



Reports of Cases

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 – Directive 1999/44/EC – Sale of consumer goods and associated guarantees – Article 3(2) – Device installed during the repair of a vehicle)

In Case C-134/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Landesgericht Eisenstadt (Regional Court, Eisenstadt, Austria), made by decision of 29 January 2020, received at the Court on 11 March 2020, in the proceedings

IR

v

Volkswagen AG,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, A. Arabadjiev, A. Prechal, K. Jürimäe, C. Lycourgos and I. Ziemele, Presidents of Chambers, M. Ilešič, J.-C. Bonichot, F. Biltgen, P.G. Xuereb (Rapporteur), N. Piçarra and N. Wahl, Judges,

Advocate General: A. Rantos,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– IR, by M. Poduschka, Rechtsanwalt,

* Language of the case: German.

- Volkswagen AG, by H. Gärtner, F. Gebert, F. Gonsior, C. Harms, N. Hellermann, F. Kroll, M. Lerbinger, S. Lutz-Bachmann, L.-K. Mannefeld, K.-U. Opper, H. Posser, J. Quecke, K. Schramm, W.F. Spieth, J. von Nordheim, K. Vorbeck, B. Wolfers and B. Wollenschläger, Rechtsanwälte,
 - the German Government, by J. Möller and D. Klebs, acting as Agents,
 - the European Commission, by M. Huttunen and M. Noll-Ehlers, acting as Agents,
- after hearing the Opinion of the Advocate General at the sitting on 23 September 2021,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 3(10) and Article 5(1) and (2) 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 (OJ 2007 L 171, p. 1) and 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 (OJ 1999 L 171, p. 12).
- 2 The request has been made in proceedings between IR and Volkswagen AG concerning an application for annulment of a sales contract for a motor vehicle with software reducing the recirculation of the vehicle’s pollutant gases according to the temperature and altitude detected.

Legal context

European Union law

Directive 1999/44

- 3 Directive 1999/44 was repealed by Directive (EU) 2019/771 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), with effect from 1 January 2022. Nevertheless, in view of the date of the facts of the dispute in the main proceedings, Directive 1999/44 remains applicable to that dispute.
- 4 Article 1(2)(f) of Directive 1999/44 provided:

‘For the purposes of this Directive:

...

(f) “repair”: shall mean, in the event of lack of conformity, bringing consumer goods into conformity with the contract of sale.’

5 Article 3 of that directive, entitled ‘Rights of the consumer’, provided:

‘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.

...’

Regulation No 715/2007

6 Recitals 1 and 6 of Regulation No 715/2007 state:

‘(1) ... The technical requirements for the type approval of motor vehicles with regard to emissions should ... be harmonised to avoid requirements that differ from one Member State to another, and to ensure a high level of environmental protection.

...

(6) In particular, a considerable reduction in nitrogen oxide emissions from diesel vehicles is necessary to improve air quality and comply with limit values for pollution. ...’

7 Article 1(1) of that regulation provides:

‘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.’

8 Article 3(10) of that regulation states:

‘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’.

9 Article 4(1) and (2) of that regulation is worded as follows:

‘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. ...

...'

10 Article 5(1) and (2) of Regulation No 715/2007 states:

'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.'

11 Annex I to that regulation, entitled 'Emission limits', lays down, inter alia, nitrogen oxide (NO_x) emission limit values.

Regulation No 692/2008

12 Commission Regulation (EC) No 692/2008 of 18 July 2008 implementing and amending Regulation No 715/2007 (OJ 2008 L 199, p. 1), has been amended by Commission Regulation (EU) No 566/2011 of 8 June 2011 (OJ 2011 L 158, p. 1) ('Regulation No 692/2008'). From 1 January 2022, Regulation No 692/2008 has been repealed by Commission Regulation (EU) 2017/1151 of 1 June 2017 supplementing Regulation No 715/2007, amending Directive 2007/46/EC of the European Parliament and of the Council, Regulation No 692/2008 and Commission Regulation (EU) No 1230/2012 and repealing Regulation No 692/2008 (OJ 2017 L 175, p. 1). However, in view of the date of the facts of the dispute in the main proceedings, Regulation No 692/2008 remains applicable to that dispute.

13 Article 1 of Regulation No 692/2008 stated:

‘This Regulation lays down measures for the implementation of Articles 4, 5 and 8 of Regulation (EC) No 715/2007.’

