States shall approve only such vehicles, systems, components or separate technical units as satisfy the requirements of this Directive.

3. Member States shall register or permit the sale or entry into service only of such vehicles, components and separate technical units as satisfy the requirements of this Directive.

…'

21. Article 5 of that directive, entitled 'Obligations of manufacturers', read, in paragraph 1 thereof, as follows:

'The manufacturer is responsible to the approval authority for all aspects of the approval process and for ensuring conformity of production, whether or not the manufacturer is directly involved in all stages of the construction of a vehicle, system, component or separate technical unit.'

22. Article 18 of the same directive, entitled 'Certificate of conformity', stated, in paragraph 1 thereof:

'The manufacturer, in his capacity as the holder of an EC type-approval of a vehicle, shall deliver a certificate of conformity to accompany each vehicle, whether complete, incomplete or completed, that is manufactured in conformity with the approved vehicle type.

…'

23. Article 26 of Directive 2007/46, entitled 'Registration, sale and entry into service of vehicles', provided, in paragraph 1 thereof:

'Without prejudice to the provisions of Articles 29 and 30, Member States shall register, and permit the sale or entry into service of, vehicles only if they are accompanied by a valid certificate of conformity issued in accordance with Article 18.

…'

24. Annex IV to that directive, entitled 'Requirements for the purpose of EC type-approval of vehicles', referred, in part I thereof, entitled 'Regulatory acts for EC type-approval of vehicles produced in unlimited series', to Regulation No 715/2007 in relation to 'emissions (Euro 5 and 6) light duty vehicles/access to information'.

25. Annex IX [10] to that directive, entitled 'EC certificate of conformity', included a point 0, entitled 'Objectives', which provided that the certificate of conformity is a statement delivered by the vehicle manufacturer to the buyer in order to assure him that the vehicle he has acquired complies with the legislation in force in the European Union at the time it was produced.

4. Regulation No 692/2008

26. Article 1 of Regulation No 692/2008, which is entitled 'Subject matter', states:

'This Regulation lays down measures for the implementation of Articles 4, 5 and 8 of Regulation [No 715/2007].'

27. Article 2 of Regulation No 692/2008, which is entitled 'Definitions', provides, in points 8 and 18 thereof:

'For the purposes of this Regulation, the following definitions shall apply:

…

8. "type of pollution control device" means catalytic converters and particulate filters which do not differ in any of the following essential aspects:

…

18. "emission control system" means, in the context of the OBD [on board diagnostic] system, the electronic engine management controller and any emission-related component in the exhaust or evaporative system which supplies an input to or receives an output from this controller.'

28. Article 3 of that regulation, which is entitled 'Requirements for type-approval', provides, in paragraph 9 thereof:

'The Type 6 test measuring emissions at low temperatures set out in Annex VIII shall not apply to diesel vehicles.

However, when applying for type-approval, manufacturers shall present to the approval authority with information showing that the NOx aftertreatment device reaches a sufficiently high temperature for efficient operation within 400 seconds after a cold start at –7 °C as described in the Type 6 test.

In addition, the manufacturer shall provide the approval authority with information on the operating strategy of the exhaust gas recirculation system (EGR), including its functioning at low temperatures.

…'

[10] The wording of this annex results from Commission Regulation (EU) 2017/1151 of 1 June 2017 supplementing 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, amending Directive 2007/46/EC of the European Parliament and of the Council, Commission Regulation (EC) No 692/2008 and Commission Regulation (EU) No 1230/2012 and repealing Commission Regulation (EC) No 692/2008 (OJ 2017 L 175, p. 1).

29. Article 10 of the regulation, which is entitled 'Pollution control devices', reads as follows, in paragraph 1 thereof:

'The manufacturer shall ensure that replacement pollution control devices intended to be fitted to EC type-approved vehicles covered by the scope of Regulation [No 715/2007] are EC type-approved, as separate technical units within the meaning of Article 10(2) of Directive [2007/46], in accordance with Article 12, Article 13 and Annex XIII to this Regulation.

Catalytic converters and particulate filters shall be considered to be pollution control devices for the purposes of this Regulation.'

30. Annex I to the same regulation, which is entitled 'Administrative provisions for EC type-approval', states, in point 3.3 thereof, which is entitled 'Extensions for durability of pollution control devices (type 5 test)':

'3.3.1. The type-approval shall be extended to different vehicle types, provided that the vehicle, engine or pollution control system parameters specified below are identical or remain within the prescribed tolerances:

3.3.1.1. Vehicle:

…

3.3.1.2. Engine

…

3.3.1.3. Pollution control system parameters:

…

(c) EGR:

with or without

type (cooled or non cooled, active or passive control, high pressure or low pressure).

…'

31. Annex XI to Regulation No 692/2008, which is entitled 'On-board diagnostics (OBD) for motor vehicles', provides, in Appendix 2 thereto, regarding the 'essential characteristics of the vehicle family':

'…

Engine:

…

Emission control system:

…

– type of particulate trap,

…

– exhaust gas recirculation (i.e. with/without).

…’

5. Regulation (EU) 2016/427

32. Under recitals 1, 2 and 4 of Regulation (EU) 2016/427: [11]

‘(1) Regulation [No 715/2007] requires the Commission to keep under review the procedures, tests and requirements for type-approval that are set out in Commission Regulation [No 692/2008] and to adjust them so that they adequately reflect the emissions generated by real driving on the road, if necessary.

(2) The Commission has performed a detailed analysis in this respect on the basis of own research and external information and found that emissions generated by real driving on the road of Euro 5/6 vehicles substantially exceed the emissions measured on the regulatory new European driving cycle (NEDC), in particular with respect to NOx emissions of diesel vehicles.

…

(4) The Commission has established in January 2011 a working group involving all interested stakeholders for developing a real driving emission (RDE) test procedure better reflecting emissions measured on the road. …’

33. Article 1 of Regulation 2016/427 provides:

‘Regulation [No 692/2008] is amended as follows:

(1) In Article 2, the following points 41 and 42 are added:

‘41. “Real driving emissions (RDE)” means the emissions of a vehicle under its normal conditions of use;

42. “Portable emissions measurement system (PEMS)” means a portable emissions measurement system meeting the requirements specified in Appendix 1 to Annex IIIA’.

[11] Commission Regulation of 10 March 2016 amending Regulation (EC) No 692/2008 as regards emissions from light passenger and commercial vehicles (Euro 6) (OJ 2016 L 82, p. 1).

6. Regulation 2017/1151

34. Under recitals 1 to 3 of Regulation 2017/1151: [12]

'(1) Commission Regulation [No 692/2008] implementing and amending Regulation [No 715/2007] provides for light-duty vehicles to be tested in accordance with the New European Driving Cycle (NEDC).

(2) Based on the continuous review of the relevant procedures, test cycles and test results provided for in Article 14(3) of Regulation [No 715/2007], it is evident that the information about fuel consumption and CO2 emissions provided by testing vehicles in accordance with the NEDC is no longer adequate and no longer reflects real world emissions.

(3) Against that background, it is appropriate to provide for a new regulatory test procedure by implementing the Worldwide harmonised Light-duty vehicles Test Procedures (WLTP) into Union legislation.'

35. Article 1 of Regulation 2017/1151, which is entitled 'Subject matter', states:

'This Regulation lays down measures for the implementation of Regulation [No 715/2007].'

36. Annex IIIA to Regulation 2017/1151, which is entitled 'Verifying real driving emissions', provides:

'…

4.1. The RDE performance shall be demonstrated by testing vehicles on the road operated over their normal driving patterns, conditions and payloads. The RDE test shall be representative for vehicles operated on their real driving routes, with their normal load.

…

5.2.1. The test shall be conducted under ambient conditions laid down in this section. The ambient conditions become "extended" when at least one of the temperature and altitude conditions is extended. The correction factor for extended conditions for temperature and altitude shall only be applied once. If a part of the test or the entire test is performed outside of normal or extended conditions, the test shall be invalid.

5.2.2. Moderate altitude conditions: Altitude lower or equal to 700 metres above sea level.

5.2.3. Extended altitude conditions: Altitude higher than 700 meters above sea level and lower or equal to 1 300 meters above sea level.

5.2.4. Moderate temperature conditions: Greater than or equal to 273.15 K (0 °C) and lower than or equal to 303.15 K (30 °C).

5.2.5. Extended temperature conditions: Greater than or equal to 266.15 K (– 7 °C) and lower than 273.15 K (0 °C) or greater than 303.15 K (30 °C) and lower than or equal to 308.15 K (35 °C).

[12] As amended by Commission Regulation (EU) 2017/1154 of 7 June 2017 (OJ 2017 L 175, p. 708) ('Regulation 2017/1151').

…’

7. Directive (EU) 2019/771

37. Under Article 23 of Directive (EU) 2019/771,[13] Directive 1999/44 is repealed with effect from 1 January 2022.

38. Article 1 of Directive 2019/771, which is entitled ‘Subject matter and purpose’, states:

‘The purpose of this Directive is to contribute to the proper functioning of the internal market while providing for a high level of consumer protection, by laying down common rules on certain requirements concerning sales contracts concluded between sellers and consumers, in particular rules on the conformity of goods with the contract, remedies in the event of a lack of such conformity, the modalities for the exercise of those remedies, and on commercial guarantees.’

39. Article 7 of that directive, which is entitled ‘Objective requirements for conformity’, provides, in paragraph 1 thereof:

‘In addition to complying with any subjective requirement for conformity, the goods shall:

(a) be fit for the purposes for which goods of the same type would normally be used, taking into account, where applicable, any existing Union and national law, technical standards or, in the absence of such technical standards, applicable sector-specific industry codes of conduct;

…’

B. Austrian law

40. Paragraph 871(1) of the Allgemeines bürgerliches Gesetzbuch (General Civil Code, ‘the ABGB’) states:

‘If, in the declaration given by him or received by the other party, a party makes an error affecting the essence, or a fundamental aspect of that essence, of what had been primarily and explicitly agreed between the parties, that party shall not incur any liability if the error was caused by the other party, or should have been obvious to him from the circumstances, or was rectified in a timely manner.’

41. Paragraph 879(1) of the ABGB provides:

‘A contract which is contrary to a legal prohibition or accepted principles of morality shall be null and void.’

42. Paragraph 922(1) of the ABGB provides:

‘A person who transfers an item to another person for consideration shall warrant that the item is in conformity with the contract. He shall therefore be liable for the fact that the item has the

[13] Directive of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44 (OJ 2019 L 136, p. 28).

agreed or customarily expected characteristics, that it corresponds to his description, a sample or a model, and that it is fit for the purpose specified or for the purpose corresponding to the nature of the legal act.'

43. Paragraph 932(1) and (4) of the ABGB reads as follows:

'(1) The transferee may require the improvement (repair or supply of what is missing) or the replacement of the item, a reasonable reduction in the consideration (price reduction) or the termination of the contract (rescission) on the grounds of a defect.

