Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

17 December 2020*

(Reference for a preliminary ruling – Approximation of laws – Regulation (EC) No 715/2007 – Article 3(10) – Article 5(2) – Defeat device – Motor vehicles – Diesel engines – Pollutant emissions – Programme acting on the electronic engine controller – Technologies and strategies to limit the production of pollutant emissions)

In Case C-693/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the examining magistrates of the tribunal de grande instance de Paris (Regional Court, Paris, France), made by decision of 26 October 2018, received at the Court on 29 October 2018, in the criminal proceedings against

X,

intervening parties:

CLCV and Others,

A and Others,

B,

AGLP and Others,

C and Others,

THE COURT (Second Chamber),

composed of A. Arabadjiev, President of the Chamber, T. von Danwitz and P.G. Xuereb (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: V. Giacobbo, Administrator,

having regard to the written procedure and further to the hearing on 7 November 2019,

* Language of the case: French.

after considering the observations submitted on behalf of:

– X, by D. Lecat, P. Benson, J. Philippe, N. Huc-Morel and J. Vogel, avocats, and by R.B.A. Wollenschläger, Rechtsanwalt,

– A and Others, by C. Constantin-Vallet, avocat,

– B, by P. Peuvrel and X. Leuck, avocats,

– AGLP and Others, by F. Sartre, avocat,

– C and Others, by J. Bensaid and F. Verdier, avocats,

– the French Government, initially by D. Colas, J. Traband, E. Leclerc and A.-L. Desjonquères, and subsequently by J. Traband, E. Leclerc and A.-L. Desjonquères, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and by G. Palatiello and P. Pucciariello, avvocati dello Stato,

– the European Commission, by J.-F. Brakeland, M. Huttunen and A.C. Becker, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 April 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 3(10) and Article 5(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).

2 The request has been made in criminal proceedings brought against company X, a car manufacturer, for placing on the French market motor vehicles equipped with software capable of changing the system for controlling pollutant gas emissions according to the driving conditions which it has detected.

Legal context

International law

3 Regulation No 83 of the Economic Commission for Europe of the United Nations (UNECE) – Uniform provisions concerning the approval of vehicles with regard to the emission of pollutants according to engine fuel requirements (OJ 2006 L 375, p. 223; 'UNECE Regulation No 83'), lays down technical requirements for type-approval of motor vehicles.

4 Paragraph 2.16 of that regulation states:

‘For the purposes of this regulation:

…

2.16. “Defeat device” means any element of design which senses temperature, vehicle speed, engine rotational speed, 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. Such an element of design may not be considered a defeat device if:

2.16.1. the need for the device is justified in terms of protecting the engine against damage or accident and for safe operation of the vehicle, or

2.16.2. the device does not function beyond the requirements of engine starting, or

2.16.3. Conditions are substantially included in the Type I or Type VI test procedures.’

5 It is apparent from paragraph 7.3.1.2 of UNECE Regulation No 83 that exhaust gas recirculation (EGR) is one of the parameters of the anti-pollution system.

European Union law

Decision 97/836/EC

6 By Article 1 of Council Decision 97/836/EC of 27 November 1997 with a view to accession by the European Community to the Agreement of the United Nations Economic Commission for Europe concerning the adoption of uniform technical prescriptions for wheeled vehicles, equipment and parts which can be fitted to and/or be used on wheeled vehicles and the conditions for reciprocal recognition of approvals granted on the basis of these prescriptions (‘Revised 1958 Agreement’) (OJ 1997 L 346, p. 78), the European Community acceded to that agreement.

7 Under Article 3(1) of that decision:

‘Pursuant to Article 1(5) of [the Revised 1958 Agreement], the Community shall state that its accession will be restricted to implementation of the [UNECE] Regulations listed in Annex II to this Decision.’

8 The UNECE regulations listed in Annex II include UNECE Regulation No 83.

The Framework Directive

9 Recital 11 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 (OJ 2007 L 263, p. 1), as amended by Commission Regulation (EC) No 1060/2008 of 7 October 2008 (OJ 2008 L 292, p. 1) ('the Framework Directive'), states:

'… [UNECE] Regulations to which the Community accedes, in application of that Decision, and amendments to UNECE Regulations to which the Community has already acceded should be incorporated within the Community type-approval procedure either as requirements for EC vehicle type-approval, or as alternatives to existing Community law. …'

10 Article 34(1) of the Framework Directive provides:

'UNECE Regulations to which the Community has acceded and which are listed in Part I of Annex IV and in Annex XI are part of the EC type-approval of a vehicle in the same way as the separate directives or regulations. They shall apply to the categories of vehicles listed in the relevant columns in the table of Part I of Annex IV and Annex XI.'

11 The first subparagraph of Article 35(1) of the Framework Directive provides:

'The UNECE Regulations listed in Part II of Annex IV are recognised as being equivalent to the corresponding separate directives or regulations in as much as they share the same scope and subject matter.'

12 UNECE Regulation No 83 is listed in Annex IV to the Framework Directive.

Regulation No 715/2007

13 Recitals 1 and 4 to 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.

…

(4) … New emission reductions from the transport (air, sea and land) sector, households and the energy, agricultural and industrial sectors are necessary to achieve the European Union's air quality objectives. …

(5) Achieving EU air quality objectives requires a continuing effort to reduce vehicle emissions. …

(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. …'

14 Article 3(6) and (10) of that regulation provides:

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

…

6. “tailpipe emissions” means the emission of gaseous and particulate pollutants;

…

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’.

