



Reports of Cases

Case C-128/20

GSMB Invest GmbH & Co. KG

v

Auto Krainer GesmbH

(Request for a preliminary ruling from the Landesgericht Klagenfurt)

Judgment of the Court (Grand Chamber), 14 July 2022

(Reference for a preliminary ruling – Approximation of laws – Regulation (EC) No 715/2007 – Approval of motor vehicles – Article 3(10) – Article 5(1) and (2) – Defeat device – Motor vehicles – Diesel engines– Pollutant emissions – Emission control system – Software installed in the electronic engine controller – Exhaust gas recirculation valve (EGR valve) – Reduction in nitrogen oxide (NO_x) emissions limited by a ‘temperature window’ – Prohibition on the use of defeat devices that reduce the effectiveness of emission control systems – Article 5(2)(a) – Exception to that prohibition)

1. *Approximation of laws – Motor vehicles – Emissions from light passenger and commercial vehicles – Regulation No 715/2007 – Defeat device – Concept – Device reducing, depending on the outside temperature and the altitude, the effectiveness of the pollutant gases recirculation system of vehicles concerned in normal vehicle operation and use – Included (Regulation No 715/2007 of the European Parliament and of the Council, Arts 3(10), 4(2) and 5(1))*

(see paragraphs 32, 33, 36, 40-43, 46, 47, operative part 1)

2. *Approximation of laws – Motor vehicles – Emissions from light passenger and commercial vehicles – Regulation No 715/2007 – Manufacturers’ type-approval obligations – Prohibition on the use of defeat devices that reduce the effectiveness of emission control systems – Exceptions – Device ensuring the protection of the engine against damage or accident and the safe operation of the vehicle – Scope – Device reducing, depending on the outside temperature and the altitude, the effectiveness of the pollutant gases recirculation system of vehicles concerned in normal vehicle operation and use – Not included (Regulation No 715/2007 of the European Parliament and of the Council, Art. 5(2)(a))*

(see paragraphs 50-56, 61-65, 67-70, operative part 2)

Résumé

The objective of ensuring a high level of environmental protection within the European Union is reflected, inter alia, by the adoption of measures to limit pollutant emissions. Accordingly, motor vehicles have been the subject of increasingly restrictive legislation, in particular with the adoption of Regulation No 715/2007 on type approval of motor vehicles.¹ That regulation aims, inter alia, to reduce significantly the nitrogen oxide (NOx) emissions from diesel vehicles in order to improve air quality and comply with limit values for pollution.

These three cases concern the purchase of vehicles equipped with software installed in the electronic engine controller which, outside certain temperature conditions and above a certain driving altitude, reduces the effectiveness of the exhaust gas recirculation system (EGR), which results in the NOx emission limit values laid down in Regulation No 715/2007 being exceeded.

Following an update of the software installed in the electronic engine controller, 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 metres ('the temperature window'). Outside that window, per 10 °C and above an altitude of 1 000 metres, per 250 metres of altitude, the rate of exhaust gas recirculation decreases in a linear way down to zero, meaning that NOx emissions increase beyond the limits of Regulation No 715/2007.

These three cases follow on from the judgment of 17 December 2020, *CLCV and Others (Defeat device on diesel engines)* ('the judgment in *CLCV*'),² where the Court of Justice interpreted, for the first time, the concept of a 'defeat device', within the meaning of Regulation No 715/2007,³ and determined the extent to which such a device is unlawful in the light of that regulation,⁴ 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.

It was in that context that the three Austrian referring courts asked the Court whether software, such as that at issue, constitutes a 'defeat device' within the meaning of Regulation No 715/2007. If so, those courts are uncertain whether that software can be authorised on the basis of the exception to the prohibition of such devices based on the need to protect the engine against damage or accident and for the safe operation of the vehicle. Lastly, if the software is not authorised, those courts want to know if its use can entail the cancellation of the sale by virtue of a minor lack of the vehicle's conformity with the contract on the basis of the directive on certain aspects of the sale of consumer goods and associated guarantees.⁵

¹ Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information (OJ 2007 L 171, p. 1).

² Judgment of 17 December 2020, *CLCV and Others (Defeat device on diesel engines)* (C-693/18, EU:C:2020:1040).