…

(4) If both the improvement and the replacement of the item are impossible or disproportionately burdensome for the transferor, the transferee shall be entitled to a price reduction or, other than in the case of a minor defect, to the rescission of the contract. …'

C. German law

44. Pursuant to Paragraph 25(2) of the Verordnung über die EG-Genehmigung für Kraftfahrzeuge und ihre Anhänger sowie für Systeme, Bauteile und selbstständige technische Einheiten für diese Fahrzeuge (EG-Fahrzeuggenehmigungsverordnung) (Regulation on EC type-approval for motor vehicles and their trailers, and for systems, components and separate technical units intended for such vehicles (EC Motor Vehicle Type-Approval Regulation), 'the EG-FGV'):

'[The Kraftfahrt-Bundesamt (Federal Motor Transport Authority, Germany, "the KBA")] may retroactively impose ancillary provisions in order to remedy any detects that have been identified and to ensure the conformity of vehicles already on the market, components or technical units.'

III. The disputes in the main proceedings, the questions referred for a preliminary ruling and the procedures before the Court

A. Case C-128/20

45. On 9 January 2011, GSMB Invest GmbH & Co. KG concluded with Auto Krainer Gesellschaft mbH a contract of sale for a Volkswagen motor vehicle (a VW Caddy Maxi Confortline 4MOTION) with a Euro 5 generation EA 189 type diesel engine and a 2-litre cylinder ('vehicle 1'). That vehicle has an EGR valve.

46. On 27 December 2017, GSMB Invest brought an action before the Landesgericht Klagenfurt (Regional Court, Klagenfurt, Austria), the referring court, seeking the cancellation of that sale, on the basis of Paragraph 879(1) and Paragraph 932(4) of the ABGB, in return for payment of a fee for use.

47. Before that court, GSMB Invest claimed that, on the date of the sale, it had believed that it was purchasing a new, environmentally friendly vehicle, the exhaust gas emissions of which, inter alia, complied with the statutory requirements. However, following an update of the software installed in the electronic engine controller fitted in vehicle 1 ('the software at issue'), an update carried out

by Volkswagen, the purification of exhaust gas is deactivated at an outside temperature of below 15 °C and above 33 °C, and at driving altitude above 1 000 m ('the temperature window'). That window is an unlawful system since none of the derogations from the prohibition of a defeat device, as provided for in Article 5 of Regulation No 715/2007, can justify it. Thus, that reduction in the purification of exhaust gas does not serve to protect the engine of vehicle 1 as there is no direct damage to that engine.

48. Auto Krainer contended that a temperature window is used by all diesel vehicle manufacturers in the Euro 5 category. The KBA (the EC type-approval authority in Germany) has always regarded that window as a lawful measure for the purposes of Regulation No 715/2007. In addition, when the software at issue was examined, the KBA found, after conducting an in-depth review, that the update had had no negative impact on the durability of the air pollution control devices.

49. According to the referring court, it follows from Article 3(10) of Regulation No 715/2007 that the temperature window is a prohibited defeat device within the meaning of that regulation. In most Member States of the European Union, in particular in Austria and Germany, the ambient temperature is more often than not below 15 °C over the course of a year and, in view of the topography of those States, vehicles are very often driven at an altitude of over 1 000 m, meaning that those conditions occur during 'normal vehicle operation and use' within the meaning of Article 3(10) of that regulation. The derogation relating to protection of the engine provided for in Article 5(2)(a) of the regulation cannot therefore serve as the legal basis for a defeat device which is activated under 'normal' conditions of vehicle use.

50. The referring court adds that, under Article 3(9) of Regulation No 692/2008, the NOx after-treatment device must reach a sufficiently high temperature for efficient operation within 400 seconds after a cold start at – 7 °C as described in the Type 6 test. The competent authorities cannot grant EC type-approval if satisfaction of those conditions is not sufficiently established. It follows from the burden of proof thus established that the EU legislature took the view that a temperature window cannot be justified if it fails to satisfy such conditions.

51. Accordingly, in the light of the temperature and altitude conditions applied, the temperature window cannot be fully operational under normal conditions of operation.

52. In those circumstances, the Landesgericht Klagenfurt (Regional Court, Klagenfurt) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 5(1) of Regulation [No 715/2007] to be interpreted as meaning that the equipment of a vehicle, within the meaning of Article 1(1) of [that regulation], is inadmissible if the exhaust gas recirculation valve (i.e. a component that is likely to affect emissions performance) is designed in such a way that the exhaust gas recirculation rate (i.e. the portion of the exhaust gas being recirculated) is regulated in such a way that the valve ensures a low-emission mode only between 15 and 33 degrees Celsius and only below an altitude of 1 000 m, and, outside this temperature window, per 10 degrees Celsius, and above an altitude of 1 000 m, per 250 meters of altitude, the rate decreases in a linear way down to zero, meaning that NOx emissions increase beyond the limits of Regulation No 715/2007?

(2) Is Article 5(2) of Regulation [No 715/2007], which states 'in terms of protecting the engine against damage', to be interpreted as meaning that an exhaust gas strategy that serves principally to protect components such as the exhaust gas recirculation value ['the EGR valve'],[14] exhaust gas recirculation cooler and diesel particulate filter does not fulfil the exemption requirements?

(3) Is Article 5(1) of Regulation [No 715/2007] to be interpreted as meaning that an exhaust gas strategy, which ensures pollution control devices operate efficiently only between 15 and 33 degrees Celsius and only below an altitude of 1 000 m ('the temperature window') and therefore do not generally operate fully functionally during the year in Europe, in particular in Austria, does not fulfil the requirement of Article 5(1) – "operation of the vehicle under normal conditions of use" – and constitutes a prohibited "defeat device"?'

53. Written observations were lodged by GSMB Invest, Auto Krainer, the German Government and the European Commission. The same parties also replied in writing to questions put by the Court.

B. Case C-134/20

54. In the course of 2013, IR, a consumer, purchased a Volkswagen motor vehicle (a VW Touran Confortline BMT) with a Euro 5 generation EA 189 type diesel engine, a 1.6-litre cylinder and an output of 77 kW ('vehicle 2'). That vehicle has an EGR valve.

55. Vehicle 2 originally contained software installed in the electronic engine controller which had a 'mode 0' and a 'mode 1' ('the switch system'). Mode 1 was used for the approval test for pollutant emissions, called the 'New European Driving Cycle' (NEDC), which is conducted in a laboratory. If the characteristic conditions of that approval test did not exist, mode 0 was applied and, in that case, the exhaust gas recirculation rate decreased and the injection timing and duration changed. In real-world operation, vehicle 2 was almost exclusively in mode 0, meaning that it did not comply with the NOx limit values laid down in Regulation No 715/2007. It is apparent from the order for reference that the switch system was therefore a prohibited defeat device within the meaning of Article 5(1) and (2) of that regulation.

56. It is likewise clear from the order for reference that vehicle 2 is technically sound and can be used in road traffic. However, if IR had been informed that that vehicle did not comply with statutory requirements on account of the software with which it was fitted, he would not have purchased it.

57. By letter of 8 October 2015, the general importer of Volkswagen vehicles in Austria informed IR that changes had to be made to vehicle 2 and that the manufacturer would bear all costs associated with the repair work required in that connection. IR was subsequently asked to install the software at issue in vehicle 2, which he did.

58. The purpose of that update was to establish the temperature window. The KBA approved the software at issue and did not therefore withdraw the EC type-approval. In that regard, it found inter alia that there was no prohibited defeat device with the meaning of Regulation No 715/2007. The KBA did not have any information about that software at its disposal because it did not request that such information be sent to it.

[14] [This footnote is not relevant to the English translation of this Opinion]

59. IR brought an action before the Landesgericht Eisenstadt (Regional Court, Eisenstadt, Austria), the referring court, seeking the cancellation of the sale of vehicle 2 on the basis of Paragraph 871 of the ABGB.

60. According to the referring court, it is not possible to establish whether the temperature window is necessary to protect the engine in vehicle 2 against damage or to determine whether the consumption, the production of soot, the performance or the total mileage of that vehicle is negatively affected by the software at issue. Nor is it possible to establish whether, if that software had been updated without a temperature window, the requirements under Regulation No 715/2007 in terms of the durability of pollution control devices, such as those referred to in Article 4(2) of that regulation, would be observed, or whether the vehicle's market value decreased after that update was installed.

61. The referring court adds that, under Austrian law, the contractual partner of the person whose consent was vitiated by a substantial error can avoid the legal consequences of that error by maintaining the transaction in the form in which the person whose consent was vitiated intended to conclude it. The latter would then cease to have an interest in bringing proceedings. That court takes the view that the switch system with which vehicle 2 was originally fitted is incompatible with EU law. Volkswagen contends that the installation of the software at issue in that vehicle gave satisfaction to IR such that he has no interest in bringing proceedings; IR contests that fact.

62. The referring court states that, for judgment to be given, it is necessary to determine whether the software at issue is a technical solution that complies with the requirements of EU law, in particular Regulations No 715/2007 and No 692/2008. Only if that is the case would the contract of sale for vehicle 2 not be cancelled and, therefore, IR's application should be dismissed.

63. In those circumstances, the Landesgericht Eisenstadt (Regional Court, Eisenstadt) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 5(1) of Regulation [No 715/2007] to be interpreted as meaning that the equipment of a vehicle, within the meaning of Article 1(1) of [that regulation], is inadmissible if the exhaust gas recirculation valve (i.e. a component that is likely to affect emissions performance) is designed in such a way that the exhaust gas recirculation rate (i.e. the portion of the exhaust gas being recirculated) is regulated in such a way that the valve ensures a low-emission mode only between 15 and 33 degrees Celsius and only below an altitude of 1 000 m, and, outside this temperature window, per 10 degrees Celsius, and above an altitude of 1 000 m, per 250 metres of altitude, the rate decreases in a linear way down to zero, meaning that NOx emissions increase beyond the limits of Regulation No 715/2007?

(2) Is it relevant to the assessment of Question [(1)] whether the equipment referred to in Question [(1)] is necessary to protect the engine against damage?

(3) Furthermore, is it relevant to the assessment of Question [(2)] whether the part of the engine which is to be protected against damage is the exhaust gas recirculation valve?

(4) Is it relevant to the assessment of Question [(1)] whether the equipment of the vehicle referred to in Question [(1)] was already installed when the vehicle was produced or whether the regulation of the exhaust gas recirculation valve described in Question [(1)] is to be installed in the vehicle by way of a repair within the meaning of Article 3(2) of Directive [1999/44]?'

64. Written observations were lodged by IR, Volkswagen, the German Government and the Commission. The same parties also replied in writing to questions put by the Court.

C. Case C-145/20

65. On 21 December 2013, DS, a consumer, purchased a Volkswagen motor vehicle with a Euro 5 generation type EA 189 diesel engine from Porsche Inter Auto GmbH & Co. KG, an independent authorised Volkswagen dealer ('vehicle 3'). That vehicle, which has an EGR valve, falls within the scope of Regulation No 715/2007.

