Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

1 August 2025 *

(Reference for a preliminary ruling – Approximation of laws – Approval of motor vehicles – Directive 2007/46/EC – Article 18(1) – Article 26(1) – Article 46 – Regulation (EC) No 715/2007 – Article 5(2) – Motor vehicles – Diesel engine – Pollutant emissions – Reduction in nitrogen oxide (NOx) 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 – Installation of that device after the vehicle's entry into service – Right to compensation from the vehicle manufacturer on the basis of tortious liability – Ground for exemption – Unavoidable error on the part of the manufacturer as regards the unlawfulness of the defeat device – Principle of effectiveness – Adequate compensation for the loss or damage – Method of calculating compensation – Compensation bracket)

In Case C-666/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the Landgericht Ravensburg (Regional Court, Ravensburg, Germany), made by decision of 27 October 2023, received at the Court on 9 November 2023, in the proceedings

CM,

DS

v

Volkswagen AG,

THE COURT (Fifth Chamber),

composed of M.L. Arastey Sahún (Rapporteur), President of the Chamber, D. Gratsias, E. Regan, J. Passer and B. Smulders, Judges,

Advocate General: A. Rantos,

Registrar: A. Calot Escobar,

having regard to the written procedure,

* Language of the case: German.

after considering the observations submitted on behalf of:

– CM, by K. Borwieck, C. Douhaire, R. Geulen, R. Klinger, D. Krebs and L. Rhiel, Rechtsanwälte,

– Volkswagen AG, by T. André, M. de Lind van Wijngaarden, and H.-P. Schroeder, Rechtsanwälte,

– the European Commission, by J. Flett and M. Noll-Ehlers, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 5(2) of Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information (OJ 2007 L 171, p. 1).

2 The request has been made in two sets of proceedings between CM and DS, on the one hand, and Volkswagen AG, on the other, concerning compensation for the loss or damage suffered as a result of the purchase of vehicles equipped with unlawful defeat devices.

Legal context

European Union law

Directive 1999/44/EC

3 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ 1999 L 171, p. 12) was repealed by Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (OJ 2019 L 136, p. 28), with effect from 1 January 2022. In view of the date of the facts of the disputes in the main proceedings, Directive 1999/44 remains applicable to those disputes.

4 Article 3(2) of Directive 1999/44 provided:

‘In the case of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity free of charge by repair or replacement, in accordance with paragraph 3, or to have an appropriate reduction made in the price or the contract rescinded with regard to those goods, in accordance with paragraphs 5 and 6’.

Directive 2007/46/EC

5 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), as amended by Commission Regulation (EC) No 385/2009 of 7 May 2009 (OJ 2009 L 118, p. 13) ('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 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. However, in view of the date of the facts of the disputes in the main proceedings, that directive remains applicable to those disputes.

6 Points 3, 5, 17 and 36 of Article 3 of Directive 2007/46 were worded as follows:

'For the purposes of this Directive and of the regulatory acts listed in Annex IV, save as otherwise provided therein:

…

3. "type-approval" means 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;

…

5. "EC type-approval" means 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;

…

17. "type of vehicle" means vehicles of a particular category which do not differ in at least the essential respects specified in Section B of Annex II. A type of vehicle may contain variants and versions as defined in Section B of Annex II;

…

36. "certificate of conformity" means 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'.

7 Article 8(6) of that directive provided:

'The approval authority shall inform without delay the approval authorities of the other Member States of its refusal or withdrawal of any vehicle approval, together with the reasons for its decision.'

8 Article 10(2) of Directive 2007/46 provided:

‘Member States shall grant a component or separate technical unit EC type-approval in respect of a component or separate technical unit which conforms to the particulars in the information folder and which meets the technical requirements laid down in the relevant separate directive or regulation, as prescribed in Annex IV.’

9 Article 13(1) of that directive stated:

‘The manufacturer shall inform without delay the Member State that granted the EC type-approval of any change in the particulars recorded in the information package. That Member State shall decide, in accordance with the rules laid down in this Chapter, which procedure is to be followed. Where necessary, the Member State may decide, in consultation with the manufacturer, that a new EC type-approval is to be granted.’

10 Under Article 18(1) of Directive 2007/46:

‘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.’

11 Article 26(1) of that directive was worded as follows:

‘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.

In the case of incomplete vehicles, Member States shall permit the sale of such vehicles but may refuse their permanent registration and entry into service for such time as the vehicles remain incomplete.’

12 Article 30(1) of that directive provided:

‘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.’

13 Article 46 of Directive 2007/46 stated:

‘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.’