15 Article 4(1) and (2) of the regulation states:

‘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. …

…’

16 Article 5(1) and (2) of Regulation No 715/2007 provides:

‘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.'

17 Annex I to that regulation, headed 'Emission limits', lays down, inter alia, nitrogen oxide emission limit values.

Regulation (EC) No 692/2008

18 Article 1 of Commission Regulation (EC) No 692/2008 of 18 July 2008 implementing and amending Regulation No 715/2007 (OJ 2008 L 199, p. 1) provides:

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

19 Under Article 2(18) of Regulation No 692/2008:

'For the purposes of this regulation:

…

18. "emission control system" means, in the context of the OBD [on-board diagnostics] 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'.

20 Annex III to that regulation, headed 'Verifying average exhaust emissions at ambient conditions (Type 1 test)', states:

'1. Introduction

This Annex describes the procedure for the type 1 test verifying the average exhaust emissions at ambient conditions.

…'

21 Annex XI to Regulation No 692/2008, headed 'On-board diagnostics (OBD) for motor vehicles', provides, in Appendix 2, relating to the 'Essential characteristics of the vehicle family':

'…

Emission control system:

…

– exhaust gas recirculation (i.e. with or without),

…'

French law

22 Article L. 213-1 of the code de la consommation (Consumer Code), in the version applicable until 18 March 2014, provides:

‘Anyone, whether or not a party to the contract, who has deceived or attempted to deceive a party to the contract, by any means or practice whatsoever, even through a third party, as to either:

1. the nature, kind, origin, essential qualities, composition or content of necessary ingredients of any goods; or

2. the quantity or identity of the things supplied, by supplying a good other than the specific thing that formed the subject matter of the contract; or

3. suitability for use, the risks inherent in the use of the goods, the controls carried out, the instructions for use or the precautions to be taken,

shall be liable to a term of imprisonment of up to two years and a fine of up to EUR 35 000 or only one of those penalties.’

23 Article L. 213-1 of that code, in the version applicable from 19 March 2014 to 30 June 2016, provides:

‘Anyone, whether or not a party to the contract, who has deceived or attempted to deceive a party to the contract, by any means or practice whatsoever, even through a third party, as to either:

1. the nature, kind, origin, essential qualities, composition or content of necessary ingredients of any goods; or

2. the quantity or identity of the things supplied, by supplying a good other than the specific thing that formed the subject matter of the contract; or

3. suitability for use, the risks inherent in the use of the goods, the controls carried out, the instructions for use or the precautions to be taken,

shall be liable to a term of imprisonment of up to two years and a fine of up to EUR 300 000.

The amount of the fine may be increased, in proportion to the advantages derived from the offence, to 10% of the average annual turnover, calculated on the basis of the last three annual turnovers known on the date of the facts.’

24 Article L. 213-2 of that code, in the version applicable until 18 March 2014, states:

‘The penalties provided for in Article L. 213-1 may be doubled:

1. if the offences laid down in that article have had the consequence of rendering the use of the goods dangerous for humans or animals;

2. if the offence or the attempted offence provided for in Article L. 213-1 was committed either:

(a) with the assistance of false or inaccurate weights, measures and other instruments; or

(b) with the assistance of manoeuvres or practices designed to distort the operations of analysis or dosage, weighing or measuring, or designed to fraudulently modify the composition, weight or volume of the goods, even before those operations; or

(c) with the assistance of fraudulent information designed to confer credibility on a previous accurate operation.'

25 Article 213-2 of that code, in the version applicable from 19 March 2014 to 30 June 2016, provides:

'I.- The penalties provided for in Article L. 213-1 may be increased to five years' imprisonment and a fine of EUR 600 000 if the offence or attempted offence laid down in Article L. 213-1 has been committed:

1. with the assistance of false or inaccurate weights, measures and other instruments; or

2. with the assistance of manoeuvres or practices designed to distort the operations of analysis or dosage, weighing or measuring, or designed to fraudulently modify the composition, weight or volume of the goods, even before those operations; or

3. with the assistance of fraudulent information designed to confer credibility on a previous accurate operation.

II.- The penalties provided for in Article L. 213-1 may be increased to seven years' imprisonment and a fine of EUR 750 000 if the offence or attempted offence provided for in the same Article L. 213-1:

1. have had the consequence of rendering the use of the goods dangerous to human or animal health;

2. were committed in an organised gang.

III.- The fines prescribed in this Article may be increased, in proportion to the advantages derived from the offence, to 10% of the average annual turnover, calculated on the basis of the last three annual turnovers known on the date of the facts.'

26 Pursuant to Article L. 213-6 of the Consumer Code:

'Legal persons declared criminally liable, in the conditions laid down in Article 121-2 of the Penal Code, for the offences defined in Articles L. 213-1 to L. 213-4 shall incur, in addition to the fine according to the procedures laid down in Article 131-38 of the Penal Code, the penalties prescribed in paragraphs 2 to 9 of Article 131-39 of that code.