³ Within the meaning of Article 3(10) of Regulation No 715/2007. That provision defines a 'defeat device' as being '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'.

⁴ Article 5(2)(a) of Regulation No 715/2007.

⁵ 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 (OJ 1999 L 171, p. 12; 'the directive on certain aspects of the sale of consumer goods and associated guarantees').

By three judgments delivered by the Grand Chamber, the Court determines, first of all, that the software at issue reduces the effectiveness of the emission control system in normal vehicle operation and use and that it, therefore, constitutes a ‘defeat device’ within the meaning of Regulation No 715/2007. Next, it concludes that a defeat device which serves primarily to protect components, such as the EGR valve, the EGR cooler and the diesel particulate filter, does not fall within the exception to the prohibition on such devices if the functioning of those parts does not affect the protection of the engine. Lastly, the Court states that a vehicle equipped with such a device is not in conformity with the contract of sale, within the meaning of the directive on certain aspects of the sale of consumer goods and associated guarantees, even if it is covered by a valid EC type-approval, and that the fault affecting such a vehicle cannot be classified as ‘minor’, which would in principle preclude the buyer from having the contract declared void.

Findings of the Court

In the first place, in order to determine whether the software at issue constitutes a ‘defeat device’ within the meaning of Regulation No 715/2007, the Court interprets the concept of ‘normal ... operation and use’ of a vehicle.

In that regard, it notes that it is apparent not only from the wording of the provision of Regulation No 715/2007, which defines such a device,⁶ but also from the context of that provision, and from the objective pursued by that regulation, that that concept refers to the use of a vehicle under normal driving conditions, that is to say, not only its use under the conditions laid down for the approval test, applicable at the time of the facts in the main proceedings. That concept thus refers to the use of that vehicle under real driving conditions, such as are usually present in the territory of the European Union. The Court points out in that regard that, as it held in the judgment in *CLCV*, the use of a device that would make it possible to ensure compliance with the emission limits laid down by Regulation No 715/2007 only during the approval test phase, even though that test phase does not make it possible to reproduce the normal conditions of use of the vehicle, would run counter to the obligation to ensure that emissions are effectively limited under such conditions of use. The same applies to the use of a device that would make it possible to ensure such compliance only within a temperature window which, although covering the conditions in which the approval test phase takes place, does not correspond to normal driving conditions.

In those circumstances, the Court holds that software, such as that at issue, which ensures compliance with the emission limit values laid down by Regulation No 715/2007 only where the outside temperature is in the temperature window reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use, within the meaning of Regulation No 715/2007. That software therefore constitutes a ‘defeat device’ within the meaning of that regulation.⁷

In the second place, the Court examines the question whether a device, such as that at issue, can fall within the exception to the prohibition on the use of defeat devices which relates to the need to protect the engine against damage or accident and for the safe operation of the vehicle, provided for by Regulation No 715/2007,⁸ in so far as that device contributes to protecting components such as the EGR valve, the EGR exchanger and the diesel particulate filter.

⁶ Article 3(10) of Regulation No 715/2007.

⁷ Article 3(10) of Regulation No 715/2007.

⁸ Article 5(2)(a) of Regulation No 715/2007.

In that regard, the Court points out that Regulation No 715/2007 provides for exceptions to the prohibition on the use of defeat devices, in particular 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’. As regards, first of all, the concept of an ‘engine’, the Court notes that EU law⁹ draws a clear distinction between, on the one hand, the engine covered by that exception and, on the other hand, the pollution control system parameters, which include the particulate filters and the EGR. Consequently, the EGR valve, the EGR exchanger and the diesel particulate filter constitute components that are distinct from the engine. As regards, next, the concepts of ‘accident’ and ‘damage’, the Court concludes that the clogging up or ageing of the engine cannot be regarded as an ‘accident’ or ‘damage’, within the meaning of Regulation No 715/2007,¹⁰ since such occurrences are, in principle, foreseeable and inherent in the normal operation of the vehicle. According to the Court, only immediate risks of damage or accident to the engine which create a specific hazard when the vehicle is driven are, therefore, such as to justify the use of a defeat device under Regulation No 715/2007.