14 Article 2(18) of Regulation No 692/2008 was worded as follows:

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

...

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’.

15 Article 3(9) of that regulation provided that:

‘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 NO_x 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.

This information shall also include a description of any effects on emissions.

The approval authority shall not grant type-approval if the information provided is insufficient to demonstrate that the aftertreatment device actually reaches a sufficiently high temperature for efficient operation within the designated period of time.

...’

16 Article 10 of that regulation, entitled ‘Pollution control devices’, provided in paragraph 1:

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

...’

17 Annex I to Regulation No 692/2008, entitled ‘Administrative provisions for EC type-approval’, stated, in point 3.3 thereof, 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).

...’

Austrian law

18 Paragraph 871 of the Allgemeines bürgerliches Gesetzbuch (Austrian Civil Code), in the version applicable to the main proceedings (‘the ABGB’), provides:

‘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.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

19 In 2013 IR, a consumer, concluded a sales contract for a Volkswagen motor vehicle, a Touran Comfortline BMT TDI model, with a Euro 5 generation EA 189 type diesel engine, a 1.6-litre cylinder and an output of 77 kW.

20 IR brought an action before the Landesgericht Eisenstadt (Regional Court, Eisenstadt, Austria), the referring court, seeking the annulment of that sales contract, on the basis of Paragraph 871 of the ABGB.

- 21 It is apparent from the order for reference that the vehicle at issue is equipped with an internal pollution control device, namely an exhaust gas recirculation valve ('EGR valve') and that it has an exhaust gas aftertreatment system in the form of a particulate filter, but does not have a treatment system for NO_x.
- 22 According to the information provided by the referring court, the vehicle at issue originally had software installed in the electronic engine controller to operate the EGR system in two modes ('the switch system'), namely mode 0, which is activated when the vehicle is driven on a road, and mode 1, which operates during the approval test for pollutant emissions, called the 'New European Driving Cycle' (NEDC), and is conducted in a laboratory. When mode 0 was activated, the EGR rate was reduced. Under normal conditions of use, the vehicle was almost exclusively in mode 0 and did not comply with the emission limit values for NO_x laid down in Regulation No 715/2007.
- 23 By letter of 8 October 2015 from the importer for VW vehicles in Austria, IR was informed that repair work would have to be carried out to his vehicle and that the manufacturer would bear all costs associated with such repair work. IR was subsequently asked to install an update of the abovementioned software, in order to deactivate the switch system, which he accepted.
- 24 That update also adjusted the EGR valve in order to regulate the EGR rate in such a way that a low emission mode is ensured only when the outside temperature is between 15 and 33 °C and the driving altitude is less than 1 000 metres ('the temperature window'), and that, outside that temperature window, the EGR rate decreases in a linear way down to zero, meaning that NO_x emissions increase beyond the limit values laid down in Regulation No 715/2007.
- 25 The Kraftfahrt-Bundesamt (Federal Office for Motor Vehicles, Germany), the competent authority responsible for type-approval in Germany, granted an authorisation for a technical modification, namely the updating of the software at issue, and therefore did not withdraw the EC type-approval. That authority concluded, inter alia, that there was no prohibited defeat device, within the meaning of Regulation No 715/2007. However, according to the referring court, that authority had no information regarding the software used for the update because it had not requested it.
- 26 The referring court considers that the switch system, which was originally fitted in the vehicle at issue, did not comply with the requirements of Regulation No 715/2007, in particular those laid down in Article 5 thereof. In that regard, it notes, first, that that system resulted in the EGR valve being regulated in such a way that, when that vehicle was used under normal conditions, such use did not comply with the requirements of that regulation and its implementing measures and, secondly, that it was not a permissible defeat device within the meaning of Article 5(2) of that regulation.
- 27 That court also notes that it is apparent from the facts of the case before it that IR believed he was purchasing a vehicle that complied with those requirements and that he would not have purchased it if he had known that that was not the case.
- 28 Nevertheless, that court states that, under Austrian law, where the consent of one party to a contract is vitiated by a substantial error, the other party to the contract can avoid the legal consequences of that error by putting that person in a situation identical to that in which he would have been in the absence of that error. The latter then ceases to have an interest in bringing proceedings.

