Reports of Cases

OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 2 June 2022 [1]

Case C-100/21

QB
v
Mercedes-Benz Group AG, formerly Daimler AG

(Request for a preliminary ruling
from the Landgericht Ravensburg (Regional Court, Ravensburg, Germany))

(Reference for a preliminary ruling – Approximation of laws – Directive 2007/46/EC – Approval of motor vehicles – Article 18(1), Article 26(1) and Article 46 – Regulation (EC) No 715/2007 – Article 5(2) – Diesel engine – Pollutant emissions – Reduction of nitrogen oxide emissions limited by a 'temperature window' – Defeat device – Protection of the interests of an individual purchaser of a vehicle equipped with an unlawful defeat device – Right to compensation from vehicle manufacturer on the basis of tortious liability – Method of calculating compensation – Principle of effectiveness – Article 267 TFEU – Discretion of a single judge to make a reference to the Court for a preliminary ruling)

I. Introduction

1. This reference for a preliminary ruling has been made in the context of cases referred to the Court concerning failure to comply with the provisions of EU law relating to emissions of pollutant gases, inter alia nitrogen oxide (NOx), by diesel vehicles. In particular, in that regard, the Court has already ruled in the judgment of 17 December 2020, *CLCV and Others (Defeat device on diesel engines)* (C-693/18, EU:C:2020:1040; 'the *CLCV* judgment'), on the definition of a 'defeat device', within the meaning of Article 3(10) of Regulation (EC) No 715/2007, [2] and on the conditions for authorising such a device, under Article 5(2)(a) of that regulation. Moreover, Cases C-128/20, *GSMB Invest*; C-134/20, *Volkswagen*, and C-145/20, *Porsche Inter Auto and Volkswagen*, in which I delivered a Joined Opinion on 23 September 2021, [3] concern the conformity with EU law of a 'temperature window' established by software installed in the electronic engine controller fitted to the vehicles concerned.

[1] Original language: French.

[2] Regulation 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), as amended by Commission Regulation (EC) No 692/2008 of 18 July 2008 (OJ 2008 L 199, p. 1) ('Regulation No 715/2007').

[3] Opinion in *GSMB Invest, Volkswagen and Porsche Inter Auto and Volkswagen* (C-128/20, C-134/20 and C-145/20, EU:C:2021:758). At the time of drafting this Opinion, the Court has not yet ruled in those cases.

2. In the present case, the Landgericht Ravensburg (Regional Court, Ravensburg, Germany) asks the Court whether Directive 2007/46/EC,[4] read in conjunction with Regulation No 715/2007, confers on an individual purchaser of a vehicle which does not comply with the NOx emission limits laid down by that regulation a right to compensation from the vehicle manufacturer, on the basis of tortious liability, and, if so, what method of calculating compensation must be established by the Member States in order to comply with EU law.

3. The referring court also seeks to ascertain whether Article 267 TFEU precludes national legislation under which the single judge having jurisdiction to rule on a dispute is able to refer a question to the Court for a preliminary ruling only if he or she has previously referred that dispute to a civil chamber, which has decided not to re-examine it.

II. Legal framework

A. European Union law

1. Regulation No 715/2007

4. According to recitals 1, 5 and 6 of Regulation No 715/2007:

'(1) The internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital must be ensured. … The technical requirements for the type approval of motor vehicles with regard to emissions should therefore be harmonised to avoid requirements that differ from one Member State to another, and to ensure a high level of environmental protection.

…

(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. …'

5. Article 1 of that regulation, entitled 'Subject matter', provides in paragraph 1 thereof:

'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.'

6. Article 3 of that regulation, entitled 'Definitions', provides:

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

…

[4] Directive of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive) (OJ 2007 L 263, p. 1), as amended by Commission Regulation (EU) 2017/1151 of 1 June 2017 (OJ 2017 L 175, p. 1) ('Directive 2007/46').

(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.

…'

7. Article 5 of that regulation, entitled 'Requirements and tests', provides in paragraphs 1 and 2 thereof:

'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;

…'

2. Directive 2007/46

8. Article 1 of Directive 2007/46,[5] entitled 'Subject matter', states:

'This Directive establishes a harmonised framework containing the administrative provisions and general technical requirements for approval of all new vehicles within its scope and of the systems, components and separate technical units intended for those vehicles, with a view to facilitating their registration, sale and entry into service within the [Union].

…

Specific technical requirements concerning the construction and functioning of vehicles shall be laid down in application of this Directive in regulatory acts, the exhaustive list of which is set out in Annex IV.'

9. Article 18 of that directive, entitled 'Certificate of conformity', provides in paragraph 1 thereof:

'The manufacturer, in his capacity as the holder of an EC type-approval of a vehicle, shall deliver a certificate of conformity to accompany each vehicle, whether complete, incomplete or completed, that is manufactured in conformity with the approved vehicle type.

[5] Directive 2007/46 was repealed by Regulation (EU) 2018/858 of the European Parliament and of the Council of 30 May 2018 on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, amending Regulations (EC) No 715/2007 and (EC) No 595/2009 and repealing Directive 2007/46 (OJ 2018 L 151, p. 1), with effect from 1 September 2020, pursuant to Article 88 of that regulation. However, in view of the date of the relevant facts, Directive 2007/46 remains applicable to the dispute in the main proceedings.

…'

10. Article 26 of that directive, entitled 'Registration, sale and entry into service of vehicles', provides in paragraph 1 thereof:

'Without prejudice to the provisions of Articles 29 and 30, Member States shall register, and permit the sale or entry into service of, vehicles only if they are accompanied by a valid certificate of conformity issued in accordance with Article 18.

…'

11. Article 46 of that directive, entitled 'Penalties', is worded as follows:

'Member States shall determine the penalties applicable for infringement of the provisions of this Directive, and in particular of the prohibitions contained in or resulting from Article 31, and of the regulatory acts listed in Part I of Annex IV and shall take all necessary measures for their implementation. The penalties determined shall be effective, proportionate and dissuasive. Member States shall notify these provisions to the Commission no later than 29 April 2009 and shall notify any subsequent modifications thereof as soon as possible.'

B. German law

12. Paragraph 823 of the Bürgerliches Gesetzbuch (Civil Code; 'the BGB'), entitled 'Obligation to provide compensation for damage', provides:

'1. Any person who, with intent or through negligence, unlawfully injures the life, body, health, freedom, property or other right of another person shall be obliged to compensate that other person for the resulting damage.

