Corporate & Commercial

The manufacturer must compensate the purchaser for damage caused by NO_x defeat devices in Dieselgate cases

(CJEU, Grand Chamber, 21 March 2023, C-100/21, QB v. Mercedes-Benz)

To date, the latest decision of the EU court in the Dieselgate saga, and the most controversial in private law.

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1. The facts and the question referred to the Court of Justice of the European Union

The reference for a preliminary ruling concerns the interpretation of Directive 2007/46/EC establishing a framework for the approval of motor vehicles, as amended by Commission Regulation (EC) No 385/2009, in conjunction with 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 as regards access to vehicle repair and maintenance information (hereinafter the 'Framework Directive'). The Framework Directive was repealed by Regulation (EU) 2018/858 on the approval and market surveillance of motor vehicles, amending Regulations (EC) No 715/2007 and (EC) No 595/2009 and repealing Directive 2007/46/EC. However, having regard to the date of the facts of the main proceedings, said Framework Directive remains applicable to those proceedings.

This reference has been made in the context of proceedings between QB and Mercedes-Benz Group AG, a car manufacturer, concerning QB's right to compensation and the calculation of the amount of compensation which may be due to him for the purchase of a diesel vehicle equipped with software which reduces the re-circulation of pollutant gases from that vehicle depending on the outside temperature and which does not comply with the requirements

of EU law. On 20 March 2014, QB purchased from Auto Y GmbH a second-hand Mercedes-Benz car, model C 220 CDI, equipped with a Euro 5 diesel engine, with a mileage of 28 591 km, for a price of EUR 29 999. This vehicle, marketed by the car manufacturer Daimler, had been registered for the first time on 15 March 2013. The vehicle is equipped with engine control software which reduces the rate of exhaust gas recirculation when outside temperatures fall below a certain threshold, which results in an increase in nitrogen oxide emissions (NO_x). Thus, this recirculation is only fully effective if the outside temperature does not fall below this threshold (hereinafter referred to as the 'temperature window'). In this respect, the exact outside temperature below which the reduction of the recirculation rate occurs and the extent of this reduction are the subject of debate between the parties to the main proceedings. QB brought an action before the Landgericht Ravensburg (Regional Civil and Criminal Court, Ravensburg, Germany), the referring court, seeking compensation for the damage which, in his view, the Mercedes-Benz Group had caused him by fitting the vehicle in question with defeat devices which are prohibited under Article 5(2) of Regulation No 715/2007. The referring court considers that the temperature window is a prohibited defeat device within the meaning of Article 3(10) and Article 5(2) of Regulation No 715/2007. It states that the exhaust gas recirculation rate of the vehicle in question and, accordingly, the effectiveness of the emission control system are already reduced at an outside temperature of more than 0 ºC, which falls within the '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.

Article 4 of this Framework Directive prescribed the following:

> 1. Member States shall ensure that manufacturers applying for approval comply with their obligations under this Directive.
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> 2. Member States shall approve only such vehicles, systems, components or separate technical units as satisfy the requirements of this Directive.
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> 3. Member States shall register or permit the sale or entry into service only of such vehicles, components and separate technical units as satisfy the requirements of this Directive.

Article 30(1) of the Framework Directive provided as follows:

> If a Member State which has granted an EC type-approval finds that new vehicles, systems, components or separate technical units accompanied by a certificate of conformity or bearing an approval mark do not conform to the type it has approved, it shall take the necessary measures, including, where necessary, the withdrawal of type-approval, to ensure that production vehicles, systems, components or separate technical units, as the case may be, are brought into conformity with the approved type. The approval authority of that Member State shall advise the approval authorities of the other Member States of the measures taken.

For the purposes of Regulation No 715/2007, a *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. 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. Manufacturers shall set out carbon dioxide emissions and fuel consumption figures in a document given to the purchaser of the vehicle at the time of purchase. 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. The use of defeat devices that reduce the effectiveness of emission control systems shall be prohibited. The prohibition shall 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.