66. The vehicle contained software which operated the exhaust gas recirculation system on the basis of a switch system. Type-approval for the vehicle type at issue was granted by the KBA. The presence of the switch system had not been disclosed to that body. If the body had been aware of that system, EC type-approval would not have been granted. Furthermore, DS would have purchased the vehicle even if he had been aware of the presence of the system.

67. On 15 October 2015, the KBA adopted a decision, pursuant to Paragraph 25(2) of the EG-FGV, by which it, inter alia, ordered Volkswagen to ensure the compliance of Euro 5 generation EA 189 type engines with the national legislation and EU law in force. By letter of 20 December 2016, the KBA informed Volkswagen that it confirmed that the software at issue was suitable for re-establishing the conformity of the vehicles concerned. As a result, EC type-approval for vehicles such as vehicle 3 was not withdrawn or revoked by the KBA.

68. On 15 February 2017, DS installed the software at issue, as referred to in the letter from the KBA of 20 December 2016, in vehicle 3. That update replaced the switch system with the temperature window.

69. DS brought an action before the Landesgericht Linz (Regional Court, Linz, Austria) seeking the reimbursement of the purchase price of vehicle 3 against return of that vehicle or, in the alternative, a reduction in the price of the vehicle or, in the further alternative, a declaration that Porsche Inter Auto and Volkswagen are liable for damages as a result of the presence of a prohibited defeat device within the meaning of Article 5(2) of Regulation No 715/2007. By a judgment of 12 December 2018, the Landesgericht Linz (Regional Court, Linz) dismissed DS's action.

70. Following an appeal lodged by DS, the Oberlandesgericht Linz (Higher Regional Court, Linz, Austria) upheld that judgment by a judgment of 4 April 2019. That court took the view, inter alia, that, even assuming that vehicle 3 was initially defective, the software at issue remedied that defect. In addition, it found that the system by which exhaust gas recirculation was reduced when the outside temperature was below 15 °C or above 33 °C is permissible under Article 5(2) of Regulation No 715/2007 because it is necessary to protect the engine against damage.

71. DS lodged an appeal on a point of law before the Oberster Gerichtshof (Supreme Court, Austria), the referring court. Before that court, DS claimed that vehicle 3 is defective because the switch system is a prohibited defeat device within the meaning of Article 5(2) of Regulation No 715/2007. The software at issue did not remedy that defect. There is a risk of the vehicle losing value in the future, as well as subsequent damage being caused by the installation of that software.

72. Porsche Inter Auto and Volkswagen acknowledged before the referring court that the temperature window is a defeat device within the meaning of Article 3(10) of Regulation No 715/2007. They contended that that device is lawful, pursuant to Article 5(2) of that regulation, and that that view is shared by the KBA.

73. The referring court states that it is called upon to rule on whether vehicle 3 was defective at the time of delivery, whether that defect has been remedied and whether DS suffered damage caused by the vehicle manufacturer concerned.

74. In that court's view, the switch system is a prohibited defeat device within the meaning of Article 3(10) of Regulation No 715/2007, read in conjunction with Article 5(1) and (2) of that regulation. In any case, vehicle 3 has a defect, for the purposes of Paragraph 922 of the ABGB, because the presence of that defeat device had not been disclosed to the KBA.

75. Since the software at issue was approved by the KBA, the referring court asks, first of all, whether that approval is sufficient, on its own, to achieve the improvement of the item purchased, within the meaning of Paragraph 932(1) of the ABGB. According to that court, it should be presumed that, in the case of a product such as a motor vehicle, in respect of which it is known that it must satisfy regulatory requirements, an average consumer, who is reasonably well informed and reasonably observant and circumspect, expects compliance with those requirements. The fact that vehicles must undergo an EC type-approval process does not necessarily preclude Article 2(2)(d) of Directive 1999/44 from being interpreted thus. The consequence of an interpretation to that effect would be that the seller of a motor vehicle would have to guarantee not only that that vehicle has the EC type-approval required for the customarily expected use within the meaning of Paragraph 922 of the ABGB, but also that it does not contain any prohibited elements of design.

76. Next, assuming that the attempt at improvement made by installing the software at issue were unsuccessful, even though the KBA did not revoke or withdraw the EC type-approval, it would be necessary to assess whether vehicle 3 is still fitted with a prohibited defeat device, within the meaning of Article 5(2) of Regulation No 715/2007. In the view of the referring court, the environmental protection objective argues in favour of a strict interpretation of the derogations provided for in Article 5(2) of that regulation. In addition, it is well known that in parts of the European Union, in particular in Austria, the average temperature is below 15 °C for several months each year. The outside temperature at which exhaust gas recirculation of the type in vehicle 3 is fully effective is thus not reached on average for a large part of the year. In those circumstances, it is not possible to justify a defeat device which operates so frequently on the basis of one of the derogations provided for in Article 5(2) of the regulation.

77. Lastly, the referring court observes that, when examining whether a defect should be classified as 'minor', which precludes rescission pursuant to Paragraph 932(4) of the ABGB, the objective interests of the parties must be weighed against each other, having regard to the contract which they concluded and the circumstances of the individual case. Article 3(6) of Directive 1999/44 is so unequivocal only in the case of an *acte clair*.

78. It is in those circumstances that the Oberster Gerichtshof (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 2(2)(d) of Directive [1999/44] to be interpreted as meaning that a motor vehicle that falls within the scope of Regulation [No 715/2007] shows the quality which is normal in goods of the same type and which the consumer can reasonably expect if the vehicle is equipped with a prohibited defeat device within the meaning of point 10 of Article 3 and Article 5(2) of [that regulation] but the vehicle type nevertheless has a valid EC type-approval, meaning that the vehicle can be used on the road?

(2) Is Article 5(2)(a) of Regulation No 715/2007 to be interpreted as meaning that a defeat device within the meaning of point 10 of Article 3 of that regulation, which is designed in such a way that the exhaust gas recirculation is fully operational outside of test operation under laboratory conditions and during real-world driving only if outside temperatures are between 15 and 33 degrees Celsius, may be permissible pursuant to Article 5(2)(a) of that regulation, or is the application of the aforementioned exemption provision excluded from the outset for the simple reason that the full effectiveness of the exhaust gas recirculation is restricted to conditions that exist for only around half of the year in parts of the European Union?

(3) Is Article 3(6) of Directive 1999/44 to be interpreted as meaning that a lack of conformity consisting in the equipping of a vehicle with a defeat device that is prohibited under point 10 of Article 3 in conjunction with Article 5(2) of Regulation No 715/2007 must be regarded as "minor" within the meaning of the aforementioned provision if the purchaser acquired the vehicle even though he was aware of the presence and operation of that device?'

79. Written observations were submitted by DS, Porsche Inter Auto, the German Government and the Commission. The same parties also replied in writing to questions put by the Court. [15]

IV. Analysis

80. The questions submitted by the referring courts concern, first, the interpretation of Regulation No 715/2007 on type approval of motor vehicles with respect to pollutant emissions [16] and, second, the interpretation of Directive 1999/44, which seeks to ensure a uniform minimum level of consumer protection in the context of the internal market.

[15] In these three cases, the Court decided to proceed to judgment without holding a hearing on account of the health risks associated with the coronavirus pandemic.

[16] For a general presentation of the regulatory framework relating to the type-approval of motor vehicles, see Opinion of Advocate General Sharpston in *CLCV and Others (Defeat device on diesel engines)* (C-693/18, EU:C:2020:323, points 45 to 54).

A. The first and third questions in Case C-128/20, the first question in Case C-134/20 and the first part of the second question in Case C-145/20

81. By the first and third questions in Case C-128/20, the first question in Case C-134/20 and the first part of the second question in Case C-145/20, which should be examined together, the referring courts ask, in essence, whether Article 3(10) of Regulation No 715/2007, read in conjunction with Article 5(1) of that regulation, is to be interpreted as meaning that a device which, under real driving conditions of a motor vehicle, ensures exhaust gas recirculation in full only when the outside temperature is between 15 °C and 33 °C and the driving altitude is lower than 1 000 m, whereas, outside that window, per 10 °C, and above an altitude of 1 000 m, per 250 m, the exhaust gas recirculation rate decreases in a linear way down to zero, with the result that NOx emissions increase beyond the limit values laid down in the regulation, constitutes a 'defeat device'.

82. In that regard, it should be noted that Article 3(10) of Regulation No 715/2007 defines a 'defeat device' as any element of design which senses temperature, vehicle speed, engine speed (RPM), transmission gear, manifold vacuum or any other parameter for the purpose of activating, modulating, delaying or deactivating the operation of any part of the emission control system, that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use.

83. In the judgment in *X*, the Court ruled for the first time on the interpretation of that provision. The case which gave rise to that judgment concerned motor vehicles fitted with an EGR valve and equipped with software capable of detecting the approval phase for pollutant emissions, in the context of the NEDC and with a view to their type-approval.[17] In that judgment, the Court held that software installed in or acting on the electronic engine controller constitutes an 'element of design', within the meaning of the abovementioned provision, where it acts on the operation of the emission control system and reduces its effectiveness.[18] In the same judgment, the Court took the view that the concept of an 'emission control system' within the meaning of the same provision covers both 'exhaust gas after-treatment' technologies and strategies that reduce emissions downstream, namely after their formation, and those which, like the exhaust gas recirculation system, reduce emissions upstream, namely during their formation.[19] It is clear from the judgment in *X* that a device which detects any parameter related to the conduct of the approval procedures provided for by Regulation No 715/2007 in order to improve the performance of the emission control system during those procedures, and thus to obtain approval of the vehicle, constitutes a 'defeat device' within the meaning of Article 3(10) of that regulation, even if such an improvement may also be observed, occasionally, under normal conditions of vehicle use.[20] The Court added that such a device could not fall within the scope of the exception to the prohibition on such devices laid down in Article 5(2)(a) of that regulation, which relates to the protection of the engine against damage or accident and the safe operation of the vehicle.[21]

84. These cases follow on from the case that gave rise to the judgment in *X* that, in the context of EC type-approval, they concern Euro 5 generation vehicles fitted with an EGR valve and equipped with the software at issue, which acts on the operation of the pollutant emission control system

17 See judgment in *X*, paragraphs 27 and 31.

18 Judgment in *X*, paragraph 68.

19 Judgment in *X*, paragraph 90.

20 Judgment in *X*, paragraph 102.

21 See judgment in *X*, paragraph 115.

and reduces its effectiveness. That software established the temperature window, in line with which – according to the referring courts – exhaust gas recirculation is fully operational only if the outside temperature is between 15 °C and 33 °C and the driving altitude is below 1 000 m. Outside that window, the gas exhaust recirculation rate is reduced on a linear basis down to 0, which, here, results in the emission limit values specified for NOx in Table 1 of Annex I to Regulation No 715/2007 being exceeded.