The prohibition referred to in paragraph 2 of Article 131-39 of the Penal Code shall apply to the activity in the exercise or on the occasion of which the offence was committed.'

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

27 Company X is a motor vehicle manufacturer that markets motor vehicles in France. It is apparent from the order for reference that that company is alleged to have put into circulation, in France, vehicles equipped with software capable of detecting the approval phase of those vehicles in order to distort the results of tests for emissions of gaseous pollutants, in particular nitrogen oxide (NOx), carried out during that phase.

28 On 28 September 2015, following disclosures in the press, the Vice-President of the conseil régional d'Île-de-France (Regional Council, Île-de-France, France) responsible for transport filed a report with the procureur de Paris (Public Prosecutor in Paris, France) regarding the actions of company X in relation to the placing on the market of vehicles equipped with that software.

29 On 2 October 2015, the parquet de Paris (Public Prosecutor's Office in Paris), taking the view that those actions should be classified as 'aggravated deception', requested the office central de lutte contre les atteintes à l'environnement et à la santé publique (Central office for combating damage to the environment and to public health, France) to carry out an investigation into the conditions in which the vehicles concerned had been placed on the French market.

30 At the same time, the ministre de l'Écologie, du Développement durable et de l'Énergie (Minister for Ecology, Sustainable Development and Energy, France), requested the Service national des enquêtes (National Investigations Service, France; 'SNE') of the Direction générale de la concurrence, de la consommation et de la répression des fraudes (Directorate-General for Competition, Consumer Affairs and Fraud Control, France) to investigate whether vehicles marketed in France were equipped with such software.

31 During the partial approval process relating to pollutant emissions, vehicles are tested in accordance with a protocol, the parameters of which are defined by regulation, in particular the speed profile to be followed, the temperature and the preconditioning of the vehicle. The speed profile used for the approval test, called the New European Driving Cycle (NEDC), is carried out in a laboratory and consists of the repetition of four urban cycles, followed by a non-urban cycle. It thus makes it possible to verify that the quantity of NOx emitted is below the maximum threshold laid down in Annex I to Regulation No 715/2007.

32 The exhaust gas recirculation valve ('the ERG valve') is one of the technologies used by vehicle manufacturers, including company X, to manage and reduce NOx emissions generated by the incomplete combustion of fuel.

33 When it is opened, the EGR valve allows the exhaust gas to be passed through the gas inlet manifold in order to burn it a second time, with a heat exchanger to cool the burnt gas. It is controlled by an electronic engine controller, which is the on-board computer installed in the vehicle that electronically controls the various functions included in the vehicle, such as those relating to engine management, transmission or safety. The opening of the EGR valve is controlled in real time by the controller, which sends instructions to the valve actuator on the basis of the information provided by various sensors, such as speed, engine temperature or air temperature. The effectiveness of the pollution control system is therefore linked to the opening of that valve, which is controlled by the source code of the software installed on the engine controller.

34 In its report, the SNE included the tests and trials carried out by the Union technique de l'automobile, du motorcycle et du cycle (Technical union for automobiles, motorcycles and bicycles, France; 'UTAC'), which is the only body authorised in France to carry out vehicle approval tests. Those tests, the purpose of which was to investigate whether fraud in respect of the anti-pollution tests could be assumed, revealed that the NOx emissions of some of company X's vehicles were 2, 3.2, 3.4 or 3.6 times higher, depending on the vehicle, as compared with the values established during the approval procedure for those vehicles.

35 Additional tests, entrusted to the Institut français du pétrole Énergies Nouvelles (French Institute for Petroleum and New Energies, France; 'IFPEN') at the request of the ministère de l'Écologie, du Développement durable et de l'Énergie (Ministry of Ecology, Sustainable Development and Energy, France), and relating to three of that company's vehicles, also revealed that the level of NOx emissions was reduced when an approval phase was detected, with the EGR valve open significantly wider.

36 On 16 October 2015, the president of the French subsidiary of company X stated, during a hearing at which he appeared on a voluntary basis, that he had not been informed of how that software worked or of its fraudulent nature and stated that the vehicles equipped with it were going to be recalled in order to update that software.

37 On 15 and 18 December 2015, at the request of company X, a law firm sent the investigators a document intended to demonstrate that the EGR system could not be regarded as a 'defeat device' within the meaning of Regulation No 715/2007.

38 On 19 February 2016, following that investigation, the Public Prosecutor referred the matter to three examining magistrates at the tribunal de grande instance de Paris (Regional Court, Paris, France). In the introductory indictment, company X is accused of having, since 1 September 2009, in France, deceived purchasers of vehicles with Euro 5 and Euro 6 diesel engines as to the essential qualities of those vehicles, on account of the presence of a defeat device contrary to Regulation No 715/2007, and as to the checks carried out, accompanied by the aggravating circumstance that its actions had the result of rendering use of the goods hazardous to human or animal health.