According to the referring court, QB may be entitled to compensation under Paragraph 823(2) of the Bürgerliches Gesetzbuch (BGB, German Civil Code), which requires only ordinary negligence. However, that provision presupposes the infringement of a law intended to protect others, which, according to the case law of the Bundesgerichtshof (German Federal Supreme Court for Civil and Criminal Matters), means that that law is intended to protect an individual or a group of persons against a failure to have regard to a specific legal interest. The referring court therefore asks whether Articles 18(1), 26(1) and 46 of the Framework Directive, read in conjunction with Article 5(2) of Regulation No 715/2007, are intended to protect, in addition to public interests, the interests of an individual purchaser of a vehicle which does not comply with EU law, in particular where that vehicle is fitted with a defeat device prohibited under the latter provision.

In the event that the above-mentioned provisions are considered to protect only general legal interests and not the specific interests of purchasers, the referring court also questions whether the principle of effectiveness could require that any fault, whether intentional or negligent, committed by a car manufacturer by placing on the market vehicles equipped with an unlawful defeat device under Article 5 of Regulation No 715/2007 should be penalised by the possibility, for the purchaser concerned, of asserting a right to compensation based on the tortious liability of that manufacturer.

In the event that QB may have such a right to compensation on the basis of Paragraph 823(2) of the German Civil Code, the referring court wonders whether it is necessary, in order to give practical effect to the applicable provisions of EU law, that the benefit derived from the use of the vehicle in question not be offset against the right to compensation or be offset only to a limited extent. That question is also the subject of differing views in German case-law and academic writing, including as regards the influence which the prohibition of unjust enrichment could have on such offsetting.

The referring court raises further questions in the alternative concerning Paragraph 826 BGB, which the Court of Justice does not decide on, having answered the question concerning Paragraph 823(2) BGB in the affirmative.

2. Answer of the Court of Justice of the European Union

As regards a temperature window similar to that at issue in the main proceedings, the Court has held 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 limit values laid down by that regulation only where the outside temperature is between 15 °C and 33 °C and the driving altitude is below 1000 metres constitutes a 'defeat device' within the meaning of Article 3(10) of that regulation (see, to that effect, judgment of 14 July 2022, GSMB Invest, C-128/20, EU:C:2022:570, paragraph 47).

Consequently, software such as that at issue in the main proceedings – if it is found to be a defeat device – 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 (see, to that effect, judgment of 14 July 2022, GSMB Invest, C-128/20, EU:C:2022:570, paragraph 62). The Court thus concluded that such a defeat device cannot be justified under that provision. To accept that such a defeat device may fall within the exception provided for in that provision 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 the first sentence of Article 5(2) of that regulation, could, in practice, be applied less frequently than that exception (judgment of 14 July 2022, GSMB Invest, C-128/20, EU:C:2022:570, paragraphs 64 and 65).

It therefore follows from the provisions of the Framework Directive referred to in paragraphs 78 to 80 of this judgment that it establishes a direct link between the car manufacturer and the individual purchaser of a motor vehicle intended to guarantee to the latter that that vehicle complies with the relevant EU legislation. In particular, since the manufacturer of a vehicle must comply with the requirements arising from Article 5 of Regulation No 715/2007 when issuing the certificate of conformity to the individual purchaser of that vehicle with a view to the registration and sale or entry into service of that vehicle, that certificate allows that purchaser to be protected against that manufacturer's failure to fulfil its obligation to place on the market vehicles which comply with that provision. In the light of the foregoing considerations, the answer must be that Articles 18(1), 26(1) and 46 of the Framework Directive, read in conjunction with Article 5(2) of Regulation No 715/2007, must be interpreted as protecting, in addition to the public interests, the specific interests of the individual purchaser of a motor vehicle vis-à-vis the manufacturer of that vehicle where that vehicle is equipped with a prohibited defeat device, within the meaning of the latter provision. Thus, it is apparent from those provisions that an individual purchaser of a motor vehicle has, vis-à-vis the manufacturer of that vehicle, the right that that vehicle not be fitted with a prohibited defeat device, within the meaning of Article 5(2) of that regulation.