2. The same obligation shall be imposed on a person who infringes a law which is intended to protect another person. If, according to the content of that law, it may also be infringed without fault, the obligation to provide compensation shall arise only in the event of fault.'

13. Paragraph 826 of the BGB, entitled 'Intentional damage contrary to public policy and accepted principles of morality', provides:

'Any person who intentionally inflicts damage on another person, in a manner contrary to public policy and accepted principles of morality, shall be obliged to make good the resulting damage.'

14. Paragraph 6 of the Verordnung über die EG-Genehmigung für Kraftfahrzeuge und ihre Anhänger sowie für Systeme, Bauteile und selbstständige technische Einheiten für diese Fahrzeuge (EG-Fahrzeuggenehmigungsverordnung) (Regulation on EC type-approval for motor vehicles and their trailers, and for systems, components and separate technical units intended for such vehicles (Regulation on EC type-approval for motor vehicles)),[6] of 3 February 2011, entitled 'Certificate of conformity and markings', is worded as follows in subparagraph 1 thereof:

'For every vehicle conforming to the approved type, the holder of the EC vehicle type-approval shall issue a certificate of conformity within the meaning of Article 18 of Directive [2007/46],

[6] BGBl. 2011 I, p. 126.

read in conjunction with Annex IX thereto. In accordance with Article 18(3) of Directive [2007/46], the certificate of conformity shall be designed to prevent forgery.'

15. Paragraph 27 of that regulation, entitled 'Registration and sale', provides in subparagraph 1 thereof:

'New vehicles, separate technical units or components requiring a certificate of conformity in accordance with Annex IX to Directive [2007/46], Annex IV to Directive 2002/24/EC [7] or Annex III to Directive 2003/37/EC [8] may only be offered for sale, sold or placed on the market in Germany for use in road traffic if they are accompanied by a valid certificate of conformity. This does not apply to vehicles within the meaning of Article 8 of Directive [2003/37].'

16. Paragraph 348 of the Zivilprozessordnung (Code of Civil Procedure; 'the ZPO'), entitled 'Initial single judge', provides:

'(1) The civil chamber shall give its decisions through one of its members as a single judge. This does not apply where:

…

(3) The single judge shall refer the dispute to the civil chamber for re-examination, where

1. the case presents particular difficulties of fact or law,

2. the case is of fundamental importance, or

3. the parties unanimously request that the judge do so.

The Chamber shall re-examine the dispute if the requirements laid down in points 1 or 2 of the first sentence are fulfilled. It shall make its decision in that regard by order, after hearing the parties. A further transfer to the single judge is precluded.

…'

III. The dispute in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

17. On 20 March 2014, QB purchased from Auto Y GmbH a used Mercedes-Benz motor vehicle, model C 220 CDI with a mileage of 28 591 km, for the price of EUR 29 999 ('the vehicle in question'). That vehicle, which was placed on the market by the vehicle manufacturer Daimler AG and first registered on 15 March 2013, is equipped with a Euro 5 diesel engine of type OM 651.

18. That vehicle contains engine programming software that establishes a temperature window ('the relevant software'), in accordance with which the exhaust gas recirculation rate is reduced when outside temperatures are colder ('the temperature window in question'), resulting in an

7 Directive of the European Parliament and of the Council of 18 March 2002 relating to the type-approval of two or three-wheel motor vehicles and repealing Council Directive 92/61/EEC (OJ 2002 L 124, p. 1).

8 Directive of the European Parliament and of the Council of 26 May 2003 on type-approval of agricultural or forestry tractors, their trailers and interchangeable towed machinery, together with their systems, components and separate technical units and repealing Directive 74/150/EEC (OJ 2003 L 171, p. 1).

increase in NOx emissions. The precise outdoor temperature at which the reduction in the exhaust gas recirculation rate takes place and the extent of that reduction are disputed by the parties to the main proceedings.

19. QB brought an action against Mercedes-Benz Group AG before the Landgericht Ravensburg (Regional Court, Ravensburg), the referring court, claiming that the relevant software contains, in addition to the temperature window in question, other prohibited defeat devices, for the purposes of Article 5(2) of Regulation No 715/2007, which reduce the effectiveness of the pollutant emission control systems under real driving conditions on the road. He argued that Mercedes-Benz Group intentionally misled him in that regard, in a manner contrary to public policy and accepted principles of morality, and that that company is obliged to make good the damage caused. QB added that, in view of Mercedes-Benz Group's intentional conduct, no payment for the use made of the vehicle in question is due. However, as a precautionary measure, he would be prepared to make a payment for use, at the discretion of the referring court, based on the mileage driven. QB took the view that that payment should be based on a proportion of at most 75% of the purchase price because of the defective pollutant emission control system.

20. According to Mercedes-Benz Group, it follows from the *CLCV* judgment that only a system allowing the detection of the characteristic conditions of the approval test for pollutant emissions, which is carried out in a laboratory, and the reduction of NOx emissions through manipulation for the sole purpose of the EC type-approval procedure constitutes a defeat device, within the meaning of Article 5(2) of Regulation No 715/2007. However, no such a system was fitted to the vehicle in question.

21. Mercedes-Benz Group has not disputed that the exhaust gas recirculation rate is already reduced from an outside temperature above 0 degrees Celsius. If full recirculation took place at low outside temperatures, condensation of the exhaust gas components would occur, leading to various undesirable deposits in the engine, and the repeated operation of the engine in that condition could cause lasting damage. Accordingly, in order to protect the engine, it is necessary to reduce exhaust gas recirculation based on the outside temperature. This is an industrial process long used by every vehicle manufacturer and takes into account the physical and technical characteristics of internal combustion engines. Mercedes-Benz added that, even if that process constitutes a defeat device within the meaning of Regulation No 715/2007, its conduct was neither contrary to public policy nor accepted principles of morality, and argued that it relied on a correct or at least justifiable interpretation of the rules laid down in EU law on emissions.

22. In the alternative, Mercedes-Benz Group argued that QB has not suffered any damage because the vehicle in question had a valid EC type-approval, could be used without restriction and did not suffer any reduction in value. Moreover, as a service provided free of charge, Mercedes-Benz Group has developed and made available to QB an update of the relevant software for the vehicle in question.