85. Auto Krainer and Volkswagen contend respectively, in their written observations in Cases C-128/20 and C-134/20, that, depending on the operation of the software at issue, provision is made for a reduction in the gas exhaust recirculation rate when the temperature of the intake air is below 15 °C; that temperature is a technical parameter that is on average 5 °C higher than the ambient temperature. The exhaust gas is therefore recycled fully so long as the ambient temperature is greater or equal to 10 °C, that is to say, within the average annual temperature range in Germany (10.4 °C).

86. In that regard, I would point out that, in proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the Court, the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law.[22] Accordingly, in these cases, the Court is bound by the finding and assessment of the facts made by the referring courts, which are moreover consistent, such that Auto Krainer and Volkswagen cannot call them into question in the present requests for a preliminary ruling. I will therefore refer to the temperature window as it has been defined by the referring courts.[23]

87. In the light of the considerations put forward by the Court in the judgment in *X*, the software at issue must be regarded as being an 'element of design', within the meaning of Article 3(10) of Regulation No 715/2007, and the technology used (here: the EGR valve) falls within the concept of an 'emission control system' within the meaning of that provision.[24] Furthermore, that software detects the air temperature and one other parameter, the driving altitude, 'for the purpose of activating, modulating, delaying or deactivating the operation of any part of the emission control system', within the meaning of the provision.

88. Therefore, in order to determine whether, in the light of the definition contained in Article 3(10) of Regulation No 715/2007, the software at issue constitutes a 'defeat device', it is necessary to examine whether the reduction in the effectiveness of the pollutant emission control system occurs 'under conditions which may reasonably be expected to be encountered in normal vehicle operation and use'.

89. In their questions, the referring courts refer not to Article 3(10) of Regulation No 715/2007 but rather to Article 5(1) of that regulation, under which the manufacturer is to equip vehicles so that the components likely to affect emissions are designed, constructed and assembled so as to enable the vehicle, 'in normal use', to comply with that regulation and its implementing measures. In that regard, it seems clear to me that those two provisions are complementary and

22 Judgment of 29 April 2021, *Bank BPH* (C-19/20, EU:C:2021:341, paragraph 37 and the case-law cited).

23 See point 47 of this Opinion.

24 See point 83 of this Opinion.

express the same idea, namely that, in order to determine whether the common technical requirements relating to the type-approval of motor vehicles are met, reference should be made to the operation of the software at issue during the 'normal use' of the vehicles concerned. [25]

90. Regulation No 715/2007 does not define, in its provisions, that concept of 'normal use'. In such circumstances, it follows from the need for uniform application of EU law and from the principle of equality that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, having regard not only to its wording but also to the context of the provision and the objective pursued by the legislation in question. [26]

91. In that connection, in their written observations in Cases C-128/20 and C-134/20, Auto Krainer and Volkswagen contend, respectively, that compliance with the limit values for pollutants must be determined exclusively in the context of the NEDC, [27] which was in force on the date of the facts in the main proceedings. [28]

92. I do not agree with that view. In my opinion, it is clear from the wording of Article 3(10) of Regulation No 715/2007, from the context of that provision and from the objective pursued by that regulation that 'normal use' refers not to the conditions provided for in the NEDC but rather to real driving conditions. [29]

93. First, Article 3(10) of Regulation No 715/2007, read in conjunction with Article 5(1) of that regulation, does not refer just to pollutant emissions measured in the course of the approval process. In the same vein, it was held in the judgment in *X* that 'normal conditions of vehicle use may, exceptionally, … correspond to the driving conditions applied during approval processes' and that, 'in normal conditions of vehicle use, the objective of reducing NOx emissions is not usually achieved'. [30] Accordingly, that judgment drew an explicit distinction between the conditions applied during approval processes and 'normal conditions of use', and used the latter as a point of reference for assessing pollutant emissions.

94. Second, it is true, in accordance with recital 17 of Regulation No 715/2007, that a 'standardised method of measuring fuel consumption and carbon dioxide emissions of vehicles is necessary to ensure that no technical barriers to trade arise between Member States'. However, the conditions applied during the approval processes cannot, as far as concerns the NEDC, be the

[25] Similarly, the second subparagraph of Article 4(2) of Regulation No 715/2007 states that 'the technical measures taken by the manufacturer must be such as to ensure that the tailpipe and evaporative emissions are effectively limited, pursuant to this Regulation, *throughout the normal life of the vehicles under normal conditions of use*' (emphasis added).

[26] See judgment of 29 April 2021, *X (European arrest warrant – Ne bis in idem)* (C-665/20 PPU, EU:C:2021:339, paragraph 69 and the case-law cited).

[27] The NEDC is carried out in a laboratory and involves the repetition of four urban cycles followed by one extra-urban cycle. I note that, under point 6.1.1 of Annex 4, which is entitled 'Type I test', to Regulation No 83 of the Economic Commission for Europe of the United Nations (UN/ECE) – Uniform provisions concerning the approval of vehicles with regard to the emission of pollutants according to engine fuel requirements (OJ 2006 L 375, p. 242), 'during the test, the test cell temperature must be between … (20 and 30 [degrees Celsius])'.

[28] As recitals 1 to 3 of Regulation 2017/1151 state, the NEDC was replaced by the WLTP (Worldwide harmonised Light-duty vehicles Test Procedures) test cycle.

[29] In that connection, the German Government points out, in its written observations that it is currently the unanimous view of the authorities responsible for type-approval in Europe that 'normal conditions of operation and use' must be understood as meaning real-world conditions that normally exist in Europe.

[30] See judgment in *X*, paragraph 101.

equivalent of real driving conditions.[31] In that connection, recital 2 of Regulation 2016/427 states that 'emissions generated by real driving on the road of Euro 5/6 vehicles substantially exceed the emissions measured on the regulatory [NEDC], in particular with respect to NOx emissions of diesel vehicles'. That situation led to Regulation No 692/2008 being amended by means of Regulation 2016/427 with a view to introducing the concept of 'real driving emissions (RDE)',[32] which are defined as the 'emissions of a vehicle under its normal conditions of use'.[33]

95. Third, the interpretation to the effect that reference must be made to the real driving conditions and not to those provided for under the NEDC is supported by the objective pursued by Regulation No 715/2007, which consists in ensuring a high level of protection of the environment.[34] It is therefore necessary to ensure that NOx emissions are effectively limited.

96. In the present cases, as I have set out in point 84 of this Opinion, the software at issue is designed so that exhaust gas recirculation is fully operational only if the outside temperature is between 15 °C and 33 °C and the driving altitude is below 1 000 m. Since NOx emissions are to be measured in real driving conditions, can that temperature window be regarded as representative of such driving conditions in Europe?

97. I do not believe so. There are, admittedly, significant differences in climate between the north and the south of Europe. However, a minimum temperature of 15 °C does not correspond with the average weather conditions recordable in Europe. Similarly, the topography of the European Union is far from uniform.

98. With that in mind, the referring court in Case C-128/20 points out that, in Austria and Germany (Member States located in the geographic heart of the European Union), the ambient temperature is more often than not below 15 °C throughout the year and, given the topography of those States, motor vehicles are very often driven above an altitude of 1 000 m.[35] That court infers from those facts, in its third question, that the treatment of exhaust gas within the temperature window is not fully operational in Europe, particularly in Austria, for the greater portion of the year. The same finding is made by the referring court in Case C-134/20.

99. As for the referring court in Case C-145/20, it observes that, in Vienna (Austria), in 2018, the average temperature was below 15 °C for six months out of twelve. Furthermore, the official statistics for the city of Vienna, to which that court refers, show that the average temperature in that city was 11.6 °C in 2017 and 12.4 °C in 2018-2019.[36]

[31] For the differences between NOx emissions measured in the course of the type-approval process and those recorded on the road, see the briefing paper produced by the European Court of Auditors entitled 'The EU's response to the "dieselgate" scandal', February 2019, p. 15.

[32] See recital 4 of Regulation 2016/427. The RDE test procedure forms the subject of the joined cases *Germany and Hungary* v *Commission* and *Commission* v *Ville de Paris and Others* (C-177/19 P to C-179/19 P). Advocate General Bobek delivered his Opinion in those cases on 10 June 2021 (EU:C:2021:476).

[33] See Article 1(1) of Regulation 2016/427.

[34] See judgment in *X*, paragraph 86.

[35] In this regard, I would observe that the average altitude in Austria is approximately 900 m.

[36] https://www.wien.gv.at/statistik/lebensraum/tabellen/temperatur-zr.html

100. I also note that, according to official data, the average temperature in Germany was 9.6 °C in 2017, 10.4 °C in 2018 and 10.2 °C in 2019. [37] As for other States located in the central region of the European Union, the average annual temperature in France was 13.4 °C in 2017, 13.9 °C in 2018 and 13.7 °C in 2019. [38] In Poland, the average annual temperature was 9 °C in 2017, 9.8 °C in 2018 and 10.2 °C in 2019. [39] Those various temperatures are significantly lower than the 15 °C used as the lower value by the temperature window.

101. It should be added that Regulation 2017/1151, which lays down measures for the implementation of Regulation No 715/2007, set out, in point 4.1 of Annex IIIA thereto, entitled 'Verifying real driving emissions', that 'the RDE performance shall be demonstrated by testing vehicles on the road operated over their normal driving patterns, conditions and payloads' and that the 'RDE test shall be representative for vehicles operated on their real driving routes, with their normal load'. Point 5.2 of that annex determines the ambient conditions for verifying real driving emissions as part of that test.

102. Although Regulation 2017/1151 post-dates the disputes in the main proceedings and is not applicable *ratione temporis* to them, it represents a benchmark for the present cases in that it seeks to assess real driving conditions in a more realistic way. In addition, the temperature range adopted as a reference appears much broader than that established by the temperature window. In particular, the minimum temperature taken into account for 'moderate temperature conditions' in point 5.2.4 of Annex IIIA to that regulation is 0 °C, far lower than the 15 °C of the temperature window. Furthermore, the 'extended temperature conditions' mentioned in point 5.2.3 of that annex correspond to an altitude higher than 700 m above sea level and lower or equal to 1 300 m above sea level. [40]

103. In the light of the foregoing, I am of the view that the temperature and altitude values used in the temperature window are not representative of 'normal use' within the meaning of Article 5(1) of Regulation No 715/2007 for motor vehicles in the European Union. In other words, the software at issue reduces the effectiveness of the emission control system under 'conditions which may reasonably be expected to be encountered in normal vehicle operation and use', with the result that it constitutes a 'defeat device' within the meaning of Article 3(10) of that regulation. [41]

[37] The Deutscher Wetterdienst is the weather service in Germany. See, respectively, https://www.dwd.de/DE/presse/pressemitteilungen/DE/2017/20171229_deutschlandwetter_jahr2017_news.html#:~:text=Mit%209%2C6%20Grad%20Celsius,Abweichung%20%2B0%2C7%20Grad
https://www.dwd.de/DE/presse/pressemitteilungen/DE/2018/20181228_deutschlandwetter_jahr2018_news.html#:~:text=Die%20Temperatur%20lag%20im%20Jahr,den%20w%C3%A4rmsten%20Regionen%20in%20Deutschland
https://www.dwd.de/DE/presse/pressemitteilungen/DE/2019/20191230_deutschlandwetter_jahr2019.pdf?__blob=publicationFile&v= 3

[38] Météo-France is the official weather and climate service in France. See, respectively, http://www.meteofrance.fr/climat-passe-et-futur/bilans-climatiques/bilan-2017/bilan-climatique-de-l-annee-2017;
http://www.meteofrance.fr/climat-passe-et-futur/bilans-climatiques/bilan-2018/bilan-climatique-de-l-annee-2018;
http://www.meteofrance.fr/climat-passe-et-futur/bilans-climatiques/bilan-2019/bilan-climatique-de-l-annee-2019

[39] The IMGW is the weather and water management institute in Poland. See https://www.imgw.pl/sites/default/files/2021-04/imgw-pib-klimat-polski-2020-opracowanie-final-pojedyncze-min.pdf (p. 12).