39 The examining magistrates of the tribunal de grande instance de Paris (Regional Court, Paris) commissioned an expert to analyse the results of the tests conducted by the administrative authority – namely the tests carried out by UTAC and IFPEN – and carry out any other technical analyses in order to describe how the software at issue operated and to explain its effects in terms of the increase in NOx emissions by the vehicles equipped with that software. In his report lodged on 26 April 2017, the expert took the view that the vehicles concerned were fitted with a device which detected the approval procedure, modified the operation of the exhaust gas recirculation system for the purposes of that approval, and reduced NOx emissions for the purposes of that procedure. He also took the view that the emission control systems of those vehicles had been manipulated in order to increase the opening of the EGR valve when an approval phase was detected. The reduction in the opening of that valve under normal conditions of use of those vehicles reduced the effectiveness of the emission control system and resulted in an increase in NOx emissions.

40 According to the expert, if the operation of the EGR valve in normal conditions of use had been identical to its operation during the approval procedures, the vehicles concerned would have produced much less NOx, their fuel consumption and engine power would have been reduced

and maintenance operations would have been more frequent and more costly. As a result of the manipulation carried out, the vehicles have a greater power of acceleration, greater power, less clogging up of air intake ducts, valves and the combustion chamber, thereby contributing to engine longevity and reliability. Thus, without that manipulation, the vehicles concerned would not have been approved.

41 On 28 March 2017, company X was summoned before the examining magistrates of the tribunal de grande instance de Paris (Regional Court, Paris). Benefiting from the status of witness with legal representation, it refused to answer the questions put to it. The judicial authorities of the Member State in which company X has its registered office also refused to provide the evidence requested by the examining magistrates. In addition, more than 1 200 persons have filed civil actions in the context of the present judicial investigation.

42 The examining magistrates of the tribunal de grande instance de Paris (Regional Court, Paris) state that since the devices capable of acting on the operation of the emission control system of vehicles can take different forms, it is important to specify what is covered by the concept of 'defeat device' within the meaning of Article 3(10) of Regulation No 715/2007, as that provision defines that concept by reference to several concepts which have yet to be interpreted by the Court.

43 Since the classification of 'deception', envisaged in the context of the criminal investigation at issue in the main proceedings, is based on the classification of 'defeat device', within the meaning of Article 3(10) and Article 5(2) of Regulation No 715/2007, the examining magistrates of the tribunal de grande instance de Paris (Regional Court, Paris) consider that an interpretation of those provisions is necessary in order to decide whether company X should be charged and committed for trial following the investigation.

44 In those circumstances the examining magistrates of the tribunal de grande instance de Paris (Regional Court, Paris) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Interpretation of the concept of "[element of] design"
   (a) What is covered by the concept of "element of design" in Article 3(10) of Regulation No 715/2007, which defines "defeat device"?
   (b) May a programme integrated in the engine control controller or more generally acting on that calculator be considered to be an "element of design" within the meaning of that article?

(2) Interpretation of the concept of "emission control system"
   (a) What is covered by the concept of "emission control system" in Article 3(10) of Regulation No 715/2007, which defines "defeat device"?
   (b) Does this emission control system include only the technologies and strategies aimed at treating and reducing emissions (in particular of NOx) after they have been created, or does it also incorporate the different technologies and strategies that enable the initial production of emissions to be limited, such as EGR technology?

(3) Interpretation of the concept of "defeat device"

(a) Is a device that detects any parameter connected with the conduct of the approval procedures provided for in Regulation No 715/2007, for the purposes of activating or adjusting upwards, during those procedures, the operation of any part of the emission control system, and thus obtaining approval of the vehicle, a "defeat device" within the meaning of Article 3(10) of Regulation No 715/2007?
(b) If so, is that defeat device prohibited under Article 5(2) of Regulation No 715/2007?
(c) May a device as described in Question 3(1) be characterised as a "defeat device" if the upwards adjustment of the activation of the emission control system is effective, not only during the approval procedures, but also on specific occasions when the precise conditions detected for the purpose of adjusting the emission control system upwards during those approval procedures are encountered in actual traffic?

(4) Interpretation of the exceptions provided for in Article 5 [of Regulation No 715/2007]
(a) What is covered by the three exceptions provided for in Article 5(2) of Regulation No 715/2007?
(b) Might the prohibition of the defeat device activating or adjusting upwards the operation of any part of the emission control system specifically during the approval procedures be disregarded for one of the three reasons listed in Article 5(2) [of that regulation]?
(c) Is slowing down the ageing or the clogging-up of the engine among the requirements of "protecting the engine against damage or accident" or of "safe operation of the vehicle" that may justify the presence of a defeat device within the meaning of Article 5(2)(a) [of the regulation]?'

Consideration of the questions referred

Admissibility

45 Company X claims that the request for a preliminary ruling is inadmissible on the ground, first, that an answer from the Court to the questions referred is not necessary for the referring court to be able to give a ruling in the main proceedings. In that regard, it submits that the Court's answer cannot influence the characterisation of the constituent elements of the offence of aggravated deception which it is alleged to have committed under French criminal law.

46 Second, company X submits that making the characterisation of the offence contingent on the interpretation of Regulation No 715/2007 leads to an infringement of the principle that offences and penalties must have a proper legal basis.

47 Third, company X argues that there is, at this stage, no dispute before the referring court in connection with the questions referred, with the result that those questions are purely hypothetical. Since the referring court did not adopt a position on those questions, they are merely a request for an advisory opinion on rules of EU law.

48 Fourth, the questions referred were not the subject of an exchange of arguments which, it is claimed, infringes the principle of the sound administration of justice.