23. The referring court emphasises that, according to its provisional assessment, the temperature window in question constitutes an unlawful defeat device, for the purposes of Article 3(10) of Regulation No 715/2007, read in conjunction with Article 5(2) thereof, in the light of the *CLCV* judgment. In its view, however, Mercedes-Benz Group neither acted in a manner contrary to public policy nor accepted principles of morality, which presupposes particularly reprehensible conduct, in relation to which intention, purpose, means and consequences must be assessed exhaustively. In that regard, it cannot be excluded that, when the vehicle in question was placed

on the market, Mercedes-Benz Group did not intentionally seek to harm potential purchasers by its interpretation of Article 5(2) of Regulation No 715/2007. Consequently, QB does not have a right to compensation based on tortious liability under Paragraph 826 of the BGB.

24. On the other hand, QB could have such a right to compensation under Paragraph 823(2) of the BGB, which relates to simple negligence. However, that provision presupposes the infringement of a law intended to protect others, which, according to the case-law of the Bundesgerichtshof (Federal Court of Justice, Germany), means that that law is intended at least to protect an individual or a group of persons against a failure to have regard to a specific legal interest. It is sufficient that that law is also intended to protect the interest of an individual, as one of its objectives, even if that law is primarily concerned with the general interest. Moreover, under that provision the danger against which that law is supposed to protect a person must have resulted in specific harm and the person specifically harmed must fall within the personal scope of the law which has been infringed. The question therefore arises as to whether Article 18(1), Article 26(1) and Article 46 of Directive 2007/46, read in conjunction with Article 5(2) of Regulation No 715/2007, cover, in addition to the protection of general interests, the interests of an individual purchaser of a vehicle that does not comply with EU law, in particular where that vehicle is equipped with an unlawful defeat device under that regulation.

25. In the German case-law and legal literature, there are differing views on those issues. In that regard, the Bundesgerichtshof (Federal Court of Justice) is of the view that although the information on the certificate of conformity, as provided for by Directive 2007/46, is also aimed, on a personal level, at the individual purchaser of a vehicle, that information does not protect that purchaser's right to economic self-determination. According to other national courts, Article 18(1), Article 26(1) and Article 46 of Directive 2007/46 and Article 5(2) of Regulation No 715/2007 provide individual protection.

26. According to the referring court, even if those provisions protect only general legal interests and not the interests of individual purchasers, the principle of effectiveness could require that any culpable act, whether negligent or intentional, committed by a vehicle manufacturer in placing on the market vehicles equipped with an unlawful defeat device should be penalised by providing the purchaser with the possibility of claiming compensation from that manufacturer based on tortious liability.

27. In the event that QB may have such a right to compensation on the basis of Paragraph 823(2) of the BGB, the referring court wonders whether it is necessary, in order to give practical effect to the applicable provisions of EU law, for the benefit of the use made of the vehicle in question not to be offset against the right to compensation or to be offset only to a limited extent. Again, that question has been the subject of divergent interpretations in the national case-law and legal literature. In that regard, the Bundesgerichtshof (Federal Court of Justice) considers that, in view of the prohibition of unjust enrichment provided for by national law on compensation, the injured party cannot be placed in a more favourable position than he or she would have been in had the harmful event not occurred and that only the benefits linked to that event must be offset against the right to compensation, so that the perpetrator of the damage is not disproportionately relieved of its obligation.

28. Finally, the referring court notes that under Paragraph 348(3)(1) and (2) of the ZPO, the initial judge having jurisdiction is obliged to refer the case to a civil chamber, in order for the latter to re-examine it if there are particular difficulties of a factual nature or if the case is of fundamental

importance.[9] A single judge has no discretion in that regard. It follows from the case-law of the Bundesgerichtshof (Federal Court of Justice) that it is only if the chamber refuses to re-examine the case that that judge can make a request for a preliminary ruling, under the constitutional principle of the lawful judge provided for in the second sentence of Paragraph 101(1) of the Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany) of 23 May 1949.[10]

29. The referring court notes that, according to the legal literature, national procedural law must not adversely affect the possibility of making a reference for a preliminary ruling under the second paragraph of Article 267 TFEU, in particular where the court concerned considers that the legal assessment of the higher court could lead to a decision contrary to EU law. Therefore, it would seem to follow from the second paragraph of Article 267 TFEU that Paragraph 348(3)(1) and (2) of the ZPO is not applicable to orders for reference made by the initial single judge. In the present case, if the primacy of EU law over national procedural law is not expressly established, the jurisdiction of the single judge could be challenged in the context of appeal proceedings.

30. In those circumstances, the Landgericht Ravensburg (Regional Court, Ravensburg) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Are Articles 18(1), 26(1) and 46 of [Directive 2007/46], read in conjunction with Article 5(2) of [Regulation No 715/2007], also intended to protect the interests of individual purchasers of motor vehicles?

If so:

(2) Does this also include the interest of an individual purchaser of a vehicle in not purchasing a vehicle which does not comply with the requirements of EU law, and in particular in not purchasing a vehicle equipped with a prohibited defeat device within the meaning of Article 5(2) of [Regulation No 715/2007]?

If Question 1 is answered in the negative:

(3) Is it incompatible with EU law if a purchaser who has unintentionally purchased a vehicle placed on the market by the manufacturer with a prohibited defeat device within the meaning of Article 5(2) of [Regulation No 715/2007] is able to assert civil claims for damages against the vehicle manufacturer on the basis of tortious liability – including, in particular, a claim for reimbursement of the purchase price paid for the vehicle against return and transfer of ownership of the vehicle – only in exceptional cases where the vehicle manufacturer has acted with intent and in a manner contrary to accepted principles of morality?

If so:

[9] In his written observations, QB stated that national case-law is interpreted as meaning that a question referred to the Court for a preliminary ruling must relate to a subject of 'fundamental importance'.

[10] BGBl. 1949, p. 1.

(4) Does EU law require that the purchaser of a vehicle has a civil claim for damages against the vehicle manufacturer on the basis of tortious liability in the event of any culpable (negligent or intentional) act on the part of the vehicle manufacturer in relation to the placing on the market of a vehicle equipped with a prohibited defeat device within the meaning of Article 5(2) of [Regulation No 715/2007]?

Irrespective of the answers to Questions 1 to 4:

(5) Is it incompatible with EU law if, under national law, the purchaser of a vehicle must accept offsetting the benefit of the actual use made of the motor vehicle where he or she seeks, by way of compensation based on tortious liability, reimbursement from the manufacturer of the purchase price of a vehicle placed on the market by the manufacturer with a prohibited defeat device within the meaning of Article 5(2) of [Regulation No 715/2007] against return and transfer of ownership of the vehicle?