[40] Under point 9.5 of Annex IIIA to Regulation 2017/1151, 'if during a particular time interval the ambient conditions are extended in accordance with point 5.2, the pollutant emissions during this particular time interval, calculated according to Appendix 4, shall be divided by a value of 1.6 before being evaluated for compliance with the requirements of this Annex'.

[41] In its written observations, the German Government states that a defeat device designed such that the exhaust gas recirculation rate operates at 100% only within a temperature window between 15 °C and 33 °C is, in the current state of technical development, prohibited, since that window is significantly above the average annual temperature in Germany and an amendment to that window to cover a more extended temperature range, particularly towards the lower limit, is technically possible. That government adds that, in recent years, it has been necessary for the authority responsible for type-approval to take decisions on a case-by-case basis in relation to a particular type of vehicle, taking into account the specific features of the motorisation at issue.

104. In those circumstances, I propose that the first and third questions in Case C-128/20, the first question in Case C-134/20 and the first part of the second question in Case C-145/20 be answered to the effect that Article 3(10) of Regulation No 715/2007, read in conjunction with Article 5(1) of that regulation, is to be interpreted as meaning that a device which, under real driving conditions of a motor vehicle, ensures exhaust gas recirculation in full only when the outside temperature is between 15 °C and 33 °C and the driving altitude is lower than 1 000 m, whereas, outside that window, per 10 °C, and above an altitude of 1 000 m, per 250 m of altitude, the exhaust gas recirculation rate decreases in a linear way down to zero, with the result that NOx emissions increase beyond the limit values laid down in the regulation, constitutes a 'defeat device'.

B. The second question in Case C-128/20, the second and third questions in Case C-134/20, and the second part of the second question in Case C-145/20

105. By the second question in Case C-128/20, the second and third questions in Case C-134/20 and the second part of the second question in Case C-145/20, which should be examined together, the referring courts ask, in essence, whether Article 5(2)(a) of Regulation No 715/2007 is to be interpreted as meaning that a defeat device which guarantees exhaust gas recirculation in full only when the outside temperature is between 15 °C and 33 °C and the driving altitude is lower than 1 000 m is covered by the exception to the prohibition of such devices laid down in that provision, which relates to the protection of the engine against damage or accident and the safe operation of the vehicle, if that device serves primarily to protect components such as the EGR value, the EGR cooler and the diesel particulate filter.

106. Under Article 5(2) of Regulation No 715/2007, the use of defeat devices that reduce the effectiveness of emission control systems is to be prohibited. However, there are three exceptions to that prohibition,[42] which include that contained in point (a) of that provision, namely where 'the need for the device is justified in terms of protecting the engine against damage or accident and for safe operation of the vehicle'.[43]

107. In the light of that wording, and in answer to the second question put by the referring court in Case C-134/20, I take the view that the issue of whether the defeat device at issue in the main proceedings is necessary to protect the engine against damage and for the safe operation of the vehicle has a bearing on the assessment on whether that device is permitted. In my view, even a device that reduces the effectiveness of the pollutant emission control systems could be permitted on the basis of Article 5(2)(a) of Regulation No 715/2007 if the conditions laid down in that provision are met.

108. In the judgment in *X*, the Court also interpreted that provision for the first time. In that regard, it noted that the concepts of 'damage' and of an 'accident' are not defined in Article 5 of Regulation No 715/2007 or in the other articles of that regulation and that, in the absence of any definition, the meaning and scope of those terms must, as the Court has consistently held, be determined by considering their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they form part.[44]

[42] The other two exceptions provided for in Article 5(2)(b) and (c) of Regulation No 715/2007, respectively, are not applicable in the cases in the main proceedings.

[43] Given the use of the conjunction 'and', I understand that provision to mean that the conditions laid down are cumulative. Thus, the criterion of the 'safe operation of the vehicle' is not independent from the existence of 'damage' or an 'accident' and one of the latter must be present in all circumstances.

[44] Judgment in *X*, paragraphs 106 and 107.

The Court took the view that, in its usual meaning in everyday language, the term 'accident' refers to an unforeseen, sudden event that results in damage or danger, such as injury or death,[45] and that, in turn, the term 'damage' refers to harm generally resulting from a violent or sudden cause.[46] A defeat device which reduces the effectiveness of the emission control system is therefore justified where, pursuant to Article 5(2)(a) of that regulation, it means that the engine is protected from sudden and exceptional damage.[47] However, the clogging up or the ageing of the engine cannot be regarded as an 'accident' or 'damage', within the meaning of that provision, since such occurrences are, in principle, foreseeable and inherent in the normal operation of the vehicle.[48] Only immediate risks of damage that trigger a specific danger whilst the vehicle is being driven are capable of justifying the use of a defeat device.[49] On that basis, the Court concluded that Article 5(2)(a) of Regulation No 715/2007 is to be interpreted as meaning that a defeat device which systematically improves the performance of the vehicles' emission control system during type-approval procedures in order to comply with the emission limits laid down by that regulation, and thus obtain the approval of those vehicles, cannot fall within the scope of the exception to the prohibition on such devices laid down in that provision, even if that device helps to prevent the ageing or clogging up of the engine.[50]

109. In their written observations, Auto Krainer, Volkswagen, Porsche Inter Auto and the German Government state that they do not agree with that interpretation by the Court, putting forward two types of argument.[51]

110. First, from a legal standpoint, those interveners argue, in essence, that a clearer distinction must be drawn between the concepts of an 'accident' and of 'damage' within the meaning of Article 5(2)(a) of Regulation No 715/2007. If the term 'accident' must in fact be understood to mean an 'unforeseen, sudden event', 'damage', by contrast, does not necessarily occur in an unforeseen and sudden manner because it can be triggered by a series of cumulative effects which, in time, over the normal life of the vehicle and under normal conditions of use, could damage the engine, it being impossible to address those effects through maintenance work carried out periodically and properly.

111. Second, from a technical perspective, a safety defect could stem from the EGR valve, which is intended to control and reduce NOx emissions generated by incomplete fuel combustion.[52] Where outside temperatures are too high or too low, that is to say where demands are placed on the components outside the framework of their operating conditions, excessive deposits or condensation, referred to as 'coating' and 'clogging', could be formed during the exhaust gas recirculation, which could lead to defects in the positioning of the EGR valve, for example it may

[45] Judgment in *X*, paragraph 108. In the judgment of 19 December 2019, *Niki Luftfahrt* (C-532/18, EU:C:2019:1127, paragraph 35), the Court found, in the same vein, that the ordinary meaning of the concept of an 'accident' is that of an 'unforeseen, harmful and involuntary event'. See also judgment of 12 May 2021, *Altenrhein Luftfahrt* (C-70/20, EU:C:2021:379, paragraph 33).

[46] Judgment in *X*, paragraph 108.

[47] Judgment in *X*, paragraph 109.

[48] Judgment in *X*, paragraph 110.

[49] Judgment in *X*, paragraph 114.

[50] Judgment in *X*, paragraph 115.

[51] The judgment in *X* was given after the end of the written procedure in the present cases. However, the interveners had the opportunity to comment on the Opinion of Advocate General Sharpston in *X*. In the context of questions for a written reply put by the Court, the interveners were, inter alia, asked about the conclusions to be drawn from the judgment in *X* in the present cases.

[52] As the referring court in Case C-134/20 observes, the EGR valve redirects exhaust gas from the engine outlet into the engine intake passage in order to replace part of the fresh air. This reduces the temperature and slows down the combustion process, leading to a reduction in NOx emissions. Furthermore, the EGR exchanger is used to cool the burnt gas (with regard to the functioning of the EGR valve, see also paragraph 33 of the judgment in *X*).

close or remain open in a certain position permanently.[53] That situation could damage the engine or some of its components without it being possible to foresee when and how the EGR valve fault could arise, or the scale of that fault, because it would depend on how the vehicle is driven and the ambient conditions, and regular and appropriate maintenance work cannot always prevent gradual damage. It follows from the foregoing that the safe operation of the vehicle concerned would be seriously and significantly affected, for example in the event of a sudden and abrupt loss of power during a manoeuvre to overtake another vehicle. The particulate filter could also combust if an excessive quantity of exhaust gas were channelled back to the combustion chamber, which could cause the engine, or even the vehicle, to catch fire.

112. Since those arguments relate to the safety of a motor vehicle, I consider it important to give them careful consideration and to determine to what extent they could justify a defeat device in the form of the software at issue.

113. In that regard, first, I would point out that, with a view to defining the term 'damage' within the meaning of Article 5(2)(a) of Regulation No 715/2007, the Court referred to the Opinion of Advocate General Sharpston in the case which gave rise to the judgment in *X*.[54] According to the Advocate General, the French term '*dégât*' refers to damage generally resulting from a violent or sudden cause, in accordance with the definition in the dictionary *Le Petit Robert*, and the term 'damage' used in the English language version of that regulation does not gainsay that meaning.[55]

114. For my part, I would add that the dictionary of the Académie française (French Academy) defines '*dégât*' as follows: '*dommage, détérioration, dévastation, qui résulte d'un accident ou d'une volonté de destruction*'.[56] Thus, that definition establishes a connection between 'damage' and an 'accident', it being understood that wilful destruction is not present in the cases in the main proceedings. In turn, the *Collins English Dictionary* provides the following definition: 'damage is physical harm that is caused to an object'.[57] As for the definition of the term in German (*Beschädigung*), it can be understood to mean any impact on an object which changes its material composition or alters, even slightly, the use for which it is intended, and that it is not necessary that the substance is damaged.[58]

115. It is true that none of those definitions of the term 'damage' refers to a sudden event. However, since they do not invalidate the interpretation of that term given by the Court in the judgment in *X*, I see no reason to revisit that interpretation, which was adopted recently. I will therefore classify 'damage', within the meaning of Article 5(2)(a) of Regulation No 715/2007, as damage generally resulting from a violent or sudden cause. In the light of that classification, it is necessary to determine whether the need for the defeat device at issue in the main proceedings is justified in terms of the *protection of the engine* against damage.

