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)

In Case C-128/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Landesgericht Klagenfurt (Regional Court, Klagenfurt, Austria), made by decision of 19 February 2020, received at the Court on the same day, in the proceedings

GSMB Invest GmbH & Co. KG

v

Auto Krainer GesmbH,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, A. Arabadjiev, A. Prechal, K. Jürimäe, C. Lycourgos, 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:

– GSMB Invest GmbH & Co. KG, by T. Kainz, Rechtsanwalt,

– Auto Krainer GesmbH, 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,

* Language of the case: German.

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).

2 The request has been made in proceedings between GSMB Invest GmbH & Co. KG and Auto Krainer GesmbH 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

Regulation No 715/2007

3 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. …'

4 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.'

5 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’.

6 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. …

…’

7 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 conditions.'

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

Regulation No 692/2008

9 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.

10 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.'

11 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'.

12 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.

…'

13 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.

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

…'

14 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)':

'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:

(a) Catalytic converters and particulate filters:

…

…

(c) EGR:

with or without

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

…'

Austrian law

15 Paragraph 879(1) of the Allgemeines bürgerliches Gesetzbuch (Austrian Civil Code), in the version applicable to the main proceedings ('the ABGB'), provides:

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

16 Paragraph 932(1) and (4) of the ABGB provides:

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

…

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

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

17 On 9 January 2011, GSMB Invest concluded with Auto Krainer a sales contract for a Volkswagen motor vehicle, a Caddy Maxi Comfortline 4 Motion TDI model, with a Euro 5 generation EA 189 type diesel engine, a two-litre cylinder and an exhaust gas recirculation (‘EGR’) valve.

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

19 In support of its action, GSMB Invest submits that, in purchasing the vehicle in question, it had believed that it was acquiring a new environmentally friendly vehicle, the exhaust gas of which, in particular, complied with the legal standards in force. Following an update of the software installed in the electronic engine controller fitted in that vehicle, carried out by Volkswagen on 9 May 2017, the purification of exhaust gas was operational only at an outside temperature of between 15 and 33 °C and at a driving altitude of less than 1 000 metres (‘the temperature window’). That temperature window constitutes a prohibited defeat device since it cannot be justified by any of the derogations provided for in Article 5(2) of Regulation No 715/2007. In particular, the reduction in the purification of exhaust gas that results from the temperature window does not protect the engine of the vehicle in question from direct damage.

20 Auto Krainer submits that such a temperature window is used by all manufacturers of diesel vehicles in the Euro 5 category and that the Kraftfahrt-Bundesamt (Federal Office for Motor Vehicles, Germany), the competent authority responsible for type-approval in Germany, has held that temperature window to be a permissible measure under Regulation No 715/2007. In addition, when reviewing the software update at issue, that authority found that it had no negative impact on the durability of the pollution control devices.

21 The referring court considers that it follows from Article 3(10) and Article 5(2) of Regulation No 715/2007 that the temperature window is a prohibited defeat device. In most countries of the Europe Union, in particular in Germany and Austria, the ambient temperature is more often than not below 15 °C throughout the year and, given the topography of those countries, vehicles are very often driven above an altitude of 1 000 metres, so that such driving conditions may reasonably be expected to be encountered in normal vehicle operation and use, within the meaning of Article 3(10) of that regulation.

22 According to that court, the derogation provided for in Article 5(2)(a) of Regulation No 715/2007 cannot provide a legal basis for defeat devices that are activated under 'normal' conditions of vehicle use.

23 That court adds that Article 3(9) of Regulation No 692/2008 determines the period of time in which efficient operation of the engine must be achieved after a cold start. Under that provision, the NO_x aftertreatment device must reach a sufficiently high temperature for efficient operation within 400 seconds after a cold start at -7 °C. The approval authorities may not grant EC type-approval where satisfaction of the conditions laid down in that provision are not sufficiently established. It follows from that burden of proof that the EU legislature has clearly established that a temperature window may not be justified if it does not meet those conditions.