If not:

(6) Is it incompatible with EU law for that benefit of use to be calculated on the basis of the full purchase price without any deduction being made for the reduction in value of the vehicle resulting from its being equipped with a prohibited defeat device and/or in view of the purchaser's inadvertent use of a vehicle which does not comply with EU law?

Irrespective of the answers to Questions 1 to 6:

(7) Inasmuch as it also refers to orders for reference in accordance with the second paragraph of Article 267 TFEU, is Paragraph 348(3) of the Zivilprozessordnung ("the ZPO", German Code of Civil Procedure) incompatible with the right conferred on the national courts to request a preliminary ruling pursuant to the second paragraph of Article 267 TFEU and must it therefore be disapplied to orders for reference?'

31. Written observations were submitted by QB, Mercedes-Benz Group and the European Commission. Those parties, as well as the German Government, also presented oral arguments at the hearing held on 8 March 2022.

IV. Analysis

A. Preliminary observations

32. The referring court states that, according to its provisional assessment, the temperature window in question constitutes an unlawful defeat device, for the purposes of Article 3(10) of Regulation No 715/2007, read in conjunction with Article 5(2)(a) of that regulation. Although the effectiveness of the pollutant emission control system is already reduced from an outside temperature above 0 degrees Celsius, that situation involves conditions which may reasonably be expected to be encountered in normal vehicle operation and use, within the meaning of that Article 3(10). The referring court adds that the fact that the temperature window in question does not make it possible to detect the parameters of the approval test for verifying the level of pollutant emissions is irrelevant, since this element is required neither by Article 5(2) of Regulation No 715/2007 nor by the *CLCV* judgment. Moreover, that window is not authorised by way of derogation on the basis of Article 5(2)(a) of that regulation, since that judgment stated that 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.[11] In the present case, Mercedes-Benz Group argues that the purpose of the temperature window in question is to prevent undesirable deposits in the engine, that is to say to protect it against wear and tear, which, according to the referring court, does not appear to meet the strict requirements laid down by the Court in order for a defeat device to be lawful.

33. In that regard, I would point out that, in the *CLCV* judgment, the Court held 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.[12] Moreover, the Court stated that Article 5(2)(a) of that regulation must be interpreted as meaning that a defeat device 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.[13]

34. The case which gave rise to the *CLCV* judgment concerned vehicles equipped with software capable of changing the system for controlling pollutant gas emissions according to the driving conditions.[14] That software was able to detect parameters matching those of the approval test for pollutant emissions, which takes place in a laboratory.

35. Unlike that case, which concerns a 'switch system', Cases C-128/20, *GSMB Invest*; C-134/20, *Volkswagen*, and C-145/20, *Porsche Inter Auto and Volkswagen* concern a temperature window, as in the case in the main proceedings. In my Joined Opinion in those three cases,[15] I proposed that the Court should hold that Article 3(10) of Regulation No 715/2007, read in conjunction with Article 5(1) of that regulation, is to be interpreted as meaning that a device which, under real driving conditions of a motor vehicle, ensures exhaust gas recirculation in full only when the outside temperature is between 15 °C and 33 °C and the driving altitude is lower than 1 000 m, whereas, outside that window, per 10 °C, and above an altitude of 1 000 m, per 250 m of altitude, the exhaust gas recirculation rate decreases in a linear way down to zero, with the result that NOx emissions increase beyond the limit values laid down in the regulation, constitutes a 'defeat device'.[16]

36. In the present case, the referring court notes that the precise outdoor temperature at which the reduction in the exhaust gas recirculation rate takes place and the extent of that reduction are disputed by the parties to the main proceedings. It is for the referring court, which alone has jurisdiction to find and assess the facts in the case before it, to examine the conditions under

[11] See the *CLCV* judgment, paragraph 114.

[12] The *CLCV* judgment, paragraph 102.

[13] The *CLCV* judgment, paragraph 115.

[14] The *CLCV* judgment, paragraph 2.

[15] See point 1 of this Opinion.

[16] Point 104 of that Opinion.

which the temperature window in question operates. As I stated in my Opinion,[17] according to official data, the average temperature in Germany was 9.6 °C in 2017, 10.4 °C in 2018 and 10.2 °C in 2019. In the light of those data and the average annual temperature in the other Member States of the European Union,[18] it is for the referring court to determine whether, as it believes, the relevant software reduces the effectiveness of the pollutant emission control system under 'conditions which may reasonably be expected to be encountered in normal vehicle operation and use'. If so, that software constitutes a 'defeat device' within the meaning of Article 3(10) of Regulation No 715/2007.

37. If that is the case, I share the referring court's view that that device cannot be justified under Article 5(2)(a) of that regulation if its sole purpose is to help to prevent the ageing or clogging up of the engine.[19] In my opinion, it is only where the deposits formed during exhaust gas recirculation cause a malfunctioning which may give rise to sudden, immediate risks of damage to the engine itself, thus triggering a specific danger whilst the vehicle is being driven, even if that vehicle undergoes regular and appropriate maintenance, that such a defeat device can fall within the scope of Article 5(2)(a).[20] Again, it is for the referring court to ascertain whether such a malfunction could occur.

38. Where that referring court, on completing those checks, confirms its assessment that the temperature window in question constitutes an unlawful defeat device, for the purposes of Article 5(2)(a) of Regulation No 715/2007, the question arises as to whether the purchaser of a vehicle equipped with such a device has any right to compensation, which is the subject matter of the first six questions referred.

B. The first and second questions referred

39. By its first and second questions, which should be considered together, the referring court asks, in essence, whether Article 18(1), Article 26(1) and Article 46 of Directive 2007/46 must be interpreted as protecting the interests of an individual purchaser of a motor vehicle, in particular the interest in not acquiring a vehicle which is equipped with an unlawful defeat device, within the meaning of Article 5(2) of Regulation No 715/2007.

40. In that regard, it should be noted that, according to the Court's case-law, it follows from recitals 1, 5 and 6 of Regulation No 715/2007 that the objective pursued by that regulation consists in ensuring a high level of environmental protection and in improving air quality within the European Union.[21] That regulation uses the terms 'customer' and 'user' only once, namely in recital 17, according to which it is 'necessary to ensure that *customers and users* are supplied with objective and precise information'[22] on the fuel consumption and carbon dioxide emissions of vehicles. Moreover, Article 4(3) of that regulation provides that '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'.[23] This is also the only reference to 'purchaser' in the whole of

17 See point 100 of my Opinion in *GSMB Invest*, *Volkswagen* and *Porsche Inter Auto and Volkswagen* (C-128/20, C-134/20 and C-145/20, EU:C:2021:758).