[53] The German Government states that, in the most modern, Euro 6 generation diesel engines, temperature windows play a minor role due to the use of air intake radiators; the EGR system is, however, still needed at extreme outside temperatures, for example at a temperature of – 10 °C.

[54] Opinion in *CLCV and Others (Defeat device on diesel engines)* (C-693/18, EU:C:2020:323).

[55] Point 135 of that Opinion.

[56] 'Damage, deterioration, ruin resulting from an accident or from a desire to destruct' (free translation). See https://www.dictionnaire-academie.fr/article/A9D0864

[57] https://www.collinsdictionary.com/dictionary/english/damage

[58] 'Eine Beschädigung ist jede Einwirkung auf eine Sache, die ihre stoffliche Zusammensetzung verändert oder ihre bestimmungsgemäße Brauchbarkeit nicht nur geringfügig beeinträchtigt. Eine Substanzverletzung ist nicht erforderlich' (free translation). See https://www.rechtswoerterbuch.de/recht/b/beschaedigung/

116. The referring court in Case C-134/20 states that the EGR valve is an integral part of the engine. However, in the Commission's view, the engine and the 'exhaust gas after-treatment system' form separate parts of a vehicle. The malfunctioning of the EGR valve would not therefore affect the protection of the engine.

117. In that regard, I would point out that Court is required to interpret the provisions of EU law as they apply to the cases in the main proceedings. Even though that conclusion is contested by Auto Krainer, Volkswagen and Porsche Inter Auto in reply to the written questions put by the Court, it is apparent from the relevant EU legislation, as it is worded, that the EGR system is not part of the engine. Thus, Article 2(18) of Regulation No 692/2008 states that 'emission control system' is to mean, 'in the context of the OBD [on-board diagnostic], the electronic *engine* management controller *and any emission-related component in the exhaust* or evaporative *system* which supplies an input to or receives an output from this controller'. [59]

118. Similarly, Annex I to Regulation No 692/2008, which is entitled 'Administrative provisions for EC type-approval', contains a point 3.3.1 which states that the 'type-approval shall be extended to different vehicle types, provided that the vehicle, *engine or pollution control system* parameters specified below are identical or remain within the prescribed tolerances'. [60] That annex makes an explicit distinction between the '*Engine*' (point 3.3.1.2) and the '*Pollution control system parameters*' (point 3.3.1.3). The latter point contains a subpoint (c) which refers to '*EGR*'. [61]

119. It follows from those provisions that, according to the relevant legislation, the EU legislature drew a clear distinction between, on the one hand, the engine and, on the other hand, the pollution control system, which includes the EGR system. In addition, under Article 10(1) of Regulation No 692/2008, particulate filters are to be considered to be pollution control devices for the purposes of that regulation.

120. Moreover, as the Court observed in the judgment in *X*, since Article 5(2)(a) of Regulation No 715/2007 is an exception to the prohibition on the use of defeat devices that reduce the effectiveness of emission control systems, it must be interpreted strictly. [62]

121. In those circumstances, in the light of the applicable provisions of EU law, it is my view that a defeat device which serves primarily to protect components such as the EGR valve, the EGR exchanger and the diesel particulate filter does not fall within the scope of the exception to the prohibition on such devices laid down in Article 5(2)(a) of Regulation No 715/2007.

122. It follows from the foregoing that, in response to the third question submitted by the referring court in Case C-134/20, I take the view that the issue of whether the component to be protected against damage is the EGR valve has no bearing on whether the defeat device at issue is permitted in the light of Article 5(2)(a) of Regulation No 715/2007.

123. However, as I noted in point 111 of this Opinion, several interveners have argued that the malfunctioning of the EGR valve could damage the engine or some of its components.

[59] Emphasis added. The same definition is reproduced in Article 2(18) of Regulation 2017/1151.

[60] Emphasis added.

[61] Reference is made to the same factors in point 3.3 of Annex I to Regulation 2017/1151. Furthermore, Annex XI to Regulation No 692/2008, which is entitled 'On-board diagnostics (OBD) for motor vehicles', reiterates, in Appendix 2 thereto, the separation between the engine and the emission control system. That distinction is likewise established in Appendix 2 to Annex XI to Regulation 2017/1151.

[62] Judgment in *X*, paragraph 112.

124. As regards the situation in which the engine of the vehicle concerned becomes clogged up on account of the malfunctioning of the EGR valve, as I have already pointed out, it follows from the judgment in *X* that the clogging up and the ageing of the engine cannot be regarded as an 'accident' or 'damage', within the meaning of Article 5(2)(a) of Regulation No 715/2007, since such occurrences are, in principle, foreseeable and inherent in the vehicle's normal operation.[63] In other words, this constitutes wear and tear as a result of the normal use of that vehicle. Those occurrences cannot therefore fall within the scope of the exception laid down in that provision.

125. In accordance, once more, with the judgment in *X*, only immediate risks of damage that trigger a specific danger whilst the vehicle is being driven are capable of justifying the use of a defeat device such as a temperature window.[64] In my view, that situation could arise if the malfunctioning of the EGR has a sudden effect on the functioning of the engine itself, and the regular and appropriate maintenance of the vehicle could not prevent such an effect.[65]

126. Only in such a situation could the defeat device at issue be authorised on the basis of Article 5(2)(a) of Regulation No 715/2007. Since this involves conducting an analysis of a factual nature, it falls to the referring courts, who alone have jurisdiction to find and assess the facts in the cases before them,[66] to determine whether the potential malfunctioning of the EGR could give rise to sudden, immediate risks of damage to the engine itself,[67] thus triggering a specific danger whilst the vehicle is being driven, even if that vehicle undergoes regular and appropriate maintenance.[68]

127. In that connection, I note that, in Case C-134/20, the referring court states that it is impossible to determine whether the defeat device is necessary to protect the vehicle's engine against damage. If that determination is indeed impossible, it should be recalled that Article 5(2)(a) of Regulation No 715/2007 must be interpreted strictly.

128. I would add that, in their written observations, Auto Krainer, Volkswagen, Porsche Inter Auto and the German Government argue that Regulation No 715/2007 is designed to be neutral from a technological perspective and that it does not require that the best technology possible is used. In that regard, it is not contested that the use of an EGR system which operates in line with a temperature window represents, to a different extent depending on the date of approval, state-of-the-art technology.

129. Such claims are, in my view, incapable of allowing a defeat device to be authorised on the basis of Article 5(2)(a) of Regulation No 715/2007. First, nowhere in that regulation is it stated that a particular technology should be used for EC type-approval. Only a pollutant emission objective is stipulated. Second, as is stated in recital 7 of that regulation, 'in setting emission standards it is important to take into account the implications for markets and manufacturers'

63 Judgment in *X*, paragraph 110.

64 Judgment in *X*, paragraph 114.

65 If regular and appropriate maintenance of the vehicle means that the malfunctioning of the EGR valve can be avoided, immediate risks of damage which give rise to a specific danger while the vehicle is being driven *are entirely avoidable*. There is thus, in my view, no problem with the functioning of the engine or the safety of the vehicle.

66 See the case-law cited in point 86 of this Opinion.

67 The Commission makes the point that, when used to justify an auxiliary emission strategy, the risk of *sudden and irreparable engine* damage should be appropriately demonstrated and documented (see the Commission Notice of 26 January 2017 entitled 'Guidance on the evaluation of Auxiliary Emission Strategies and the presence of Defeat Devices with regard to the application 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)', C(2017) 352 final, point 2.2, p. 8).

68 If so, it is my view that the condition that the need for the device must be justified for safe operation of the vehicle, laid down in Article 5(2)(a) of Regulation No 715/2007, would thus also be satisfied.

competitiveness, the direct and indirect costs imposed on business and the benefits that accrue in terms of stimulating innovation, improving air quality, reducing health costs and increasing life expectancy, as well as the implications for the overall impact on carbon dioxide emissions'. Accordingly, when the EU legislature determined the limit values of pollutant emissions, account had already been taken of the interests of vehicle manufacturers. It is therefore for those manufacturers to adapt to and to apply the appropriate technical means to comply with those limit values,[69] without the technology used necessarily being the best possible or being required.

130. In addition, as the Court made clear in the judgment in *X*, the objective pursued by Regulation No 715/2007, which consists in guaranteeing a high level of protection of the environment and improving air quality within the European Union, means NOx emissions being effectively limited throughout the normal life of vehicles.[70] Permitting a defeat device under Article 5(2)(a) of that regulation solely because, for example, research costs are high, the technical device is expensive or vehicle maintenance is more frequent or more costly for the user would render the regulation meaningless.[71]

131. In the light of the foregoing considerations, I propose that the Court answer the second question in Case C-128/20, the second and third questions in Case C-134/20 and the second part of the second question in Case C-145/20 to the effect that Article 5(2)(a) of Regulation No 715/2007 is to be interpreted as meaning that a defeat device which guarantees exhaust gas recirculation in full only when the outside temperature is between 15 °C and 33 °C and the driving altitude is lower than 1 000 m is not covered by the exception to the prohibition of such devices laid down in that provision, which relates to the protection of the engine against damage or accident and the safe operation of the vehicle, if that device serves primarily to protect components such as the EGR value, the EGR exchanger and the diesel particulate filter.

C. The fourth question in Case C-134/20

132. By the fourth question in Case C-134/20, the referring court asks, in essence, whether Article 5(1) and (2) of Regulation No 715/2007 is to be interpreted as meaning that the question of whether a defeat device is permitted depends on whether that device was fitted in the vehicle from the vehicle's manufacture or whether it was installed only later by way of a repair within the meaning of Article 3(2) of Directive 1999/44.

133. Under Article 3(2) of Directive 1999/44, in the case of a lack of conformity of goods at the time they were delivered, the consumer is to be entitled to have the goods brought into conformity free of charge by repair or replacement, in accordance with paragraph 3 of that article, or to have an appropriate reduction made in the price or the contract rescinded with regard to those goods, in accordance with paragraphs 5 and 6 of that article.

[69] In its Report on the inquiry into emission measurements in the automotive sector of 2 March 2017, p. 44, the European Parliament stated that 'driving at very low ambient temperatures (or at very high altitudes where air pressure is low) can pose a challenge for EGR systems, due to the possible creation of soot, hydrocarbons and condensates that may clog the EGR valve or intercooler, and cause, for instance, increased PM or hydrocarbon pollutant emissions … However, manufacturers seem to switch off EGR systems unjustifiably quickly and unjustifiably close to the temperature range used in the test cycle'.

[70] Judgment in *X*, paragraph 113.

[71] In that connection, the Court refers in its case-law to the general principle that the protection of public health must unquestionably take precedence over economic considerations (judgment of 19 April 2012, *Artegodan* v *Commission*, C-221/10 P, EU:C:2012:216, paragraph 99 and the case-law cited).