- 29 Volkswagen submits that the updating of the software in question gave satisfaction to IR such that he has no interest in bringing proceeding, which the latter disputes.
- 30 Thus, the referring court considers that, in order to rule on the case in the main proceedings, it must determine whether the temperature window constitutes a technical solution that complies with the requirements of EU law, in particular those laid down in Regulations No 715/2007 and No 692/2008. If so, the sales contract concluded by IR will not be annulled and IR's application will therefore be dismissed.
- 31 That court observes that, for most of the year, temperatures in Austria are below 15 °C. It notes that it is not possible to determine whether the temperature window is necessary in order to protect the engine against damage. It also states that it is not possible to determine whether the requirements relating to the durability of pollution control devices referred to in Article 4(2) of Regulation No 715/2007 would have been complied with if the update had been undertaken without providing for that temperature window.
- 32 In those circumstances, the Landesgericht Eisenstadt (Regional Court, Eisenstadt) decided to stay the proceedings and to refer the following questions to the Court of Justice 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 Regulation No 715/2007, is inadmissible if the [EGR 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 [in the temperature window], and, outside this temperature window, per 10 °C, and above an altitude of 1 000 metres, per 250 meters of altitude, the rate decreases in a linear way down to zero, meaning that NO_x 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 [EGR 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 [EGR 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]?'

Consideration of the questions referred

The first question

- 33 As a preliminary point, it should be borne in mind that, according to settled case-law, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court, it is for the latter to provide the national court with an answer which will be of use to it and will enable the national court to determine the case before it. Consequently, even if, formally, the referring court has limited its question to the interpretation of a particular provision of EU

law, that does not prevent the Court from providing the referring court with all the elements of interpretation of EU law which may be of assistance in adjudicating in the case pending before it, whether or not the referring court has referred to them in the wording of its questions. It is, in this regard, for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision to make the reference, the points of EU law which require interpretation in view of the subject matter of the dispute in the main proceedings (judgment of 15 July 2021, *DocMorris*, C-190/20, EU:C:2021:609, paragraph 23 and the case-law cited).

- 34 In the present case, the first question refers to Article 5(1) of Regulation No 715/2007. However, it is apparent from the request for a preliminary ruling that the referring court seeks to determine whether the temperature window constitutes a ‘defeat device’ within the meaning of Article 3(10) of that regulation, the use of which is in principle prohibited under Article 5(2) of that regulation.
- 35 It should be noted that, in its written observations, Volkswagen submits that the referring court erroneously describes the operation of the software at issue. It maintains that that software leads to a reduction in the exhaust gas recirculation rate when the temperature of the engine intake air, and not the ambient temperature, is below 15 °C. It is common ground, from a technical point of view, that the temperature of the engine intake air 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, not 15 °C, but 10 °C, that is to say, within the average annual ambient temperature range in Germany, which is 10.4 °C. In addition, Volkswagen submits that the referring court fails to note that, when the ambient temperature is below 10 °C, the exhaust gas recirculation rate is only gradually decreased, in a linear way, to zero, until an ambient temperature of -5 °C.
- 36 It should be noted 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 (judgment of 9 July 2020, *Raiffeisen Bank and BRD Groupe Société Générale*, C-698/18 and C-699/18, EU:C:2020:537, paragraph 46).
- 37 In those circumstances, in order to provide a useful answer to the referring court, it must be considered that, by its first question, that court asks, in essence, whether Article 3(10) of Regulation No 715/2007, read in conjunction with Article 5(1) of that regulation, must be interpreted as meaning that a device which ensures compliance with the emission limits laid down by that regulation only in the temperature window constitutes a ‘defeat device’ within the meaning of Article 3(10) of that regulation.
- 38 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’.