18 See also point 100 of that Opinion.

19 See, to that effect, the *CLCV* judgment, paragraph 115.

20 See, to that effect, points 125 and 126 of my Opinion in *GSMB Invest*, *Volkswagen* and *Porsche Inter Auto and Volkswagen* (C-128/20, C-134/20 and C-145/20, EU:C:2021:758).

21 See the *CLCV* judgment, paragraphs 86, 87 and 113.

22 My emphasis.

23 My emphasis.

that regulation. Accordingly, Regulation No 715/2007 provides for specific obligations to inform consumers and purchasers about the fuel consumption of the vehicle concerned in order to enable them to decide, with full knowledge of the facts, whether or not to purchase that vehicle. However, it appears that those information obligations form part of the objective pursued by that regulation of ensuring a high level of environmental protection through a reduction in pollutant emissions. Apart from those obligations, that regulation does not establish an explicit link between the vehicle manufacturer and the individual purchaser of a vehicle with a view to protecting the latter's interests.

41. In that connection, Article 5(1) and (2) of Regulation No 715/2007 provides that the manufacturer is to equip vehicles so that the components likely to affect emissions are designed, constructed and assembled so as to enable those vehicles, in normal use, to comply with that regulation and its implementing measures, and that, subject to certain exceptions, the use of defeat devices that reduce the effectiveness of emission control systems is to be prohibited. Accordingly, those provisions concern only manufacturers. I therefore share the Commission's view that that regulation, as such, and in particular Article 5(1) and (2) thereof, is not directly aimed at protecting the interests of an individual purchaser of a motor vehicle equipped with an unlawful defeat device.

42. However, in order to answer the first two questions raised, Regulation No 715/2007 must be placed in its context. Directive 2007/46, which is a directive establishing a *framework* for the type approval of motor vehicles, is the basic act with respect to that regulation. As stated in recital 3 of that directive, the regulatory acts which specify the technical requirements applicable should primarily seek to ensure a high level of road safety, health protection, environmental protection, energy efficiency and protection against unauthorised use. However, in my view, contrary to what Mercedes-Benz Group and the German Government maintain, it is apparent from the provisions of that directive that it is also intended to protect the interests of an individual purchaser of a vehicle equipped with an unlawful defeat device.

43. Article 3(5) of Directive 2007/46 defines 'EC type-approval' as 'the procedure whereby a Member State certifies that a type of vehicle, system, component or separate technical unit satisfies the relevant administrative provisions and technical requirements of this Directive and of the regulatory acts listed in Annex IV or XI' to that directive. Annex IV, entitled 'Requirements for the purpose of EC type-approval of vehicles', refers, in Part I thereof, entitled 'Regulatory acts for EC type-approval of vehicles produced in unlimited series', to Regulation No 715/2007 in relation to 'emissions (Euro 5 and 6) light duty vehicles/access to information'.

44. Moreover, as provided for in Article 5(1) of Directive 2007/46, the 'manufacturer is responsible to the approval authority for all aspects of the approval process and for ensuring conformity of production, whether or not the manufacturer is directly involved in all stages of the construction of a vehicle, system, component or separate technical unit'. Therefore, the manufacturer, when applying for EC type-approval of vehicles, is required to comply with Article 5(2) of Regulation No 715/2007.

45. Although compliance with those requirements is necessary for the purposes of that EC type-approval, it must be pointed out that that compliance also directly concerns the individual purchaser of a vehicle, *through the certificate of conformity*. The latter is defined in Article 3(36) of Directive 2007/46 as 'the document set out in Annex IX, issued by the manufacturer and certifying that a vehicle belonging to the series of the type approved in accordance with this Directive complied with all regulatory acts at the time of its production'. Annex IX, entitled 'EC

certificate of conformity', includes a point 0, entitled 'Objectives', according to which the certificate of conformity is a statement delivered by the vehicle *manufacturer to the buyer* in order to assure him or her that the vehicle he or she has acquired complies with the legislation in force in the European Union at the time it was produced. [24] Therefore, Directive 2007/46, unlike Regulation No 715/2007, establishes an *explicit link* between the vehicle manufacturer and the individual purchaser of a vehicle, with a view to guaranteeing to the latter that the vehicle purchased complies with the applicable EU rules.

46. In that context, Article 18(1) of Directive 2007/46 provides that the manufacturer, in his capacity as the holder of an EC type-approval of a vehicle, is to deliver a certificate of conformity to accompany each vehicle that is manufactured in conformity with the approved vehicle type. Pursuant to Article 26(1) of that directive, that document is mandatory for registration or sale. Moreover, Article 46 of that directive provides that Member States are to determine the penalties applicable for infringement of the provisions of that directive, and in particular of the prohibitions contained in or resulting from Article 31, and of the regulatory acts listed in Part I of Annex IV to Directive 2007/46 and are to take all necessary measures for their implementation. According to the Court's case-law, Article 46 primarily serves the objective of establishing and opening an internal market characterised by fair competition between manufacturers and, in addition to that objective, the penalties laid down in Article 46 must also ensure that *the purchaser of a vehicle* has a certificate of conformity enabling him or her, in accordance with Annex IX to that directive, to register it in any Member State without having to provide additional technical documents. [25]

47. It follows from those various provisions of Directive 2007/46 that, in the context of EC type-approval, the manufacturer must comply, in particular, with the requirements relating to defeat devices referred to in Article 5(1) and (2) of Regulation No 715/2007. Only in those circumstances may the manufacturer issue to the purchaser of a vehicle a certificate of conformity which allows that purchaser to register or sell the vehicle. That certificate, which constitutes a guarantee, is thus intended to protect the purchaser against a manufacturer's failure to comply with its obligation to place on the market vehicles which comply with the relevant EU rules.

48. However, EC type-approval may, inter alia, have been obtained even though the approval body was unaware of the presence of a prohibited defeat device, for the purposes of Article 5(1) and (2) of Regulation No 715/2007. [26] Moreover, the vehicle concerned may also not correspond to the approved type. In the context of the individual sale of a vehicle equipped with such an unlawful device, that vehicle does not have an accurate certificate of conformity and therefore cannot, under Article 26(1) of Directive 2007/46, be registered or resold. In such a situation, the interests of the purchaser of such a vehicle have not been protected, resulting in harm to the purchaser.