Regulation No 715/2007

14 Under recitals 6 and 15 of Regulation No 715/2007:

‘(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. This requires reaching ambitious limit values at the Euro 6 stage without being obliged to forego the advantages of diesel engines in terms of fuel consumption and hydrocarbon and carbon monoxide emissions. Setting such a step for reducing nitrogen oxide emissions at an early stage will provide long-term, Europe-wide planning security for vehicle manufacturers.

…

(15) The Commission should keep under review the need to revise the New European Drive Cycle as the test procedure that provides the basis of EC type approval emissions regulations. Updating or replacement of the test cycles may be required to reflect changes in vehicle specification and driver behaviour. Revisions may be necessary to ensure that real world emissions correspond to those measured at type approval. The use of portable emission measurement systems and the introduction of the ‘not-to-exceed’ regulatory concept should also be considered.’

15 Point 10 of Article 3 of that regulation provides:

‘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’.

16 Article 4(1) and (2) of that regulation provides:

‘1. Manufacturers shall demonstrate that all new vehicles sold, registered or put into service in the [European] 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. Therefore, in-service conformity measures shall be checked for a period of up to five years or 100 000 km, whichever is the sooner. Durability testing of pollution control devices undertaken for type approval shall cover 160 000 km. To comply with this durability test, the manufacturers should have the possibility to make use of test bench ageing, subject to the implementing measures referred to in paragraph 4.

In-service conformity shall be checked, in particular, for tailpipe emissions as tested against emission limits set out in Annex I. In order to improve control of evaporative emissions and low ambient temperature emissions, the test procedures shall be reviewed by the Commission.'

17 Article 5(1) and (2) of that regulation is worded as follows:

'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.'

18 Under Article 13 of Regulation No 715/2007:

'1. Member States shall lay down the provisions on penalties applicable for infringement by manufacturers of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. …

2. The types of infringements which are subject to a penalty shall include:

…

(d) use of defeat devices;

…'

Regulation No 692/2008

19 Commission Regulation (EC) No 692/2008 of 18 July 2008 implementing and amending Regulation No 715/2007 (OJ 2008 L 199, p. 1), was amended by Commission Regulation (EU) No 566/2011 of 8 June 2011 (OJ 2011 L 158, p. 1) ('Regulation No 692/2008'). As from 1 January 2022, Regulation No 692/2008 was repealed by Commission Regulation (EU) 2017/1151 of 1 June 2017 supplementing Regulation No 715/2007, amending Directive 2007/46, 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 disputes in the main proceedings, Regulation No 692/2008 remains applicable to those disputes.

20 Article 10(1) of Regulation No 692/2008 provided:

'The manufacturer shall ensure that replacement pollution control devices intended to be fitted to EC type-approved vehicles covered by the scope of Regulation [No 715/2007] are EC type-approved, as separate technical units within the meaning of Article 10(2) of [Directive 2007/46], in accordance with Article 12, Article 13 and Annex XIII to this Regulation.'

German law

21 Paragraph 276 of the Bürgerliches Gesetzbuch (Civil Code; 'the BGB') provides:

'1 The debtor shall be liable for intentional acts or negligence if no reduced or increased liability has been agreed or is to be inferred from the content of the obligation, in particular, the acceptance of a guarantee or the assumption of a risk. The provisions of Paragraphs 827 and 828 apply accordingly.

2 Any person who fails to exercise the care required in business dealings acts negligently.

3 The debtor cannot be exempted in advance from his or her liability for intentional misconduct.'

22 Under Paragraph 823 of the BGB:

'1 Any person who, intentionally or negligently, unlawfully harms the life, body, health, freedom, property or other right of another person shall be liable to compensate that other person for the resulting loss or damage.

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

23 Paragraph 826 of the BGB states:

'Any person who causes harm to another intentionally and in a manner offending common decency shall be liable to the latter to repair the damage.'

24 The Verordnung über die EG-Genehmigung für Kraftfahrzeuge und ihre Anhänger sowie für Systeme, Bauteile und selbstständige technische Einheiten für diese Fahrzeuge (EG-Fahrzeuggenehmigungsverordnung – EG-FGV) (Regulation on EC approval for motor

vehicles and their trailers, and for systems, components and separate technical units intended for such vehicles (EC Vehicle Approval Regulation)) ('the EG-FGV') of 3 February 2011 provides, in Paragraph 6(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, read in conjunction with Annex IX to, Directive 2007/46. Under Article 18(3) of Directive 2007/46, the certificate of conformity is designed in such a way as to exclude any falsification.'

25 Paragraph 27(1) of the EG-FGV provides:

'New vehicles, technical units or components requiring a certificate of conformity in accordance with Annex IX to Directive 2007/46, …, 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.'