134. Here, it is apparent from the order for reference in Case C-134/20 that the purpose of the installation of the defeat device in the form of the software at issue was to remedy the prohibited switch system and to comply with the provisions of Regulation No 715/2007 by means of a repair. This question is based on the assumption that that software enabled the vehicle manufacturer concerned to achieve that objective. It is for the referring court to determine, having regard to the answers given to the questions previously examined, whether that is the case.[72] If not, the defeat device would, in any event, be prohibited on the basis of Article 5(1) and (2) of that regulation.

135. Assuming that the defeat device at issue is regarded by the referring court as complying with the provisions of Regulation No 715/2007, I take the view that the question of whether such a device is permitted does not turn on whether it was fitted in the vehicle concerned from that vehicle's manufacture.

136. First, the wording of Article 3(10) of Regulation No 715/2007, read in conjunction with Article 5(1) and (2) of that regulation, does not draw a distinction according to whether the defeat device was fitted in the vehicle from the beginning or whether it was installed subsequently, as no mention of the time of installation of such a device is made in those provisions.

137. Next, in the context of Regulation No 715/2007, Article 4(1) of that regulation states that manufacturers are to demonstrate that *all new replacement pollution control devices* requiring type approval which are sold or put into service in the Union are type approved in accordance with that regulation and its implementing measures, and that those obligations include respecting the emission limits set out in Annex I and the implementing measures referred to in Article 5 of the regulation. In addition, under Article 10(1) of Regulation No 692/2008, 'the manufacturer shall ensure that replacement pollution control devices intended to be fitted to EC type-approved vehicles covered by the scope of Regulation [No 715/2007] are type-approved, as separate technical units within the meaning of Article 10(2) of Directive [2007/46], in accordance with Article 12, Article 13 and Annex XIII to this Regulation'. Thus, it follows from those provisions that all pollution control devices, whether installed originally or subsequently, must comply with the obligations laid down in Regulation No 715/2007.

138. Lastly, as has already been stated, the objective of Regulation No 715/2007 is to guarantee a high level of protection of the environment. The assumption that the sole standpoint to be adopted is that of the date of manufacture of the vehicle would mean that vehicle manufacturers would not be required, once a vehicle has been put into service, to install a defeat device that complies with the provisions of that regulation. Such an assumption would be contrary to the objective of the regulation. Indeed, in order to circumvent the obligations laid down in that regulation, manufacturers would need only to replace the original pollution control device, which would be compliant with Regulation No 715/2007, with a less effective defeat device that does not ensure compliance with the limit values laid down for NOx.

139. It is therefore my view that the fourth question in Case C-134/20 should be answered to the effect that Article 5(1) and (2) of Regulation No 715/2007 is to be interpreted as meaning that the question of whether a defeat device is permitted does not depend on whether that device was fitted in the vehicle from the vehicle's manufacture or whether it was installed only later by way of a repair within the meaning of Article 3(2) of Directive 1999/44.

[72] See, inter alia, point 126 of this Opinion.

D. The first question in Case C-145/20

140. By the first question in Case C-145/20, the referring court asks, in essence, whether Article 2(2)(d) of Directive 1999/44 is to be interpreted as meaning that a motor vehicle that falls within the scope of Regulation No 715/2007 shows the quality which is normal in goods of the same type and which the consumer can reasonably expect where that vehicle is fitted with a prohibited defeat device within the meaning of Article 3(10) of that regulation, read in conjunction with Article 5(2) of the regulation, but the vehicle is covered by a valid EC type-approval.

141. As a preliminary point, I would observe that that question is based on the premiss that the vehicle concerned is equipped with a prohibited defeat device within the meaning of Article 3(10) of Regulation No 715/2007, read in conjunction with Article 5(2) of that regulation. As I have stated,[73] it is for the referring court to determine whether that is the case.

142. If that is so, it must be recalled that the purpose of Directive 1999/44 is, as recital 1 thereof states, to ensure a high level of consumer protection. In particular, Article 2(1) of that directive obliges the seller to deliver goods to the consumer which are in conformity with the contract of sale.[74] Recital 8 of the directive explains that, in order to facilitate the application of the principle of conformity with the contract, it is useful to introduce a rebuttable presumption of conformity with the contract covering the most common situations, and that, in the absence of specific contractual terms, as well as where the minimum protection clause is applied, the elements mentioned in that presumption may be used to determine the lack of conformity of the goods with the contract.

143. With regard, specifically, to motor vehicles, I note that, under recital 3 of Directive 2007/46, the regulatory acts specifying the technical requirements 'should primarily seek to ensure a high level of road safety, health protection, environmental protection, energy efficiency and protection against unauthorised use'.[75] In that connection, Article 3(5) of that directive defines 'EC type-approval' as the 'procedure whereby a Member State certifies that a type of vehicle, system, component or separate technical unit satisfies the relevant administrative provisions and technical requirements of this Directive and of the regulatory acts listed in Annex IV or XI'. That Annex IV, which is entitled 'Requirements for the purpose of EC type-approval of vehicles', refers, in Part I thereof, which is entitled 'Regulatory acts for EC type-approval of vehicles produced in unlimited series', to Regulation No 715/2007 in connection with 'emissions (Euro 5 and 6) light duty vehicles/access to information'. Furthermore, the first subparagraph of Article 4(3) of that directive states that Member States are to register or permit the sale or entry into service only of such vehicles as satisfy the requirements of the same directive.

144. It follows from those provisions that, in the context of an EC type-approval, the vehicles concerned must comply with the requirements laid down in Annex IV to Directive 2007/46, in particular those relating to defeat devices. If they do not, those vehicles do not have an accurate certificate of conformity, as referred to in Article 18(1) of that directive and defined in Article 3(36) of that directive as 'the document set out in Annex IX, [76] issued by the

[73] See point 126 of this Opinion.

[74] Judgment of 3 October 2013, *Duarte Hueros* (C-32/12, EU:C:2013:637, paragraphs 25 and 26).

[75] See, on the principles of the EU secondary legislation in the field of vehicle registration, Opinion of Advocate General Wahl in *RDW and Others* (C-326/17, EU:C:2018:760, points 29 to 38).

[76] Point 0 of Annex IX to Directive 2007/46 states that 'the certificate of conformity is a statement delivered by the vehicle manufacturer to the buyer in order to assure him that the vehicle he has acquired complies with the legislation in force in the European Union at the time it was produced'.

manufacturer and certifying that a vehicle belonging to the series of the type approved in accordance with this Directive complied with all regulatory acts at the time of its production'. Pursuant to Article 26(1) of the same directive, that document is mandatory for registration or sale.

145. In its written observations, Porsche Inter Auto contends that consumers expect merely that they can use a vehicle to drive and can do so in complete safety, and that that vehicle's total compliance with all regulatory requirements is not of interest to them. However, it should be pointed out that that view is at odds with the wording of Article 3(36) of Directive 2007/46, which refers to compliance with *all regulatory acts* at the time of production for the certificate of conformity to be issued.

146. Since an average consumer, who is reasonably well informed and reasonably observant and circumspect, can expect that the regulatory requirements for EC type-approval are satisfied, even in the absence of specific contractual terms, it seems clear to me that, if not all those requirements are met, the vehicle concerned is not in conformity with the contract of sale within the meaning of Directive 1999/44. [77]

147. In my view, in the absence of an accurate certificate of conformity, the vehicle concerned does not comply 'with the description given by the seller', within the meaning of Article 2(2)(a) of Directive 1999/44. Similarly, that vehicle is not 'fit for any particular purpose for which the consumer requires [it]' and is not 'fit for the purposes for which goods of the same type are normally used', within the meaning of Article 2(2)(b) and (c) of that directive. In the same way, with regard to the question put by the referring court, that vehicle does not show 'the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods', within the meaning of Article 2(2)(d) of the directive.

148. As the Commission observes, that interpretation is supported by Article 7 of Directive 2019/771, entitled 'Objective requirements for conformity', which states, in point (a) of paragraph 1 thereof, that, in addition to complying with any subjective requirements for conformity specified in the contract, the goods are to be fit for the purposes for which goods of the same type would normally be used, taking into account, where applicable, *any* existing *Union* and national *law*, technical standards or, in the absence of such technical standards, applicable sector-specific industry codes of conduct.

149. In my opinion, the fact that the vehicle concerned is EC type-approved, allowing that vehicle to be driven on the road, is incapable of changing the answer that should be given to the question submitted. [78] That approval may, inter alia, have been obtained even though the approval body was unaware of the presence of a prohibited device. Thus, in Case C-145/20, the referring court states that the vehicle type concerned was, originally, type-approved by the KBA even though that body had not been made aware of the presence of the switch system and, if the approval body had been aware of that system, EC type-approval would not have been granted.

[77] In that regard, the Court has held that the purchaser of a vehicle can legitimately expect that that vehicle is compliant with the statutory requirements imposed on the vehicle manufacturer (judgment of 9 July 2020, *Verein für Konsumenteninformation*, C-343/19, EU:C:2020:534, paragraph 37). For the analysis that, in relations between professionals and consumers, goods and services must be in conformity with the consumers' legitimate expectations, see Calais-Auloy, J., Temple, H., and Depincé, M., *Droit de la consommation*, Dalloz, Paris, 10th edition, 2020, p. 225 et seq.

[78] See, to that effect, judgment of 4 October 2018, *Commission* v *Germany* (C-668/16, EU:C:2018:802, paragraphs 85 to 89).

150. Accordingly, although the vehicle concerned is covered by an EC type approval issued by the competent national body, the fact remains that that vehicle is not in conformity with the contract of sale within the meaning of Directive 1999/44.

151. I therefore propose that the first question in Case C-145/20 be answered to the effect that Article 2(2)(d) of Directive 1999/44 is to be interpreted as meaning that a motor vehicle that falls within the scope of Regulation No 715/2007 does not show the quality which is normal in goods of the same type and which the consumer can reasonably expect where that vehicle is fitted with a prohibited defeat device within the meaning of Article 3(10) of that regulation, read in conjunction with Article 5(2) of the regulation, even if the vehicle is covered by a valid EC type-approval.

E. The third question in Case C-145/20

152. By the third question in Case C-145/20, the referring court asks, in essence, whether Article 3(6) of Directive 1999/44 is to be interpreted as meaning that a lack of conformity consisting in the presence, in the vehicle concerned, of a prohibited defeat device within the meaning of Article 3(10) of Regulation No 715/2007, read in conjunction with Article 5(1) and (2) of that regulation, can be classified as 'minor' if, assuming that the consumer had been aware of the presence and the operation of that device, he would nevertheless have purchased that vehicle.