49. Moreover, as the Court has stated, the purchaser suffers material damage resulting from a loss in value of the vehicle concerned and stemming from the fact that, with the disclosure that software which manipulates data relating to exhaust gas emissions was installed, the purchaser received, in return for the payment made to purchase such a vehicle, a vehicle which is defective

[24] In the light of that wording, I do not share the position expressed by Mercedes-Benz Group at the hearing that the purchaser is not the addressee of the certificate of conformity.

[25] Judgment of 4 October 2018, *Commission* v *Germany* (C-668/16, EU:C:2018:802, paragraph 87).

[26] See, to that effect, point 149 of my Opinion in *GSMB Invest, Volkswagen and Porsche Inter Auto and Volkswagen* (C-128/20, C-134/20 and C-145/20, EU:C:2021:758).

and, accordingly, has a lower value.[27] Possession of a vehicle which does not comply with the provisions of EU law on environmental protection, as a result of pollutant gas emissions which exceed the limit values laid down, also causes, in my view, non-material damage to that purchaser.

50. In those circumstances, I propose that the first and second questions referred should be answered to the effect that Article 18(1), Article 26(1) and Article 46 of Directive 2007/46 must be interpreted as protecting the interests of an individual purchaser of a motor vehicle, in particular the interest in not acquiring a vehicle which is equipped with an unlawful defeat device, within the meaning of Article 5(2) of Regulation No 715/2007.

C. The third to sixth questions referred

51. By its third to sixth questions, which should be considered together,[28] the referring court asks, in essence, whether Directive 2007/46 must be interpreted as requiring Member States to provide that a purchaser of a vehicle has a right to compensation from the vehicle manufacturer where that vehicle is equipped with an unlawful defeat device, within the meaning of Article 5(2) of Regulation No 715/2007, and, if so, to what extent those States must provide for the benefit of the actual use made of that vehicle to be offset against the amount of the compensation.

52. First of all, I would point out that QB brought his action against Mercedes-Benz Group, that is to say the manufacturer, and not against the person who sold him the second-hand vehicle. Accordingly, Directive 1999/44/EC,[29] which concerns the relationship between the consumer and the seller, cannot apply in a case such as that in the main proceedings. Moreover, QB relied not on Directive 2005/29/EC[30] on unfair commercial practices, but instead on tortious liability, as provided for in the provisions of the BGB. In that context, the referring court seeks to ascertain the extent to which the national legislation complies with EU law as regards the right to compensation and the method of calculating it.

53. As regards tortious liability, it is clear from my proposed answer to the first two questions that Directive 2007/46 creates rights in favour of the purchaser in his relations with the manufacturer where that purchaser has acquired a vehicle equipped with an unlawful defeat device, for the purposes of Article 5(2) of Regulation No 715/2007. Moreover, Article 46 of that directive provides that Member States are to determine the penalties applicable for infringement of the regulatory acts listed in Part I of Annex IV to that directive and are to take all necessary measures for their implementation by means of effective, proportionate and dissuasive penalties.[31] That

[27] See, to that effect, judgment of 9 July 2020, *Verein für Konsumenteninformation* (C-343/19, EU:C:2020:534, paragraph 34).

[28] The referring court states that it asks the third question in the event that the first question is answered in the negative. Moreover, the fourth question is a sub-question of the third question. However, in order to give a useful answer to the referring court, I shall deal with all the questions relating to the right to compensation and its scope together.

[29] Directive of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ 1999 L 171, p. 12).

[30] Directive of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ 2005 L 149, p. 22).

[31] In response to a written question from the Court, the German Government clarified the nature of the various sanctions implemented at national level under Article 46 of Directive 2007/46 and Article 13 of Regulation No 715/2007.

article thus applies to the situation where, for the purposes of EC type-approval, the vehicles concerned are equipped with an unlawful defeat device in breach of Article 5(2) of Regulation No 715/2007. [32]

54. Accordingly, those penalties must be for the benefit not only of the Member State concerned, in the context of EC type-approval, but also of an individual purchaser of a vehicle equipped with an unlawful defeat device. In other words, Directive 2007/46 requires Member States to provide that a purchaser of a vehicle has a right to compensation where the manufacturer has committed the infringement of placing such a vehicle on the market. However, that directive states only that Member States must implement effective, proportionate and dissuasive penalties. [33]

55. According to the Court's case-law, in the absence of EU rules, the Member States are responsible for designating the courts having jurisdiction and for determining the rules of procedure governing actions for safeguarding rights which individuals derive from EU law. [34] Accordingly, subject to the right to reparation which flows directly from EU law where the relevant necessary conditions are satisfied, it is on the basis of the rules of national law on liability that it is necessary to determine how the loss and damage caused must be repaired, provided that the conditions for reparation of loss and damage must allow effective, proportionate and dissuasive penalties.

56. In the present case, the referring court asks, first, whether it is in accordance with EU law for the purchaser of a vehicle equipped with a defeat device to be able to assert civil claims for damages against the vehicle manufacturer on the basis of tortious liability only in circumstances in which the manufacturer has intentionally inflicted damage on another person, in a manner contrary to public policy and accepted principles of morality, within the meaning of Paragraph 826 of the BGB.

57. In that regard, in accordance with the principle of effectiveness, [35] it is for the referring court to examine whether the conditions laid down in Paragraph 826 of the BGB are such as to render impossible in practice or excessively difficult the exercise of the right to compensation which the purchaser of a vehicle derives from Directive 2007/46. If the answer is in the affirmative, those national procedural rules are not consistent with EU law.

58. At this point, I would note that, in its order for reference, the referring court stated that it is unlikely that the conditions laid down in Paragraph 826 of the BGB, as interpreted by the national courts, satisfy Article 46 of Directive 2007/46, since only exceptional cases fulfil those conditions,

[32] As Advocate General Mengozzi noted in his Opinion in *Commission* v *Germany* (C-668/16, EU:C:2018:230, point 94), the obligation laid down in Article 46 of Directive 2007/46 to impose effective, proportionate and dissuasive penalties for failure to comply with the provisions of that directive must be applied independently of the obligation, laid down in Articles 12 and 30 of that directive, to re-establish conformity to the approved type.

[33] Similarly, Article 13(1) of Regulation No 715/2007 provides that Member States are to lay down the provisions on penalties applicable for infringement by manufacturers of the provisions of that regulation and are to take all measures necessary to ensure that they are implemented, the penalties provided for having to be effective, proportionate and dissuasive.