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

26 Volkswagen is the manufacturer of the motor vehicles that CM and DS purchased second-hand from professional sellers.

27 With regard to CM, he purchased, in accordance with an order of 14 March 2016 and at a price of EUR 49 950, a Volkswagen vehicle fitted with a type EA 288 diesel engine. At the time when that vehicle was purchased, it was equipped with a test bench detection system, which was removed on 10 October 2017 following an update to the software concerned, as well as other engine programming software that reduces the exhaust gas recirculation rate when outside temperatures are below a certain threshold, resulting in higher NOx emissions. Thus, that recirculation is fully effective only if the outside temperature does not fall below that threshold ('the temperature window').

28 On account of the presence of those two allegedly unlawful defeat devices, CM takes the view that he has suffered loss or damage inflicted intentionally and in a manner offending public order and common decency within the meaning of Paragraph 826 of the BGB, attributable to Volkswagen.

29 By his action before the Landgericht Ravensburg (Regional Court, Ravensburg, Germany), which is the referring court, CM claims, as compensation in respect of the loss or damage suffered, payment in the amount of EUR 8 938, which represents 20% of the purchase price of the vehicle; and, in the alternative, compensation the amount of which is to be decided at the discretion of that court but which may not, however, be less than EUR 6 703.50, which is equivalent to 15% of the purchase price.

30 According to the order for reference, Volkswagen concedes that the test bench detection system is part of software used to reduce the exhaust gas recirculation rate outside the New European Driving Cycle upon reaching an operating temperature of 200 degrees Celsius. According to Volkswagen, above that temperature, the Selective Catalytic Reduction system contributes to a reduction in NOx emissions, so as to remain in compliance with the tolerance limits.

31 With regard to the temperature window, that company contends that a reduction occurs in the exhaust gas recirculation rate below an ambient temperature above 12 degrees Celsius. That temperature window is permissible since it is necessary for the safe operation of the vehicle.

32 In the alternative, that company invokes, in order to be exempted from its liability, the existence of an unavoidable error as regards the unlawful nature of the defeat devices and relies, in that regard, on a so-called hypothetical approval by the Kraftfahrt-Bundesamt (Federal Office for Motor Vehicles, Germany), namely the fact that its incorrect legal opinion regarding the existence of a lawful defeat device would have been confirmed by that authority competent for EC type-approval in the event that a query had been made to that authority ('the hypothetical approval').

33 With regard to DS, he purchased, in accordance with an order dated 29 March 2016 and at a price of EUR 32 000, a Volkswagen vehicle fitted with a type EA 189 diesel engine. At the time when the vehicle was purchased, it was equipped with an unlawful defeat device, consisting of a test bench detection with an engine switching system.

34 Since the Federal Office for Motor Vehicles, by decisions of 14 and 15 October 2015, ordered Volkswagen to remove that device from vehicles placed on the market, a software, developed by that company and approved by that office, was installed in DS's vehicle on 7 March 2017. However, at the same time, another defeat device, namely a temperature window, was installed in that vehicle.

35 As a result, DS takes the view that he has suffered loss or damage caused by that company intentionally and in a manner offending public order and common decency.

36 By his action lodged with the referring court on 4 March 2021, DS seeks, first, payment of compensation in an amount to be decided at the discretion of that court but which may not be less than EUR 4 800, which is equivalent to 15% of the purchase price, and, secondly, a declaration from that court, moreover, finding that that company shall compensate him for the loss and damage suffered as a result of the installation of the defeat device consisting of a temperature window.

37 Volkswagen raises a plea of inadmissibility alleging that the claim has become time-barred and argues, in any event, that it should be dismissed on the merits.

38 In so far as concerns the temperature window, that company claims that exhaust gas recirculation is only reduced below a temperature above 10 degrees Celsius, which is necessary for the safe operation of the vehicle.

39 Furthermore, it states that, in its judgments of 14 July 2022, *GSMB Invest* (C-128/20, EU:C:2022:570), of 14 July 2022, *Volkswagen* (C-134/20, EU:C:2022:571), and of 14 July 2022, *Porsche Inter Auto and Volkswagen* (C-145/20, EU:C:2022:572), the Court based its decision, for Volkswagen vehicles equipped with an identical temperature window, a temperature range of between 15 and 33 degrees Celsius for the outside temperature. That approach is based on findings of fact by the national referring courts, which do not reflect the circumstances at issue in the main proceedings.

40 That company invokes, in the alternative, an unavoidable error as regards the unlawful nature of that defeat device and relies, in that regard, on a hypothetical approval by the Federal Office for Motor Vehicles.

41 The referring court considers, in the first place, that a right to compensation for CM and DS, in accordance with Paragraph 826 of the BGB and on the basis of intentional harm that is in a manner offending public order and common decency, does not appear to be well founded.