- 39 The Court has held that that definition of a defeat device confers a broad scope on the concept of ‘element of design’, which covers both mechanical parts and the electronic components which control the activation of those parts, where they act on the operation of the emission control system and reduce its effectiveness (judgment of 17 December 2020, *CLCV and Others (Defeat device on diesel engines)*, C-693/18, EU:C:2020:1040, paragraph 64).
- 40 The Court has also held that the concept of an ‘emission control system’, within the meaning of Article 3(10) of Regulation No 715/2007, covers both ‘exhaust gas aftertreatment’ 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 (see, to that effect, judgment of 17 December 2020, *CLCV and Others (Defeat device on diesel engines)*, C-693/18, EU:C:2020:1040, paragraph 90).
- 41 In the present case, it is apparent from the order for reference that the vehicle at issue is equipped with an EGR valve and software installed in the electronic engine controller. That valve is one of the technologies used by vehicle manufacturers to manage and reduce emissions of NO_x generated by the incomplete combustion of fuel. The effectiveness of the pollution reduction system is linked to the opening of the EGR valve, which is controlled by the abovementioned software. Outside of the temperature window established by the software update and referred to in paragraph 24 above, the exhaust gas recirculation rate decreases in a linear way down to zero, which leads to the emission limits for NO_x laid down in Regulation No 715/2007 being exceeded.
- 42 Thus, the software at issue in the main proceedings, programmed to operate according to the temperature window, detects the air temperature as well as 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 Article 3(10) of Regulation No 715/2007.
- 43 Consequently, where it acts on the operation of the emission control system and reduces its effectiveness, such software constitutes an ‘element of design’ within the meaning of that provision (see, to that effect, judgment of 17 December 2020, *CLCV and Others (Defeat device on diesel engines)*, C-693/18, EU:C:2020:1040, paragraph 66).
- 44 In order to determine whether the software at issue in the main proceedings constitutes a defeat device within the meaning of Article 3(10) of Regulation No 715/2007, it is also necessary to examine whether that software reduces the effectiveness of the emission control system ‘under conditions which may reasonably be expected to be encountered in normal vehicle operation and use’.
- 45 Regulation No 715/2007 does not define the concept of ‘normal vehicle operation and use’ and makes no reference to the law of the Member States for the purpose of determining the meaning and scope of that concept.
- 46 Accordingly, that concept is a concept of EU law that must be given an autonomous and uniform interpretation throughout the European Union, which interpretation must take into account not only the wording of the provisions in which it appears but also the context of those provisions and the objective pursued by them (see, by analogy, judgment of 26 January 2021, *Hessischer Rundfunk*, C-422/19 and C-423/19, EU:C:2021:63, paragraph 45).

- 47 As is apparent from the very wording of Article 3(10) of Regulation No 715/2007, the concept of ‘normal ... operation and use’ of a vehicle refers to the use of the vehicle under normal driving conditions, that is to say not only, as argued, in essence, by Volkswagen in its written observations, to its use under the conditions laid down for the approval test, as referred to in paragraph 22 above, applicable at the material time, which is carried out in a laboratory and involves the repetition of four urban cycles followed by one extra-urban cycle. 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 (see, to that effect, judgment of 17 December 2020, *CLCV and Others (Defeat device on diesel engines)*, C-693/18, EU:C:2020:1040, paragraphs 96 and 101). The test cycles for vehicle emissions under the approval procedure are not based on real driving conditions (see, to that effect, judgment of 17 December 2020, *CLCV and Others (Defeat device on diesel engines)*, C-693/18, EU:C:2020:1040, paragraph 92).
- 48 That interpretation is borne out by the context of Article 3(10) of Regulation No 715/2007. Under Article 4(2) of that regulation, technical measures adopted by the manufacturer must be such as to ensure, in particular, that tailpipe emissions are effectively limited throughout the normal life of the vehicles under normal conditions of use. Moreover, Article 5(1) of that regulation provides that the manufacturer is to equip vehicles so that the components likely to affect emissions, such as the software at issue in the main proceedings, are designed, constructed and assembled so as to enable the vehicle, in normal use, to comply with the emission limits laid down by that regulation and its implementing measures (see, to that effect, judgment of 17 December 2020, *CLCV and Others (Defeat device on diesel engines)*, C-693/18, EU:C:2020:1040, paragraph 97).
- 49 There is nothing in those provisions that allows a distinction to be drawn between the operation of a device such as the software at issue in the main proceedings during the approval test phase and when driving the vehicle under normal conditions. On the contrary, 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 (see, to that effect, judgment of 17 December 2020, *CLCV and Others (Defeat device on diesel engines)*, C-693/18, EU:C:2020:1040, paragraphs 97 and 98). 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, as defined in paragraph 47 above.
- 50 The interpretation set out in paragraph 47 above, according to which the concept of ‘normal ... operation and use’ of a vehicle refers to its use under real driving conditions, such as are usually present in the territory of the European Union, is also borne out by the objective pursued by Regulation No 715/2007, which, as is apparent from recitals 1 and 6 thereof, is to ensure a high level of environmental protection and, more specifically, to considerably reduce the NO_x emissions from diesel vehicles in order to improve air quality and comply with limit values for pollution (see, to that effect, judgment of 17 December 2020, *CLCV and Others (Defeat device on diesel engines)*, C-693/18, EU:C:2020:1040, paragraphs 67, 86 and 87).
- 51 As regards whether software such as that at issue in the main proceedings reduces the effectiveness of the emission control system under normal driving conditions, it is common ground that ambient temperatures below 15 °C and driving on roads at an altitude above 1 000 metres are to be considered as normal within the territory of the European Union.