In view of the fact that the exception to the prohibition on the use of defeat devices must be interpreted strictly, the Court holds that the ‘need’ for such a device within the meaning of Regulation No 715/2007, exists only where, at the time of the EC type-approval of that device or vehicle equipped with it, no other technical solution makes it possible to avoid immediate risks of damage or accident to the engine which give rise to a specific hazard when driving the vehicle.

Consequently, the Court finds that a defeat device which guarantees compliance with the emission limits laid down by Regulation No 715/2007 only where the external temperature is in the temperature window cannot fall within the exception to the prohibition on the use of such devices, laid down in that regulation, solely because that device contributes to protecting parts, such as the EGR valve, the EGR exchanger and the diesel particulate filter. The position is different, however, if it is established that that device strictly meets the need to avoid immediate risks of damage or accident to the engine, caused by a malfunction of one of those parts, of such a serious nature as to give rise to a specific hazard when a vehicle fitted with that device is driven. In any event, a defeat device which, under normal driving conditions, operates during most of the year in order to protect the engine from damage or accident and ensure the safe operation of the vehicle could not fall within the exception provided for by Regulation No 715/2007.

Furthermore, the Court states that the fact that a defeat device, within the meaning of Regulation No 715/2007, was installed after a vehicle was put into service, in the course of a repair,¹¹ is irrelevant for the purposes of assessing whether the use of that device is prohibited under that regulation.¹²

In the third and last place, the Court examines the question of whether the use of prohibited software can entail the cancellation of the sale by virtue of a minor lack of the vehicle’s conformity with the contract on the basis of the directive on certain aspects of the sale of consumer goods and associated guarantees.

⁹ Annex I of Commission Regulation (EC) No 692/2008 of 18 July 2008 implementing and amending [Regulation No 715/200] (OJ 2008 L 199, p. 1), as amended by Commission Regulation (EU) No 566/2011 of 8 June 2011 (OJ 2011 L 158, p. 1).

¹⁰ Article 5(2)(a) of Regulation No 715/2007.

¹¹ Within the meaning of Article 3(2) of Directive 1999/44.

¹² Article 5(2) of Regulation No 715/2007.

In that regard, the Court notes, first, that vehicles falling within the scope of Directive 2007/46¹³ are to be EC type-approved and, second, that such approval may be granted only if the type of vehicle in question satisfies the provisions of Regulation No 715/2007, in particular those relating to emissions of pollutants. Furthermore, under Directive 2007/46,¹⁴ the manufacturer in its capacity as the holder of an EC type-approval of a vehicle, is to deliver a certificate of conformity to accompany each vehicle, whether complete, incomplete or completed, that is manufactured in conformity with the approved vehicle type. That certificate is required for the purposes of registration and sale or entry into service of a vehicle.¹⁵ When acquiring a vehicle model of a type that has been approved and is, consequently, accompanied by a certificate of conformity, a consumer can reasonably expect that Regulation No 715/2007 has been complied with in respect of that vehicle, even in the absence of specific contractual clauses.

Consequently, the Court finds that a motor vehicle falling 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', within the meaning of the directive on certain aspects of the sale of consumer goods and associated guarantees,¹⁶ where, although it is covered by a valid EC type-approval and may, consequently, be used on the road, that vehicle is fitted with a defeat device, the use of which is prohibited under Regulation No 715/2007.¹⁷

Lastly, the Court states that a lack of conformity consisting in the presence, in the vehicle concerned, of a defeat device the use of which is prohibited under Regulation No 715/2007 is not to be classified as 'minor'¹⁸ even if the consumer would still have purchased that vehicle if he or she had been aware of the existence and operation of that device.

¹³ Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive) (OJ 2007 L 263, p. 1), as amended by Commission Regulation (EU) No 1229/2012 of 10 December 2012 (OJ 2012 L 353, p. 1).

¹⁴ Pursuant to Article 18(1) of Directive 2007/46.

¹⁵ In accordance with Article 26(1) of Directive 2007/46.

¹⁶ Article 2(2)(d) of Directive 1999/44.

¹⁷ Article 5(2) of Regulation No 715/2007.

¹⁸ Pursuant to Article 3(6) of Directive 1999/44.