49 Fifth, even if the questions referred reflect the reasoning of the referring court, company X takes the view that the order for reference does not set out with the necessary clarity the reasons why that court considers that the interpretation of the provisions of Regulation No 715/2007 is useful for the resolution of the case in the main proceedings, or the link between that interpretation and

the case in the main proceedings. In that regard, company X has also stated that the questions referred for a preliminary ruling were referred prematurely, given that the factual context had not been established, at that stage of the investigation, with sufficient precision.

50 It must be borne in mind that, in accordance with the Court's 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).

51 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).

52 In the present case, it should be noted, first of all, that the order for reference contains a reasoned explanation of the legal and factual context of the dispute in the main proceedings and the reasons why the referring court considered that the answer to the questions referred in those proceedings is necessary to enable it to give judgment.

53 It is also apparent from the order for reference that the classification of 'aggravated deception', provided for under national law, in respect of acts such as those alleged against company X, is contingent on whether the software at issue in the main proceedings may be regarded as a 'defeat device', within the meaning of Article 3(10) of Regulation No 715/2007, the use of which is prohibited under Article 5(2) of that regulation.

54 In those circumstances, it cannot be considered that the interpretation of EU law sought bears no relation to the actual facts of the main action or its object.

55 Next, as regards the finding of the constituent elements of the offence of aggravated deception under French criminal law, it must be recalled that, in so far as, in proceedings under Article 267 TFEU, the interpretation of national law and the examination of the conditions laid down by that law fall exclusively to the referring court (judgment of 13 November 2018, *Čepelnik*, C-33/17, EU:C:2018:896, paragraph 24 and the case-law cited), the arguments put forward by company X on that point are not sufficient to rebut the presumption of relevance referred to in paragraph 51 above.

56 The same applies to company X's argument relating to the principle that offences and penalties must have a proper legal basis. Regulation No 715/2007 does not introduce criminal penalties, with the result that that principle is irrelevant for the purposes of assessing the admissibility of the present request for a preliminary ruling.

57 Lastly, company X's claim that the questions referred for a preliminary ruling were not the subject of an exchange of arguments cannot be accepted, since Article 267 TFEU does not make the reference to the Court subject to there having been an *inter partes* hearing in the proceedings before the referring court (judgment of 16 July 2020, *Governo della Repubblica italiana (Status of Italian magistrates)*, C-658/18, EU:C:2020:572, paragraph 63).

58 Accordingly, the request for a preliminary ruling is admissible.

Substance

Question 1

59 By its first question, the referring court asks, in essence, whether Article 3(10) of Regulation No 715/2007 must be interpreted as meaning that software installed or acting on the electronic engine controller constitutes an 'element of design' within the meaning of that provision.

60 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'.

61 It is clear from that provision that it does not define the concept of 'element of design'.

62 In that connection, according to the settled case-law of the Court, the meaning and scope of terms for which EU law provides no definition must be determined by reference to their usual meaning in everyday language, while account is also taken of the context in which they occur and the purposes of the rules of which they form part (judgment of 1 October 2020, *Entoma*, C-526/19, EU:C:2020:769, paragraph 29).

63 In the first place, it should be noted that the words 'element of design' designate, in their usual meaning, an object manufactured with a view to its incorporation into a functional whole.

64 In the second place, it is apparent from Article 3(10) of that regulation that the concept of a defeat device referred to in that provision covers 'any' element of design. In that regard, as the French Government and the Commission submit, it must be found that that definition of a defeat device therefore 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.

65 In the present case, it is apparent from the order for reference that the opening of the EGR valve is controlled in real time by one of the electronic engine controllers, which is an on-board computer system. Thus, on the basis of the information provided by various sensors – such as the engine speed or engine temperature sensors – that controller sends instructions to the EGR valve actuator. The effectiveness of the pollution reduction system is linked to the opening of that valve, which is controlled by the source code of the software installed on the controller.

66 Consequently, where it acts on the operation of the emission control system and reduces its effectiveness, software, such as that at issue in the main proceedings, installed on the electronic engine controller, constitutes an 'element of design' within the meaning of Article 3(10) of Regulation No 715/2007.

67 That broad interpretation of the concept of 'element of design' is borne out by the objective pursued by Regulation No 715/2007, which consists, as is apparent from recital 6 in the preamble thereto, in considerably reducing NOx emissions from diesel vehicles in order to improve air quality and comply with limit values for pollution.

68 In the light of all the foregoing considerations, the answer to the first question is that Article 3(10) of Regulation No 715/2007 must be interpreted as meaning that software installed or acting on the electronic engine controller constitutes an 'element of design', within the meaning of that provision, where it acts on the operation of the emission control system and reduces its effectiveness.

Question 2

69 By its second question, the referring court asks, in essence, whether Article 3(10) of Regulation No 715/2007 must be interpreted as meaning that the concept of an 'emission control system', within the meaning of that provision, covers only 'exhaust gas after-treatment' technologies and strategies, which reduce emissions downstream, that is to say, after they are formed, or also those which, like the EGR system, reduce emissions upstream, that is to say, when they are formed.