- 52 It should also be noted that Regulation No 692/2008, applicable to the facts in the main proceedings, which, under Article 1 thereof, lays down the provisions for implementing Articles 4, 5 and 8 of Regulation No 715/2007, provides, in the second subparagraph of Article 3(9) thereof, that manufacturers are to present to the approval authority with information showing that the NO_x aftertreatment device of their vehicles reaches a sufficiently high temperature for efficient operation within 400 seconds after a cold start at -7 °C. Under the fifth subparagraph of Article 3(9) of that regulation, the approval authority is not to grant type-approval if the information provided is insufficient to demonstrate that the aftertreatment device actually reaches a sufficiently high temperature for efficient operation within the designated period of time. The latter provision confirms the interpretation that the emission limits laid down by Regulation No 715/2007 must be complied with when temperatures are significantly lower than 15 °C.
- 53 Accordingly, it must be held that software such as that at issue in the main proceedings 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 Article 3(10) of Regulation No 715/2007, and therefore constitutes a defeat device within the meaning of that provision.
- 54 Consequently, the answer to the first question must be that Article 3(10) of Regulation No 715/2007, read in conjunction with Article 5(1) of that regulation, must be interpreted as meaning that a device which ensures compliance with the emission limits laid down by that regulation only in the temperature window constitutes a ‘defeat device’ within the meaning of Article 3(10) of that regulation.

The second and third questions

Admissibility

- 55 IR submits that the second question, by which the referring court asks whether the fact that a device, such as the temperature window, is necessary to protect the engine against damage, has a bearing on the lawfulness of such a device, is hypothetical in so far as that court has stated that it was unable to determine whether the temperature window was necessary to protect the engine of the vehicle concerned from damage.
- 56 It must be borne in mind that, in accordance with settled case-law, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is, in principle, bound to give a ruling (judgment of 24 November 2020, *Openbaar Ministerie (Forgery of documents)*, C-510/19, EU:C:2020:953, paragraph 25 and the case-law cited).
- 57 It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court for a preliminary ruling only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not

have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 24 November 2020, *Openbaar Ministerie (Forgery of documents)*, C-510/19, EU:C:2020:953, paragraph 26 and the case-law cited).

- 58 In the present case, it is true that, in the request for a preliminary ruling, the referring court states that it is not possible to determine whether the temperature window is necessary to protect the engine of the vehicle concerned from damage.
- 59 Nevertheless, it is also apparent from that request that, by its second and third questions, which it is appropriate to examine together, the referring court expresses doubts as to the interpretation to be given to Article 5(2)(a) of Regulation No 715/2007, which provides that the prohibition on the use of defeat devices which reduce the effectiveness of emission control systems does not apply 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’.
- 60 In those circumstances, it is not obvious that the interpretation of Article 5(2)(a) of Regulation No 715/2007 sought by the referring court bears no relation to the actual facts of the main action or its purpose or that the problem is hypothetical.
- 61 The second and third questions are therefore admissible.