24 The referring court observes, however, that the Court has not yet ruled on the questions of interpretation of the provisions of Regulation No 715/2007 raised by the dispute before it.

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

'(1) Is Article 5(1) of [Regulation No 715/2007] to be interpreted as meaning that the equipment of a vehicle, within the meaning of Article 1(1) of 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 Article 5(2) [of Regulation No 715/2007], which states "in terms of protecting the engine against damage" …, to be interpreted as meaning that an exhaust gas strategy that serves principally to protect components such as the [EGR valve], exhaust gas recirculation cooler and diesel particulate filter does not fulfil the exemption requirements?

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

Consideration of the questions referred

The first and third questions

26 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).

27 In the present case, the first and third questions, which it is appropriate to answer together, refer 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.

28 It should be noted that, in its written observations, Auto Krainer 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, Auto Krainer submits that that 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.

29 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).

30 In those circumstances, in order to provide a useful answer to the referring court, it must be considered that, by its first and third questions, 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.

31 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'.

32 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).

33 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).

34 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 19 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.

35 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.

36 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).

37 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'.

38 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.

39 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).

40 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 Auto Krainer in its written observations, to its use under the conditions laid down for the approval test, applicable at the material time of the case in the main proceedings, known as the 'New European Driving Cycle' (NEDC), 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).

41 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).

42 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 40 above.

43 The interpretation set out in paragraph 40 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).

44 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.

45 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.

46 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.

47 Consequently, the answer to the first and third questions 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 question

48 By its second question, 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 ensures 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, set out in that provision, where that device contributes to protecting parts such as the EGR valve, the EGR cooler and the diesel particulate filter.

49 Under Article 5(2) of Regulation No 715/2007, the use of defeat devices that reduce the effectiveness of emission control systems is prohibited. However, there are three exceptions to that prohibition, including that in Article 5(2)(a) of that regulation, namely where 'the need for the device is justified in terms of protecting the engine against damage or accident and for safe operation of the vehicle'.

50 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).

51 As regards, first of all, the concept of 'engine', 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 (a) and (c), expressly

includes particulate filters and exhaust gas recirculation. Furthermore, under the second subparagraph of Article 10(1) of that regulation, particulate filters are to be considered to be pollution control devices for the purposes of that regulation.

52 Consequently, the EGR valve, the EGR cooler and the diesel particulate filter constitute components that are distinct from the engine. The EGR valve is situated at the engine outlet, after the exhaust manifold. When 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, the EGR cooler, and to cool the burnt gas. The particulate filter, which is situated before the tailpipe, makes it possible to filter the air in order to retain the fine polluting particles.

53 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).

54 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).

55 That interpretation is borne out by the objective pursued by Regulation No 715/2007, which is, as noted in paragraph 43 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 (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 113).

56 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.

57 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 Auto Krainer 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.

58 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 50 and 55 above.

59 However, the German Government and Auto Krainer 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.

60 Furthermore, Auto Krainer 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.

61 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.

62 Consequently, and, as has been pointed out in paragraph 50 above, 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.

63 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.

64 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.

65 To accept that a defeat device such as that described in paragraph 63 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 that regulation, could, in practice, be applied less frequently than that exception.

66 In addition, Auto Krainer 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, Auto Krainer 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.

67 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.

68 Secondly, as stated in paragraph 55 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.

69 In those circumstances, and in view of the fact that that provision must, as noted in paragraphs 50 and 62 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.

70 Consequently, the answer to the second question 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 contributes to the protection of parts such as the EGR valve, the EGR cooler and the diesel particulate filter, 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 one of those parts, of such a serious nature as to give rise to a specific hazard when a vehicle fitted with that device is driven. In any event, a defeat device which, under normal driving conditions, 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.

Costs

71 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 contributes to the protection of parts such as the exhaust gas recirculation valve, the exhaust gas recirculation cooler and the diesel particulate filter, 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 one of those parts, of such a serious nature as to give rise to a specific hazard when a vehicle fitted with that device is driven. In any event, a defeat device which, under normal driving conditions, 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.**

[Signatures]