70 As a preliminary point, it should be borne in mind that there are two strategies which may be put in place by manufacturers, in their diesel-powered vehicles, in order to reduce pollutant emissions. First, the 'in-engine' strategy, such as the EGR system, which consists in reducing the formation of pollutants within the engine itself and, second, the 'exhaust gas after-treatment' strategy, which consists in treating exhaust gas emissions after they are formed.

71 Regulation No 715/2007 does not define the concept of 'emission control system' per se, but notes, in its preamble, that in view of the objective of reducing emissions pursued by that regulation, it is necessary to provide for devices intended to measure and, therefore, control emissions during vehicle use.

72 According to the case-law recalled in paragraph 62 of the present judgment, the meaning and scope of terms for which EU law provides no definition must be determined by reference to their usual meaning in everyday language, while account is also taken of the context in which they occur and the purposes of the rules of which they form part.

73 First of all, it should be noted that, in literal terms, the emission control system is a component of a vehicle, the aim of which is to control the emissions of that vehicle.

74 In that connection, it is apparent from the order for reference that the EGR system is a device the sole purpose of which is to reduce, and therefore control, NOx emissions. Consequently, it cannot be inferred from Article 3(10) of Regulation No 715/2007 that such a device could not technically form part of the emission control system where it enables the volume of NOx emissions to be controlled on the basis of pre-set parameters.

75 That interpretation is borne out, next, by the context of Article 3(10) of Regulation No 715/2007. That provision, which is set out in Chapter I of that regulation dedicated to the subject matter, scope and definitions thereof, must be examined in the light of the various provisions of that regulation and the regulatory framework for the approval of motor vehicles within the European Union of which that regulation forms part.

76 In that regard, it must be borne in mind that Part I of Annex IV to the Framework Directive lists the legislative acts laying down the substantive conditions which must be satisfied in order for the motor vehicle type-approval to be granted. Regulation No 715/2007 is listed in that annex and provides, in Article 5 thereof, that 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. As regards concerns controlling emissions, Article 5 imposes specific technical requirements, laid down by Regulation No 692/2008. The latter regulation refers, in turn, to UNECE Regulation No 83 with respect to certain technical requirements concerning vehicle type-approval.

77 As regards, in the first place, Regulation No 715/2007, Article 4(2) of that regulation provides that the technical measures taken by the manufacturer must be such as to ensure that the tailpipe emissions, inter alia, are effectively limited, throughout the normal life of the vehicles under normal conditions of use. In that connection, Article 3(6) of that regulation defines the concept of 'tailpipe emissions' as 'the emission of gaseous and particulate pollutants'.

78 Those provisions therefore fix only the objective to be achieved by manufacturers, namely to limit tailpipe emissions, without specifying the means of achieving that objective.

79 Consequently, Article 3(10) of Regulation No 715/2007, examined in the light of the other provisions of that regulation, should be interpreted as meaning that the concept of an 'emission control system' does not exclude technologies and strategies that reduce emissions upstream, that is to say, when those emissions are formed.

80 In the second place, it should be noted that UNECE Regulation No 83, and in particular paragraph 2.16 thereof, also refers to the concept of 'emission control system' without, however, specifying whether that concept refers to measures adopted to process emissions after their formation or to those intended to limit the formation of emissions.

81 That provision defines the 'defeat device' in terms similar to those of Article 3(10) of Regulation No 715/2007. Consequently, it cannot be inferred from paragraph 2.16 of UNECE Regulation No 83 that the 'emission control system', within the meaning of that provision, covers only technologies and strategies that reduce exhaust emissions after their formation and not those intended to limit their formation.

82 Furthermore, paragraph 7.3.1.2 of UNECE Regulation No 83, entitled 'Pollution control system', stipulates that the EGR system is one of those parameters. It thus follows from those provisions that the EGR system falls within the scope of the concept of 'emission control system'.

83 In the third place, while Regulation No 692/2008 defines, in Article 2(18) thereof, the 'emission control system' as being, 'in the context of the OBD 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', and although that regulation contains numerous provisions relating to the various emissions treatment systems located in the

exhaust system of vehicles and categorises them as 'emission control system', it also lists, in the same category, in-engine systems, designed to limit the formation of emissions. On that basis, Appendix 2 to Annex XI to that regulation expressly refers to exhaust gas recirculation in the list of emission control systems. That is the purpose of the EGR system.

84 Moreover, it should be borne in mind that, in motor vehicle type-approval procedures, the emissions level is always measured at the outlet of the exhaust system, as is apparent from Annex III to Regulation No 692/2008. Accordingly, no distinction may be drawn between strategies which reduce exhaust emissions after their formation and those designed to limit their formation.

85 Thus it is clear from the context of Article 3(10) of Regulation No 715/2007 that the concept of 'emission control system' includes both in-engine technologies and strategies designed to limit the production of emissions and those designed to reduce emissions after they are formed.

86 Lastly, that interpretation is also borne out by the objective pursued by Regulation No 715/2007, which consists in ensuring a high level of environmental protection.

87 As is set out in recital 1 of Regulation No 715/2007, the technical requirements for type-approval of motor vehicles with regard to emissions should be harmonised, inter alia, in order to achieve that objective. Moreover, recital 5 of that regulation states that the achievement of the European Union's objectives in terms of air quality requires continuous efforts to reduce vehicle emissions. Recital 6 of the regulation states that, in particular, a considerable reduction in NOx emissions from diesel vehicles is necessary to improve air quality and comply with limit values for pollution.