Substance

- 62 By its second and third questions, the referring court asks, in essence, whether Article 5(2)(a) of Regulation No 715/2007 must be interpreted as meaning that a defeat device, which guarantees compliance with the emission limits laid down by that regulation only in the temperature window, may fall within the exception to the prohibition on the use of such devices, laid down in that provision, where that device is intended to protect the EGR valve.
- 63 In so far as it lays down an exception to the prohibition on the use of defeat devices that reduce the effectiveness of emission control systems, that provision must be interpreted strictly (see, to that effect, judgment of 17 December 2020, *CLCV and Others (Defeat device on diesel engines)*, C-693/18, EU:C:2020:1040, paragraphs 111 and 112).
- 64 As regards, first of all, the concept of ‘engine’, referred to in Article 5(2)(a) of Regulation No 715/2007, and as the Advocate General observed in points 118 and 119 of his Opinion, Annex I to Regulation No 692/2008 makes an explicit distinction between the engine and the pollution control system. The requirements relating to the ‘engine’ are set out in point 3.3.1.2 of that annex, whereas those relating to ‘pollution control system parameters’ are set out in point 3.3.1.3 of that annex. The latter point, under (c), expressly includes EGR. Consequently, the EGR valve, which, when opened, allows the exhaust gas to be passed through the gas inlet manifold in order to burn it a second time, constitutes a component that is distinct from the engine. The EGR valve is situated at the engine outlet, after the exhaust manifold.
- 65 As regards, next, the concepts of ‘accident’ and ‘damage’ referred to in Article 5(2)(a) of Regulation No 715/2007, the Court has previously held that, in order to be justified under that provision, a defeat device that reduces the effectiveness of the emission control system must allow the engine to be protected against sudden and exceptional damage (see, to that effect, judgment of 17 December 2020, *CLCV and Others (Defeat device on diesel engines)*, C-693/18, EU:C:2020:1040, paragraph 109).

- 66 The clogging up or the ageing of the engine cannot, in any event, 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 (see, to that effect, judgment of 17 December 2020, *CLCV and Others (Defeat device on diesel engines)*, C-693/18, EU:C:2020:1040, paragraph 110).
- 67 That interpretation is borne out by the objective pursued by Regulation No 715/2007, which is, as noted in paragraph 50 above, to ensure a high level of environmental protection and improve air quality within the European Union, which entails the effective reduction of NO_x emissions throughout the normal life of vehicles. The prohibition laid down in Article 5(2) of that regulation would be devoid of substance and deprived of any effectiveness if car manufacturers were permitted to equip motor vehicles with such defeat devices with the sole aim of protecting the engine against clogging up and ageing (judgment of 17 December 2020, *CLCV and Others (Defeat device on diesel engines)*, C-693/18, EU:C:2020:1040, paragraph 113).
- 68 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 Article 5(2)(a) of Regulation No 715/2007.
- 69 The interpretation of the word ‘damage’ given by the Court in the judgment of 17 December 2020, *CLCV and Others (Defeat device on diesel engines)* (C-693/18, EU:C:2020:1040), is not called into question by the argument of the German Government and Volkswagen that it follows from that word in the English version (‘damage’) and the German version (‘Beschädigung’) that that word does not cover only sudden and unforeseeable events.
- 70 First, as the Advocate General observed, in essence, in point 115 of his Opinion, although, unlike the French definition, the definitions of that word in English and German do not necessarily imply that a removal is due to a ‘sudden’ event, they do not invalidate the Court’s interpretation of the word ‘damage’. Secondly, it should be recalled that the strict interpretation adopted by the Court is based on the grounds set out in paragraphs 63 and 67 above.
- 71 However, the German Government and Volkswagen submit that the defeat device at issue is justified because, in the event of temperatures that are too low or too high, deposits may be formed, during the exhaust gas recirculation, and thus lead to poor positioning of the EGR valve, namely, for example, it may no longer open or may no longer close correctly, or the valve may become completely blocked. A damaged or poorly positioned valve could cause damage to the engine itself and lead, inter alia, to loss of vehicle power. Furthermore, it is impossible to predict and calculate a threshold for when the EGR valve fault could arise, since it could take place suddenly and unpredictably, even if that valve has been maintained regularly. Sudden and unforeseeable losses of vehicle power would affect the safe operation of the vehicle, for example by considerably increasing the risk of a serious traffic accident when overtaking.
- 72 Furthermore, Volkswagen submits that the clogging of components of the exhaust gas recirculation system, by causing the malfunctioning or even the blocking of the EGR valve, is liable to lead to the combustion of the particulate filter and to the engine catching fire, or even, as a result, to the entire vehicle catching fire, which would jeopardise the safe operation of the vehicle.