[34] Judgment of 24 February 2022, *ORLEN KolTrans* (C-563/20, EU:C:2022:113, paragraph 63 and the case-law cited). In its written pleadings, Mercedes-Benz Group refers, inter alia, to the judgment of 16 February 2017, *Schmitt* (C-219/15, EU:C:2017:128, paragraphs 49 to 60), to support the view that the purchaser of the vehicle in question has no right to compensation.

[35] Concerning this principle, see judgment of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi* (C-561/19, EU:C:2021:799, paragraph 63 and the case-law cited).

and that, accordingly, as the law stands at present, a manufacturer has no need to fear an action for damages, and therefore has no incentive to comply scrupulously with the provisions of EU law in order to prevent it from incurring liability in tort. [36]

59. If the referring court were to confirm that assessment, it would then have to refer to Paragraph 823(2) of the BGB, the application of which, according to that court, requires simple negligence. I note that, according to the referring court, even assuming that the relevant provisions of EU law were intended solely to protect the public interest, they would probably be complied with only if negligent infringement were also penalised by a right to compensation of purchasers based on the tortious liability of manufacturers and if the latter were required to take this into account from the outset.

60. Secondly, the referring court seeks to ascertain whether, in the context of the right to compensation of the purchaser of a vehicle equipped with an unlawful defeat device, EU law precludes the benefit of the actual use made of that vehicle from being offset against the reimbursement of the purchase price of the vehicle.

61. As is apparent from the Court's case-law, with regard to the form and method of calculation of reparation for loss or damage, reparation for loss or damage caused to individuals as a result of breaches of EU law must be commensurate with the loss or damage sustained so as to ensure the effective protection of their rights. [37] As has already been stated, is for the national law of the Member States, to lay down the rules concerning how reparation for the loss or damage caused to an individual as a result of the infringement of the provisions of Directive 2007/46 is to be calculated. [38] In that regard, the national courts are entitled to ensure that the protection of rights guaranteed by the legal order of the European Union does not result in unjust enrichment of the persons concerned. [39]

62. Therefore, it is for the referring court to ascertain to what extent offsetting the benefit of the actual use made of the motor vehicle (under normal conditions of use of the vehicle) against the reimbursement of the purchase price of the vehicle would ensure adequate compensation for the purchaser. The referring court states that, up until the date of the hearing held before it, QB had driven more than 60 000 km in the vehicle in question and that, if the benefit of the use made of the vehicle were to be offset, it would be necessary to estimate the reduction in value sustained by that vehicle in order to calculate the amount to be offset. In that regard, as is clear from the case-law cited in the preceding point of this Opinion, the referring court is entitled to take into account that the protection of the rights guaranteed by Directive 2007/46 should not entail the unjust enrichment of QB. Accordingly, the benefit of the actual use made of the vehicle in question may be offset against the reimbursement of the purchase price of that vehicle. However, it seems clear to me that if offsetting that benefit were to result in QB ultimately obtaining no compensation for the damage suffered, that method of calculation would not provide effective protection for him and would not be consistent with EU law.

63. Thirdly, the referring court wonders whether the benefit of the use made of the vehicle in question must be calculated on the basis of its full purchase price without any deduction being made for the reduction in value of the vehicle resulting from its being equipped with an unlawful

[36] Mercedes-Benz Group challenges that reasoning by the referring court, arguing that infringements of EU law by manufacturers can result in substantial fines and penalties.

[37] See, to that effect, judgment of 25 November 2010, *Fuß* (C-429/09, EU:C:2010:717, paragraph 92 and the case-law cited).

[38] See, to that effect, judgment of 25 November 2010, *Fuß* (C-429/09, EU:C:2010:717, paragraph 94).

[39] See judgment of 25 March 2021, *Balgarska Narodna Banka* (C-501/18, EU:C:2021:249, paragraph 125 and the case-law cited).

defeat device and/or in view of use of a vehicle which does not comply with EU law. Again, in the absence of EU rules, it is not for the Court to consider in depth the law of the Member States in order to indicate how compensation for the damage suffered should be calculated.[40] The only requirement provided for by EU law is that the compensation should be adequate, that is to say such as to ensure the effective protection of the purchaser's rights.

64. Finally, I note that while the requirements of Annex IV to Directive 2007/46, in particular the application of Article 5(1) and (2) of Regulation No 715/2007, must be fulfilled by vehicle manufacturers for new vehicles,[41] they also apply to second-hand vehicles, in the context of tortious liability, where the manufacture has committed the infringement of fitting an unlawful defeat device.

65. In the light of the foregoing considerations, I propose that the third to sixth questions referred should be answered to the effect that Directive 2007/46 must be interpreted as requiring Member States to provide that a purchaser of a vehicle has a right to compensation from the vehicle manufacturer where that vehicle is equipped with an unlawful defeat device, within the meaning of Article 5(2) of Regulation No 715/2007. It is for the Member States to define the rules concerning the method of calculating compensation for the damage caused to the purchaser, provided that, in accordance with the principle of effectiveness, that compensation is commensurate with the loss or damage sustained.

D. The seventh question referred

66. By its seventh question, the referring court asks, in essence, whether Article 267 TFEU must be interpreted as precluding national legislation under which the single judge having jurisdiction to rule on a dispute is able to refer a question to the Court for a preliminary ruling only if that judge has previously referred that dispute to a civil chamber, which has decided not to re-examine it.

1. Admissibility

67. Mercedes-Benz Group argues that the seventh question referred is inadmissible on the ground that, in proceedings brought under Article 267 TFEU, the Court does not have jurisdiction to rule on the compatibility of national law with EU law.[42]

68. The German Government stated, at the hearing, that that question is not helpful for the purposes of the case in the main proceedings.

69. The Commission states that it has doubts as to the admissibility of the question. In its view, an answer to this question is not relevant for the resolution of the dispute in the main proceedings, which concerns the existence of a right to compensation for the purchaser of a vehicle as a result of use of an unlawful defeat device. Moreover, the very question appears to be of a hypothetical nature. As is apparent from the order for reference, that order was not under appeal when the matter was referred to the Court. Accordingly, any answer to the seventh question referred does

[40] In that regard, I agree with the German Government's position that Member States, through the application of their tort law, must be able to decide how to make good the damage suffered by an individual. I would add, however, that their tort law must respect the principles laid down by EU law.

[41] See judgment of 24 January 2019, *RDW and Others* (C-326/17, EU:C:2019:59, paragraph 61).