Member States are required to provide that the purchaser of a motor vehicle equipped with a prohibited defeat device, within the meaning of Article 5(2) of that regulation, has a right to compensation from the manufacturer of that vehicle where that device has caused damage to that purchaser. In the absence of provisions of EU law governing the detailed rules under which

purchasers concerned by the acquisition of such a vehicle may obtain compensation, it is for each Member State to determine those rules. However, it would not be compatible with the principle of effectiveness for national legislation to make it impossible in practice or excessively difficult for the purchaser of a motor vehicle to obtain adequate compensation for the damage caused to him or her by the failure of the manufacturer of that vehicle to comply with the prohibition laid down in Article 5(2) of that regulation.

In the present case, it is for the referring court to determine whether the offsetting of the benefit derived from the actual use of the vehicle in question ensures adequate compensation for the purchaser concerned, if it is established that that purchaser suffered damage connected with the installation in that vehicle of a prohibited defeat device within the meaning of Article 5(2) of Regulation No 715/2007. Consequently, EU law must be interpreted as meaning that, in the absence of provisions of EU law governing the matter, it is for the law of the Member State concerned to determine the rules concerning compensation for damage actually caused to the purchaser of a vehicle equipped with a prohibited defeat device, within the meaning of Article 5(2) of Regulation No 715/2007, provided that that compensation is adequate with respect to the damage suffered.

3. Commentary

§ 1. It is not the first time that the Court of Justice of the European Union has held unlawful the installation of a device for disabling the control of pollutant gas emissions not authorised by EU regulation; most recently Regulations (EU) 715/2007 and 2018/858 (CJEU, 9 July 2020, Case C-343/19; CJEU, 9 December 2020, Case C-343/19; CJEU, 17 December 2020, Case C- 693/18, and three judgments of 14 July 2022: Cases C-128/20, C-134/20 and C-145/20). This is a ruling that has been reiterated in all the decisions produced in relation to so-called Dieselgate cases.

§ 2. What is that that Regulation 715/2007 and the current Regulation 2018/858 are aimed at the legal protection of the purchasers "concerned", *in addition to* pursuing the protection of public interests? Only in German law is this question to be asked and the answer to it to be wandered about. I believe that the court misunderstands what is being questioned and ends up answering as obvious that the law does produce this specific protective effect, without it having it very clear why this question raised by the judge *a quo* is important (*cf.* the unclear considerations in numbers 75 to 84 of the judgment).

§ 3. It is the case that in German law a number of absolute personal rights are protected extra-contractually. But a *purely economic interest*, such as a car buyer would have, is not protected as a right. It is one thing if a third party damages or steals your vehicle; it is quite another if the vehicle is delivered to you without the expected material or environmental qualities or if it is furtively fitted with an emission control "defeat device". This is not non-contractual harm to an absolute right because the buyer receives his property right to the vehicle as it is and in the condition it is in, and therefore cannot be treated as adventitious harm to the right of ownership of the car. It is "pure economic" harm. Pure economic harm is only protected extra-contractually under two conditions: one, that the harm is caused by a breach of a law whose precise purpose is the protection of the private interest harmed; two, that the harm is caused by wilful misconduct *contra bonos mores* (in breach of good customs).