- 73 In that regard, it should be noted that it is apparent from the very wording of Article 5(2)(a) of Regulation No 715/2007 that, in order to fall within the exception provided for in that provision, the need for a defeat device must be justified not only in terms of protecting the engine against damage or accident, but also in terms of the safe operation of the vehicle. As the Advocate General pointed out in point 106 of his Opinion, in view of the use of the conjunction ‘and’ in that provision, it must be interpreted as meaning that the conditions laid down therein are cumulative.
- 74 Consequently, as has been pointed out in paragraph 63 above, and in view of the strict interpretation to be given to that exception, a defeat device such as that at issue in the main proceedings can be justified under that exception only where 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 a component of the exhaust gas recirculation system, of such a serious nature as to give rise to a specific hazard when a vehicle fitted with that device is driven. As the Advocate General pointed out in point 126 of his Opinion, however, such a determination is, in the main proceedings, part of the assessment of the facts which falls to the referring court alone.
- 75 Furthermore, while it is true that Article 5(2)(a) of Regulation No 715/2007 does not formally impose any further conditions for the application of the exception laid down in that provision, the fact remains that a defeat device which, under normal driving conditions, operated during most of the year in order to protect the engine from damage or accident and ensure the safe operation of the vehicle, would clearly run counter to the objective pursued by that regulation, from which that provision allows derogation only in very specific circumstances, and would result in a disproportionate infringement of the principle of limiting NO_x emissions from vehicles.
- 76 In view of the strict interpretation that must be given to Article 5(2)(a) of Regulation No 715/2007, such a defeat device cannot therefore be justified under that provision.
- 77 To accept that a defeat device such as that described in paragraph 75 above may fall within the exception provided for in Article 5(2)(a) of Regulation No 715/2007, would result in that exception being applicable for most of the year under real driving conditions prevalent in the territory of the European Union, with the result that the principle of the prohibition of such defeat devices, laid down in Article 5(2) of Regulation No 715/2007, could, in practice, be applied less frequently than that exception.
- 78 In addition, Volkswagen and the German Government submit that the concept of ‘need’ for a defeat device does not require the best available technology and that account must be taken of the state-of-the-art technology at the time of EC type-approval in order to assess whether that need is justified in terms of protecting the engine and for safe operation of the vehicle, within the meaning of Article 5(2)(a) of Regulation No 715/2007. 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. Furthermore, Volkswagen and the German Government submit that the interpretation of the word ‘need’ in that provision should take account of the need to balance environmental interests with the economic interests of manufacturers.
- 79 In that regard, it must be pointed out, as the Advocate General observed in point 129 of his Opinion, first, that it is apparent from recital 7 of Regulation No 715/2007 that, when the EU legislature determined the emission limits for pollutants, it took into account the economic interests of manufacturers and, in particular, the costs imposed on undertakings by the need to

comply with those limits. It is thus for manufacturers to adapt and apply technical devices capable of complying with those limits as that regulation does not require the use of any particular technology.

- 80 Secondly, as stated in paragraph 67 above, 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 NO_x emissions being effectively limited throughout the normal life of vehicles (judgment of 17 December 2020, *CLCV and Others (Defeat device on diesel engines)*, C-693/18, EU:C:2020:1040, paragraph 113). 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 jeopardise that aim.
- 81 In those circumstances, and in view of the fact that that provision must, as noted in paragraphs 63 and 74 above, be interpreted strictly, it must be held that the ‘need’ for a defeat device, within the meaning of that provision, exists only where, at the time of the EC type-approval of that device or the 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.
- 82 Consequently, the answer to the second and third questions is that Article 5(2)(a) of Regulation No 715/2007 must be interpreted as meaning that a defeat device, which guarantees compliance with the emission limits laid down by that regulation only in the temperature window, cannot fall within the exception to the prohibition on the use of such devices, laid down in that provision, solely because that device is intended to protect the EGR valve, unless 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 that part, 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, operated 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 in Article 5(2)(a) of Regulation No 715/2007.

The fourth question

- 83 In accordance with the case-law referred to in paragraph 33 above and having regard to the information contained in the request for a preliminary ruling, it is appropriate, in order to provide a useful answer to the referring court, to consider that, by its fourth question, that court asks, in essence, whether Article 5(1) and (2) of Regulation No 715/2007, read in conjunction with Article 3(10) of that regulation, must be interpreted as meaning that the fact that a defeat device, within the meaning of that provision, was installed after a vehicle was put into service, in the course of a repair, within the meaning of Article 3(2) of Directive 1999/44, is relevant for the purposes of assessing whether the use of that device is prohibited under Article 5(2) thereof.