[42] Mercedes-Benz Group refers in particular to the judgment of 29 November 2001, *De Coster* (C-17/00, EU:C:2001:651, paragraph 23).

not appear capable of providing the referring court with an interpretation of EU law which would allow it to resolve procedural questions of national law before being able to rule on the substance of the dispute before it. [43]

70. As regards the admissibility of the seventh question referred, it results from the order for reference that, under the national legislation, a single judge seised of a dispute is required to refer the case to a civil chamber in order for that chamber to re-examine the case, where that case presents particular difficulties of fact or law or is of fundamental importance. It is apparent from the order for reference that the referring court, that is to say a single judge, did not refer the present case to a civil chamber and referred the matter directly to the Court for a preliminary ruling.

71. According to established case-law, 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. [44]

72. In that regard, the dispute in the main proceedings concerns the right to compensation and the method of calculating it so far as concerns an individual purchaser of a vehicle equipped with an unlawful defeat device, for the purposes of Article 5(2) of Regulation No 715/2007. According to the Court's case-law, even if, in accordance with the national procedural rules, the referring court, which consists of a single judge, should have referred the case in the main proceedings to a civil chamber, the first six questions referred relating to that right to compensation are admissible. It is not for the Court to determine whether the decision to make the reference was taken in accordance with the national rules on the organisation of the courts and their procedure. [45]

73. The seventh question referred concerns the interpretation of Article 267 TFEU itself, which is not at issue for the purposes of resolving the dispute in the main proceedings. Moreover, the referring court states only that the jurisdiction of the single judge could be challenged in the context of appeal proceedings. On the one hand, the referring court does not specify what consequences this may have for the order for reference. On the other hand, the file submitted to the Court does not show that, at this stage, the order for reference is under appeal.

74. In those circumstances, I am of the view that the interpretation requested by the seventh question referred is not objectively required for the decision which must be made by the referring court. [46] Accordingly, in my view, this question is hypothetical and must therefore be rejected as inadmissible.

2. Substance

75. Should the Court consider that the seventh question referred is admissible, I would like to recall the case-law according to which national courts have the widest discretion in referring questions to the Court involving interpretation of relevant provisions of EU law, that discretion

[43] The Commission refers to the order of 2 July 2020, *S.A.D. Maler und Anstreicher* (C-256/19, EU:C:2020:523, paragraphs 44 and 48).

[44] Judgment of 15 July 2021, *The Department for Communities in Northern Ireland* (C-709/20, EU:C:2021:602, paragraph 55).

[45] See, to that effect, judgment of 13 December 2018, *Rittinger and Others* (C-492/17, EU:C:2018:1019, paragraphs 29 to 34).

[46] See, to that effect, judgment of 9 July 2020, *Land Hessen* (C-272/19, EU:C:2020:535, paragraph 62 and the case-law cited). I also note that the referring court has asked a similar question in cases unconnected with the present case, in particular in Cases C-336/20, *Bank 11 für Privatkunden und Handel*; C-47/21, *C. Bank and Bank D. K.*, and C-232/21, *Volkswagen Bank and Audi Bank*.

being replaced by an obligation for courts of final instance, subject to certain exceptions recognised by the Court's case-law. Both that discretion and that obligation are an inherent part of the system of cooperation between the national courts and the Court of Justice established by Article 267 TFEU and of the functions of the court responsible for the application of EU law entrusted by that provision to the national courts. As a consequence, where a national court before which a case is pending considers that a question concerning the interpretation or validity of EU law has arisen in that case, it has the discretion, or is under an obligation, to request a preliminary ruling from the Court of Justice, and national rules imposed by legislation or case-law cannot interfere with that discretion or that obligation. [47]

76. Concerning a national court or tribunal against whose decisions there is a judicial remedy under national law, Article 267 TFEU does not preclude a decision of such a court, making a reference to the Court, from remaining subject to the remedies normally available under national law. Nevertheless, the outcome of such an appeal cannot limit the jurisdiction conferred by Article 267 TFEU on that court to make a reference to the Court if it considers that a case pending before it raises questions on the interpretation of provisions of EU law necessitating a ruling by the Court. [48] Accordingly, the functioning of the system of cooperation between the Court of Justice and the national courts established by Article 267 TFEU requires, as does the principle of primacy of EU law, the national court to be free to refer to the Court for a preliminary ruling any question that it considers necessary, at whatever stage of the proceedings it considers appropriate, [49] including in situations where there is a single judge. [50]

77. I am therefore of the view that Article 267 TFEU precludes national legislation under which a single judge, who considers, in a case pending before him or her, that a question has been raised which concerns the interpretation or validity of EU law and requires a decision by the Court, must refer that question to a civil chamber, thereby preventing him or her from making a request to the Court of Justice for a preliminary ruling. [51]

V. Conclusion

78. In the light of the foregoing considerations, I propose that the Court should answer the questions referred by the Landgericht Ravensburg (Regional Court, Ravensburg, Germany) as follows:

(1) Article 18(1), Article 26(1) and Article 46 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), as amended, must be interpreted as protecting the interests of an individual purchaser of a motor vehicle, in particular the interest in not acquiring a vehicle which is equipped with an unlawful defeat device, within the meaning of Article 5(2) of Regulation (EC) No 715/2007 of the European Parliament and of the Council of

[47] Judgment of 23 November 2021, *IS (Illegality of the order for reference)* (C-564/19, EU:C:2021:949, paragraphs 68 to 70 and the case-law cited).

[48] See, to that effect, judgment of 16 December 2008, *Cartesio* (C-210/06, EU:C:2008:723, paragraph 93).

[49] See, to that effect, judgment of 16 July 2020, *Adusbef and Others* (C-686/18, EU:C:2020:567, paragraph 30 and the case-law cited).

[50] See, to that effect, judgment of 13 December 2018, *Rittinger and Others* (C-492/17, EU:C:2018:1019, paragraphs 29 to 34).

[51] See, to that effect, judgment of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199, paragraph 36).

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, as amended.

(2) Directive 2007/46, as amended, must be interpreted as requiring Member States to provide that a purchaser of a vehicle has a right to compensation from the vehicle manufacturer where that vehicle is equipped with an unlawful defeat device, within the meaning of Article 5(2) of Regulation No 715/2007. It is for the Member States to define the rules concerning the method of calculating compensation for the damage caused to that purchaser, provided that, in accordance with the principle of effectiveness, that compensation is commensurate with the loss or damage sustained.