153. As is apparent from the case-law of the Court, Article 2(1) of Directive 1999/44 obliges the seller to deliver goods to the consumer which are in conformity with the contract of sale. Accordingly, under Article 3(1) of that directive, the seller is to be liable to the consumer for any lack of conformity which exists at the time at which the goods were delivered. Article 3(2) of that directive lists the rights on which the consumer may rely against the seller in cases where there is a lack of conformity in the goods delivered. In the first place, under Article 3(3) of the same directive, the consumer has the right to require that the goods be brought into conformity. If that is not possible, he may subsequently, in accordance with Article 3(5) thereof, seek a reduction in the price or rescission of the contract. However, as is apparent from Article 3(6) of Directive 1999/44, where the lack of conformity in the goods delivered is minor, the consumer is not entitled to have the contract rescinded and, in such a case, may request only an appropriate reduction in the price of the goods at issue. [79]

154. It thus follows from Article 3(3) and (5) of Directive 1999/44, read in the light of recital 10 of that directive, that that directive favours, in the interest of both parties to the contract, the performance of that contract by means of the two remedies first provided for, rather than the rescission of the contract. [80]

155. Here, the referring court in Case C-145/20 states that DS, who has brought an action against Porsche Inter Auto seeking the rescission of the contract of sale of vehicle 3, would have bought that vehicle, albeit subject to different terms, if he had known that it was fitted with the switch system, that is to say, a prohibited defeat device within the meaning of Article 3(10) of Regulation

[79] Judgment of 3 October 2013, *Duarte Hueros* (C-32/12, EU:C:2013:637, paragraphs 26 to 28).

[80] Judgment of 23 May 2019, *Fülla* (C-52/18, EU:C:2019:447, paragraph 61).

No 715/2007, read in conjunction with Article 5(1) and (2) of that regulation. That court asks this question having taken the view that that vehicle is still fitted with a prohibited defeat device within the meaning of those provisions, following the installation of the software at issue. [81]

156. As a preliminary point, I note that that question is based on the assumption that DS could seek the rescission of the contract of sale of vehicle 3. However, it is only if the consumer is entitled to neither repair nor replacement of the goods not in conformity or if the seller has failed to complete one of those remedies within a reasonable time or without significant inconvenience to the consumer that the consumer may, under Article 3(5) of Directive 1999/44, require the rescission of the contract, unless, in accordance with Article 3(6) of that directive, the lack of conformity is minor. [82] It is for the referring court to determine whether, in the light of those conditions, DS is entitled to neither repair nor replacement of the goods not in conformity or whether Porsche Inter Auto failed to complete one of the abovementioned remedies.

157. Furthermore, under Article 2(3) of Directive 1999/44, it is to be deemed that there is not a lack of conformity for the purposes of that article if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of, the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer. [83] In the light of that wording, it is my view that the consumer's awareness of the lack of conformity is objective in nature. That condition is met, for example, where the seller informs the consumer of the lack of conformity at the time of the sale and the latter therefore purchases the goods in full knowledge of the facts. Logically, that consumer can then no longer rely on the presence of that lack of conformity.

158. To my mind, Article 2(3) of Directive 1999/44 cannot apply in the case in the main proceedings. It is not contested that, at the time vehicle 3 was sold, DS was unaware of the alleged lack of conformity and could not reasonably have been aware of it. Thus, the question submitted by the referring court is based solely on DS' hypothetical readiness to acquire that vehicle even if he had been aware of the lack of conformity. That is a subjective point, which cannot be proven and might also change over time, in particular depending on the information available to the consumer as to the seriousness of the lack of conformity. [84]

159. Directive 1999/44 does not define the concept of a 'minor lack of conformity'. [85] Nor has the Court specifically ruled on the scope of that concept. [86] It is difficult to define such a concept in general terms because a lack of conformity depends on the specific situation and must be established on a case-by-case basis according to the contract concluded between the parties. In

[81] I would point out that it is for the referring court to determine whether this is the case, as I observed in point 126 of this Opinion.

[82] Judgment of 23 May 2019, *Fülla* (C-52/18, EU:C:2019:447, paragraph 60).

[83] The last scenario does not apply in the case in the main proceedings.

[84] In this regard, inter alia, the consumer cannot be asked to anticipate the outcome of the analysis of the legal characterisation regarding the lack of conformity in the goods (see, to that effect, judgment of 3 October 2013, *Duarte Hueros*, C-32/12, EU:C:2013:637, paragraph 40).

[85] The concept of a 'minor lack of conformity' exists as early as in the proposal for a European Parliament and Council Directive on the sale of consumer goods and associated guarantees of 18 June 1996 (COM(95) 520 final, p. 1). The explanatory memorandum to that proposal states that, 'with an eye to compromise and in order to accommodate different national traditions, Member States are allowed to limit the consumer's options in the case of a minor lack of conformity' (p. 13). Furthermore, Directive 1999/44 is repealed with effect from 1 January 2022 by Directive 2019/771, which also does not define the concept of a 'minor lack of conformity'.

[86] I would note that, in the case that gave rise to the judgment of 3 October 2013, *Duarte Hueros* (C-32/12, EU:C:2013:637, paragraphs 17, 18 and 20), a consumer had purchased a car with a sliding roof and, when it rained, water leaked in through the roof into the car interior. Following the action brought by that consumer seeking rescission of the contract of sale, the referring court took the view that the fault at the issue of the dispute brought before it was 'minor' within the meaning of Article 3(6) of Directive 1999/44. In her Opinion in *Duarte Hueros* (C-32/12, EU:C:2013:128, point 57), Advocate General Kokott stated that, in comparable cases, other European courts, including supreme courts, have ruled that the entry of water is not to be regarded as a minor defect and that the fact that the vehicle could still be used as a means of transport despite the entry of water was irrelevant to those decisions.

any case, I take the view that a lack of conformity which affects the safety and proper functioning of goods is not 'minor' within the meaning of Article 2(3) of that directive.[87] Similarly, a defect is not 'minor' where the goods do not correspond to the terms of the contract. For example, if a consumer orders a vehicle and specifies the colour red and a blue car is delivered to him, the lack of conformity cannot be considered 'minor', which could entail, pursuant to Article 3(3) and (5) of that directive, the rescission of the contract.

160. It is indeed true, as is clear from the case-law of the Court, that Article 3 of Directive 1999/44 seeks to strike a fair balance between the interests of the consumer and the seller, by guaranteeing the consumer, as the weak party to the contract, complete and effective protection from faulty performance by the seller of his contractual obligations, while enabling account to be taken of economic considerations advanced by the seller.[88] Accordingly, the rescission of the contract, the remedy available to the consumer that has the weightiest consequences, can be sought only if the lack of conformity is of a sufficient magnitude.

161. However, as observed in point 146 of this Opinion, an average consumer, who is reasonably well informed and reasonably observant and circumspect, can expect that the regulatory requirements for EC type-approval of vehicles are satisfied, even in the absence of specific contractual terms. Where a prohibited defeat device within the meaning of Article 5(1) and (2) of Regulation No 715/2007 is fitted, the certificate of conformity is not accurate.[89] In addition, pursuant to Article 26(1) of Directive 2007/46, Member States are to register, and permit the sale or entry into service, only of those vehicles accompanied by a valid certificate of conformity issued in accordance with Article 18 of that directive.

162. Accordingly, as stated in reply to the first question submitted in Case C-145/20, a vehicle, inter alia, does not show the quality which is normal in goods of the same type and which the consumer can reasonably expect, within the meaning of Article 2(2)(d) of Directive 1999/44, where that vehicle is fitted with a prohibited defeat device, within the meaning of Article 5(1) and (2) of Regulation No 715/2007.

163. In those circumstances, I am of the view that the lack of conformity of the vehicle with the contract as a result of the use of such a device cannot be considered to be 'minor' within the meaning of Article 3(6) of Directive 1999/44.

164. On the basis of the foregoing considerations, I propose that the third question in Case C-145/20 be answered to the effect that Article 3(6) of Directive 1999/44 is to be interpreted as meaning that a lack of conformity consisting in the presence, in the vehicle concerned, of a prohibited defeat device within the meaning of Article 3(10) of Regulation No 715/2007, read in conjunction with Article 5(1) and (2) of that regulation, cannot be classified as 'minor', even if, assuming that the consumer had been aware of the presence and the operation of that device, he would nevertheless have purchased that vehicle.

87 See, to that effect, Durovic, M., 'Consumer sales law in the European Union', *Comparative Consumer Sales Law*, 2018, pp. 1 to 182, in particular p. 41.

88 Judgment of 23 May 2019, *Fülla* (C-52/18, EU:C:2019:447, paragraph 41 and the case-law cited).

89 See also point 144 of this Opinion.

V. Conclusion

165. In the light of the foregoing considerations, I propose that the Court answer the questions referred by the Landesgericht Klagenfurt (Regional Court, Klagenfurt, Austria), the Landesgericht Eisenstadt (Regional Court, Eisenstadt, Austria) and the Oberster Gerichtshof (Supreme Court, Austria) for a preliminary ruling as follows:

(1) Article 3(10) of Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information, as amended by Commission Regulation (EC) No 692/2008 of 18 July 2008, read in conjunction with Article 5(1) of that regulation, is to be interpreted as meaning that a device which, under real driving conditions of a motor vehicle, ensures exhaust gas recirculation in full only when the outside temperature is between 15 °C and 33 °C and the driving altitude is lower than 1 000 m, whereas, outside that window, per 10 °C, and above an altitude of 1 000 m, per 250 m of altitude, the exhaust gas recirculation rate decreases in a linear way down to zero, with the result that nitrogen oxide (NOx) emissions increase beyond the limit values laid down in the regulation, constitutes a 'defeat device'.

(2) Article 5(2)(a) of Regulation No 715/2007, as amended, is to be interpreted as meaning that a defeat device which guarantees exhaust gas recirculation in full only when the outside temperature is between 15 °C and 33 °C and the driving altitude is lower than 1 000 m is not covered by the exception to the prohibition of such devices laid down in that provision, which relates to the protection of the engine against damage or accident and the safe operation of the vehicle, if that device serves primarily to protect components such as the EGR value, the EGR exchanger and the diesel particulate filter.

(3) Article 5(1) and (2) of Regulation No 715/2007, as amended, is to be interpreted as meaning that the question of whether a defeat device is permitted does not depend on whether that device was fitted in the vehicle from the vehicle's manufacture or whether it was installed only later by way of a repair within the meaning of Article 3(2) of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

(4) Article 2(2)(d) of Directive 1999/44 is to be interpreted as meaning that a motor vehicle that falls within the scope of Regulation No 715/2007, as amended, does not show the quality which is normal in goods of the same type and which the consumer can reasonably expect where that vehicle is fitted with a prohibited defeat device within the meaning of Article 3(10) of that regulation, read in conjunction with Article 5(2) of the regulation, even if the vehicle is covered by a valid EC type-approval.

(5) Article 3(6) of Directive 1999/44 is to be interpreted as meaning that a lack of conformity consisting in the presence, in the vehicle concerned, of a prohibited defeat device within the meaning of Article 3(10) of Regulation No 715/2007, as amended, read in conjunction with Article 5(1) and (2) of that regulation, cannot be classified as 'minor', even if, assuming that the consumer had been aware of the presence and the operation of that device, he would nevertheless have purchased that vehicle.

[i] — The wording of footnote 27 to this document has been amended since it was first put online.