88 Article 4 of Regulation No 715/2007 requires the manufacturer to demonstrate that the technical measures taken ensure that the tailpipe emissions in particular are effectively limited, throughout the normal life of the vehicles under normal conditions of use.

89 Consequently, the interpretation of the concept of 'emission control system' set out in Article 3(10) of Regulation No 715/2007 according to which that concept includes both the in-engine technologies and strategies designed to reduce emissions after they are formed and those intended to limit the formation of those emissions, is in line with the objective pursued by that regulation. As the Advocate General observes in point 106 of her Opinion, limiting the scope of that concept solely to technologies and strategies which reduce exhaust emissions after their formation would considerably reduce the effectiveness of Regulation No 715/2007.

90 In the light of the foregoing considerations, the answer to the second question is that Article 3(10) of Regulation No 715/2007 must be interpreted as meaning that the concept of an 'emission control system', within the meaning of that provision, covers both 'exhaust gas after-treatment' technologies and strategies that reduce emissions downstream, that is to say after their formation, and those which, like the EGR system, reduce emissions upstream, that is to say during their formation.

Question 3(a) and (c)

91 By parts (a) and (c) of its third question, the referring court asks, in essence, whether Article 3(10) of Regulation No 715/2007 must be interpreted as meaning that a device which detects any parameter linked to the conduct of the approval procedures provided for by that regulation, in order to improve the performance of the emission control system during those procedures, and

thus obtain approval of the vehicle, constitutes a 'defeat device' within the meaning of that provision, even if such an improvement may also be observed, occasionally, under normal conditions of vehicle use.

92 It should be recalled that, in the context of the partial approval relating to pollutant emissions, vehicles are tested in accordance with the NEDC speed profile, which consists of the repetition, in a laboratory, of four urban cycles followed by a non-urban cycle. This makes it possible, inter alia, to verify that the quantity of NOx emitted is below the threshold laid down by Regulation No 715/2007. The test cycles for vehicle emissions under this procedure are not based on real driving conditions.

93 The software at issue in the main proceedings makes it possible to detect the parameters corresponding to those of the laboratory tests carried out in accordance with the NEDC profile and, where those parameters are detected, to open the EGR valve wider in order to redirect a larger proportion of the exhaust gases to the gas inlet manifold and thus reduce the emissions of the vehicle tested. That software therefore makes it possible to augment the operation of the EGR valve so that the emissions comply with the thresholds laid down by Regulation No 715/2007. It is apparent from the order for reference that, where that software does not detect the NEDC profile and therefore considers that the vehicle is under normal conditions of use, NOx emissions are found to be higher than those recorded during the testing phase and, moreover, do not comply with the limits laid down by Regulation No 715/2007.

94 According to the Court's settled case-law, in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (judgment of 18 November 2020, *Kaplan International colleges UK*, C-77/19, EU:C:2020:934, paragraph 39 and the case-law cited).

95 It is clear, first of all, from the wording of Article 3(10) of Regulation No 715/2007 that a defeat device is intended to reduce 'the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use'.

96 Consequently, it could be inferred from the wording of that provision that a device, such as the EGR system at issue in the main proceedings, put in place in order to ensure that emissions are limited in accordance with Regulation No 715/2007, should be operational both during the laboratory approval period and under normal conditions of vehicle use.

97 As regards, next, the context of Article 3(10) of Regulation No 715/2007, it is clear from paragraph 77 above that, 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 Regulation No 715/2007 provides that the manufacturer are 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.

98 It should be observed that that context does not reveal any factors which would allow a distinction to be drawn between the operation of the device at issue during the type-approval test phase and during vehicle use under normal conditions. As the Advocate General observed in point 124 of her Opinion, the introduction of a mechanism the sole purpose of which is to ensure compliance with

the emission limits laid down by Regulation No 715/2007 only at the type-approval test phase would run counter to the obligation to ensure that emissions are effectively limited under normal conditions of vehicle use.

99 Consequently, it is appropriate to adopt an interpretation of Article 3(10) of Regulation No 715/2007 according to which software, such as that at issue in the main proceedings, which alters the level of vehicle emissions according to the driving conditions which it detects and ensures compliance with emission limits only where those conditions correspond to those applied during the approval procedures, constitutes a 'defeat device' within the meaning of that provision. Thus, such a device constitutes a defeat device even if an improvement in the performance of the emission control system may also be observed, occasionally, under normal conditions of vehicle use.

100 Lastly, that interpretation is borne out by the objective pursued by Regulation No 715/2007, which, as is apparent from paragraphs 86 and 87 above, is to reduce NOx emissions considerably and ensure a high level of environmental protection.

101 The fact that, as can be seen from the order for reference, the normal conditions of vehicle use may exceptionally correspond to the driving conditions applied during approval procedures and thus improve, occasionally, the performance of the device in question does not affect that interpretation, since, under normal conditions of vehicle use, the objective of reducing NOx emissions is usually not achieved.

102 In the light of the foregoing, the answer to parts (a) and (c) of the third question is that Article 3(10) of Regulation No 715/2007 must be interpreted as meaning that a device which detects any parameter related to the conduct of the approval procedures provided for by that regulation in order to improve the performance of the emission control system during those procedures, and thus obtain approval of the vehicle, constitutes a 'defeat device', within the meaning of that provision, even if such an improvement may also be observed, occasionally, under normal conditions of vehicle use.