Admissibility

- 84 The German Government considers that the present question is inadmissible since the order for reference does not set out the reasons why an answer to such a question is necessary in order to resolve the dispute in the main proceedings.

- 85 In the present case, it is not obvious that the fourth question falls within one of the situations set out in paragraph 57 above, in which the Court may refuse to rule on a question referred for a preliminary ruling.
- 86 On the contrary, it is apparent from the request for a preliminary ruling, first, that the installation of the defeat device at issue was intended to remedy the unlawfulness of the switch system and to satisfy the requirements of Regulation No 715/2007 by means of a repair and, secondly, that the referring court considers that it is necessary to determine whether the fact that the defeat device at issue was not included in the vehicle at the time of its entry into service has a bearing on the assessment of the conformity of that device with that regulation.
- 87 The fourth question is therefore admissible.

Substance

- 88 It is not apparent either from the wording of Article 5(2) of Regulation No 715/2007, which provides that the use of defeat devices that reduce the effectiveness of emission control systems is prohibited, subject to certain exceptions, or from that of Article 3(10) of that regulation, which defines the concept of a 'defeat device', that a distinction must be made according to whether such a device is installed at the stage of production of a vehicle or only after it has been put into service, in particular, following a repair, within the meaning of Article 3(2) of Directive 1999/44, for the purposes of assessing whether the use of that device is prohibited.
- 89 That interpretation is, as the Advocate General observed in points 137 and 138 of his Opinion, supported by the context of those provisions in Regulation No 715/2007 and the objective pursued by that regulation.
- 90 First, as regards the context of those provisions, it should be noted that, in accordance with the second sentence of the first subparagraph of Article 4(1) of Regulation No 715/2007, manufacturers are to demonstrate that all new replacement pollution control devices requiring type approval which are sold or put into service in the European Union are type approved in accordance with that regulation and its implementing measures. The second subparagraph of Article 4(1) of that regulation states that that obligation includes respecting the emission limits set out in Annex I and the implementing measures referred to in Article 5 of the regulation.
- 91 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'.
- 92 It follows from those provisions of Regulations No 715/2007 and No 692/2008 that pollution control devices must comply with the obligations laid down by Regulation No 715/2007, whether they are installed from the outset or after a vehicle's entry into service.
- 93 Secondly, allowing vehicle manufacturers to install, after the entry into service of a vehicle, a defeat device that does not comply with those obligations would be contrary to the objective pursued by Regulation No 715/2007, referred to in paragraph 50 above, which is to ensure a high

level of environmental protection and, more specifically, to considerably reduce the NO_x emissions from diesel vehicles in order to improve air quality and comply with limit values for pollution.

- 94 Consequently, the answer to the fourth question is that Article 5(1) and (2) of Regulation No 715/2007, read in conjunction with Article 3(10) of that regulation, must be interpreted as meaning that the fact that a defeat device, within the meaning of that provision, was installed after a vehicle was put into service, in the course of a repair, within the meaning of Article 3(2) of Directive 1999/44, is irrelevant for the purposes of assessing whether the use of that device is prohibited under Article 5(2) of that directive.

Costs

- 95 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

- 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, read in conjunction with Article 5(1) of that regulation, must be interpreted as meaning that a device which ensures compliance with the emission limits laid down by that regulation only when the outside temperature is between 15 and 33 °C and the driving altitude is below 1 000 metres constitutes a ‘defeat device’ within the meaning of Article 3(10) of that regulation.**
- 2. Article 5(2)(a) of Regulation No 715/2007 must be interpreted as meaning that a defeat device, which guarantees compliance with the emission limits laid down by that regulation only where the outside temperature is between 15 and 33 °C, and the driving altitude is less than 1 000 metres, cannot fall within the exception to the prohibition on the use of such devices, laid down in that provision, solely because that device is intended to protect the exhaust gas recirculation valve, unless 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 that part, 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, operated 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 in Article 5(2)(a) of Regulation No 715/2007.**

- 3. Article 5(1) and (2) of Regulation No 715/2007, read in conjunction with Article 3(10) of that regulation, must be interpreted as meaning that the fact that a defeat device, within the meaning of that provision, was installed after a vehicle was put into service, in the course 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, is irrelevant for the purposes of assessing whether the use of that device is prohibited under Article 5(2) of that directive.**

[Signatures]