§ 4. Until now, German case law *had been finding Volkswagen liable on the basis of* the latter rule. The manufacturer had misled the market with unacceptable, *indecent* business conduct. For whatever reason, the judge in this *Mercedes* case did not consider this particularly reprehensible conduct to have been proven and therefore declined to take the first route to liability. A comprehensive analysis of the extensive German case law to date can be found in B. Menhofer, "Die Rechtsprechung zu unzulässigen Abschalteinrichtungen", *Neue Juristische Wochenschrift*, 2021, pp. 3692-3695, and A. Janssen, "The Dieselgate Saga: The Next Round", *Journal of European Consumer and Market Law* 11, 2022, pp. 169-172.

§ 5. Without any prejudices or environmental bias, it seems to me that neither the directive nor the regulation under consideration by the Court are *rules protecting the interests of car buyers*. No doubt they can indirectly produce positive effects of this kind, but the general protection of the environment by means of a regulation does not make it a regulation *that intentionally protects individual personal rights*. Even less so when it comes to the rights of the citizen as a buyer of polluting vehicles. There is a difference between a citizen whose lungs are affected by excessive pollution and a citizen who drives a polluting car while ignoring the fact that the manufacturer does not comply with the environmental requirements of the type approval it obtained. The former has an absolute personal right (right to health) against the polluting activity, while the latter has at best a kind of environmental commitment that does not sit well with the driving of vehicles with that defect. The court's assertion that every citizen has a *right to the manufacturer* not to use emission control defeat devices is not true. Because, if we all had that right, anyone could sue the manufacturer *for the harm caused to us by our neighbour's* car suffering from such an irregularity, which – we should recall - is not an irregularity that is actualised by causing higher emissions, but by disguising the real emissions. And, if only the purchaser of the vehicle concerned has this right, he can only have it by virtue of his sales contract. *Outside the sales contract*, a purchaser of such a vehicle cannot claim compensation for harm that he does not suffer because all pollution harm is externalised on third parties, not on the vehicle owner, for whose driving it is irrelevant whether there is a fraudulent device that conceals the actual level of nitrogen oxide emissions.

§ 6. As is well known, the case law of the highest Spanish court, in my opinion with prudent arguments, has so far found no other way to find liable a manufacturer involved in *Dieselgate* than the non-material damage of 500 euros based on the distress caused by the management and transaction of the problem of the defeat device (Supreme Court Judgments 167/2020, 561/2021).

§ 7. When the present conflict is dealt with as a problem of compensation for damage caused extra-contractually, the law of the sale of movable property falters, because extra-contractual or contractual compensation of the *full interest in performance* is treated in German law and in our law as an *improper termination* of the contract that obliges the manufacturer to return the price in full, without the first application of the basic remedies for lack of conformity (repair, replacement, price reduction) being considered. However, with the burden of deducting from the returnable price a deduction for the decrease in the commercial value of the vehicle due to the number of years it has been used normally by the purchaser.

§ 8. Why do German courts not turn to sales law? The first reason is that claims for damages for lack of conformity will normally be

time-barred when buying a second-hand vehicle. The second reason is that, as *long as the manufacturer or seller has not falsely declared that the vehicle possesses certain qualities or meets certain standards,* the buyer can only claim for what he *could legitimately expect* as a usual quality or quality of the product as a member of a class of goods (Art. 6 and 7 Directive 2019/771). It seems to me beyond dispute that compliance with environmental regulatory standards, the transgression of which does not affect the drivability, safety and durability of the vehicle, is not a quality that the buyer *as a purchaser* can legitimately expect, and that it does not fall within the scope of Article 7(1)(a) of the directive.

§ 9. What would have happened if regulatory standards had been replicated by the manufacturer as a promised quality of the thing sold? This will be more likely to happen with other sustainability contingencies, such as the seller's declaration of maintaining a demanding code of conduct of proper care for the environmental or labour conditions under which the supply is produced at source. I do not believe that these cases will become compliance niches as envisaged in Directive 2019/771. Indicative of this is that the main remedial actions (repair, replacement) are not even possible. In my opinion, in this case, there would be no choice but to give the buyer the right to bring price reduction or rescission actions, applying civil contract law.

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