Question 3(b) and Question 4

103 As a preliminary point, it should be noted that Question 3(b) and Question 4 concern all the exceptions provided for in Article 5(2) of Regulation No 715/2007. However, it is apparent from the order for reference that the exceptions laid down in Article 5(2)(b) and (c) of that regulation are irrelevant for the purposes of resolving the dispute in the main proceedings. It is therefore not necessary to give an interpretation of Article 5(2)(b) and (c).

104 Thus, by those 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, such as that at issue in the main proceedings, which systematically improves the performance of the vehicle emissions control system during type-approval procedures as compared with that observed under normal conditions of use, can fall within the exception to the prohibition on such devices laid down in that provision where that device helps to prevent the ageing or clogging up of the engine.

105 Under Article 5(2) of Regulation No 715/2007, the use of defeat devices which reduce the effectiveness of emission control systems is prohibited. However, there are three exceptions to that prohibition, including the one set out in point (a) of that provision, according to which that prohibition 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'.

106 It should be noted that the concepts of 'damage' and 'accident' are defined neither in Article 5 of Regulation No 715/2007 nor in the other articles of that regulation.

107 It should be recalled that it is clear from the case-law cited in paragraph 62 of the present judgment that, in the absence of any definition of those concepts in Regulation No 715/2007, the meaning and scope of those terms must, according to the Court's settled case-law, 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.

108 In its usual meaning in everyday language, the term 'accident' refers, as the Advocate General observes in point 135 of her Opinion, to an unforeseen and sudden occurrence which causes damage or hazards, such as injuries or death. The term 'damage' refers, for its part, to damage generally resulting from a violent or sudden cause of action.

109 Consequently, a defeat device which reduces the effectiveness of the emission control system is justified where, pursuant to Article 5(2)(a) of Regulation No 715/2007, it allows the engine to be protected against sudden and exceptional damage.

110 In that regard, it should be noted that the clogging up and ageing of the engine cannot be regarded as an 'accident' or 'damage' within the meaning of that provision, since, as the Commission observes, those events are, in principle, foreseeable and inherent to the normal operation of the vehicle.

111 That interpretation is borne out by the context of Article 5(2)(a) of Regulation No 715/2007 – which lays down an exception to the prohibition on the use of defeat devices that reduce the effectiveness of emission control systems – and by the objective pursued by that regulation. Any exception must be interpreted strictly, so as to safeguard its effectiveness and respect its purpose (see, by analogy, judgment of 3 September 2014, *Deckmyn and Vrijheidsfonds*, C-201/13, EU:C:2014:2132, paragraphs 22 and 23).

112 Since Article 5(2)(a) of Regulation No 715/2007 constitutes an exception to the prohibition on the use of defeat devices which reduce the effectiveness of emission control systems, it must be interpreted strictly.

113 That interpretation is also supported by the objective pursued by Regulation No 715/2007, which is to ensure a high level of environmental protection and improve air quality within the European Union, which entails the effective reduction of NOx emissions throughout the normal life of vehicles. The prohibition laid down in Article 5(2)(a) 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.

114 Consequently, as the Advocate General observes in point 146 of her Opinion, only immediate risks of damage which create a specific hazard when the vehicle is driven are such as to justify the use of a defeat device.

115 In the light of the foregoing considerations, the answer to Question 3(a) and Question 4 is that Article 5(2)(a) of Regulation No 715/2007 must be interpreted as meaning that a defeat device, such as that at issue in the main proceedings, which systematically improves the performance of the emission control system of vehicles 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, which relates to the protection of the engine against damage or accident and the safe operation of the vehicle, even if that device helps to prevent the ageing or clogging up of the engine.

Costs

116 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 (Second 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 must be interpreted as meaning that software installed or acting on the electronic engine controller constitutes an 'element of design', within the meaning of that provision, where it acts on the operation of the emission control system and reduces its effectiveness.**

2. **Article 3(10) of Regulation No 715/2007 must be interpreted as meaning that the concept of an 'emission control system', within the meaning of that provision, covers both 'exhaust gas after-treatment' technologies and strategies that reduce emissions downstream, that is to say after their formation, and those which, like the exhaust gas recirculation system, reduce emissions upstream, that is to say during their formation.**

3. **Article 3(10) of Regulation No 715/2007 must be interpreted as meaning that a device which detects any parameter related to the conduct of the approval procedures provided for by that regulation in order to improve the performance of the emission control system during those procedures, and thus obtain approval of the vehicle, constitutes a 'defeat device', within the meaning of that provision, even if such an improvement may also be observed, occasionally, under normal conditions of vehicle use.**

4. **Article 5(2)(a) of Regulation No 715/2007 must be interpreted as meaning that a defeat device, such as that at issue in the main proceedings, which systematically improves the performance of the emission control system of vehicles during type-approval procedures in order to comply with the emission limits laid down by that regulation, and thus to 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, which relates to the protection of the engine against damage or accident and the safe operation of the vehicle, even if that device helps to prevent the ageing or clogging up of the engine.

[Signatures]