42 That court notes that CM's vehicle was admittedly equipped, at the time when it was purchased, with an unlawful defeat device within the meaning of Article 5(2) of Regulation No 715/2007 and that such a device, in the case of DS's vehicle, was installed during a software update.

43 In so far as concerns both vehicles, exhaust gas recirculation is reduced above an ambient temperature of 10 degrees Celsius, which is why the referring court is of the opinion that there is, in both cases, an unlawful temperature window. The latter could not be considered lawful under the second sentence of Article 5(2)(a) of that regulation, since it concerns the need to avoid immediate risks of damage or accident to the engine which may be caused by a malfunction of a component of the exhaust gas recirculation system, of such seriousness that those risks generate a real danger when driving the vehicle equipped with that device, since such a specific risk should be lacking in the present case.

44 Furthermore, in so far as concerns CM, that court considers that the additional criterion for derogation arising from that provision, that a defeat device must not operate for most of the year, should not be considered to be fulfilled either, in the light of the case-law resulting from the judgment of 14 July 2022, *GSMB Invest* (C-128/20, EU:C:2022:570, paragraph 65). The exhaust gas recirculation of that vehicle is reduced once the ambient temperature falls to 12 degrees Celsius, whereas the average annual temperatures in Germany are below that threshold.

45 Despite those factors, the referring court argues that there is no intentional conduct that is objectively contrary to public order and common decency, within the meaning of Paragraph 826 of the BGB, in the disputes in the main proceedings on account, in particular, of the absence of defeat measures that are 'manifestly unlawful' according to the case-law of the Bundesgerichtshof (Federal Court of Justice, Germany).

46 In the second place, that court considers that CM and DS could benefit from a right to compensation under Paragraph 823(2) of the BGB.

47 Referring to the judgment of the Bundesgerichtshof (Federal Court of Justice) of 26 June 2023 ('the judgment of the Bundesgerichtshof'), the referring court states that Paragraph 823(2) of the BGB, read in conjunction with Paragraph 6(1) and Paragraph 27(1) of the EG-FGV, protects the interests of the purchaser of a vehicle as to a possible financial loss arising from the manufacturer's failure to comply with EU law on motor vehicle exhaust gases.

48 In that regard, according to the referring court, it is apparent, first, that Volkswagen infringed EU law by installing an unlawful temperature window in the vehicles concerned.

49 Secondly, the right to compensation is also subject to the condition that the manufacturer of the vehicle concerned acted at least negligently in so far as concerns the defeat device at issue, the manufacturer being presumed to be at fault.

50 That manufacturer may exonerate itself from its liability by invoking and demonstrating the existence of exceptional circumstances showing no negligence on its part, which covers proof of an unavoidable error as to the unlawful nature of the defeat device at issue.

51 Thirdly, that court states, on the one hand, that such an error exists when, exercising the due diligence required, that manufacturer has made a legal decision based on a rigorous examination of the legal situation, taking into account the case-law of the highest courts, and that it could not expect a different assessment of that situation. On the other hand, such an error is unavoidable where the manufacturer can produce an EC type-approval issued for the defeat device at issue in accordance with Article 5(2) of Regulation No 715/2007.

52 A mere hypothetical approval, as referred to in paragraph 32 of the present judgment, could now be sufficient according to the judgment of the Bundesgerichtshof.

53 The referring court asks whether, in the light of EU law, a right to compensation for the purchaser of a vehicle fitted with an unlawful defeat device may be refused on the ground that the manufacturer concerned has made an unavoidable error as regards the unlawful nature of that device and, if the answer to that question is in the affirmative, whether the exemption of that manufacturer may be based on the actual approval, or even on a hypothetical approval, of the vehicle at issue by the competent national authority.

54 Fourthly, that court notes that, in the case of DS, the right to compensation arising from the defeat device that existed at the time when the vehicle was purchased – namely the test bench detection with the engine switching system – is time-barred. However, in so far as that vehicle is equipped with a new unlawful defeat device in the form of a temperature window since the installation of the update provided by Volkswagen, the question arises as to whether or not the owner of that vehicle has a right to compensation vis-à-vis the manufacturer.

55 Fifthly, that court observes that the right to compensation under Paragraph 823(2) of the BGB, read in conjunction with Paragraph 6(1) and Paragraph 27(1) of the EG-FGV, refers to 'minor compensation', namely payment of a sum of money representing the difference between the value of the vehicle fitted with an unlawful defeat device and that of the vehicle without that device.

56 According to the judgment of the Bundesgerichtshof, the benefits derived from the use of the vehicle should be deducted from the amount of compensation, if, together with the residual value of the vehicle, they exceed the purchase price, after deduction of that amount. Furthermore, that court requires that the amount of compensation cannot exceed 15% of the purchase price for reasons of proportionality.

57 The referring court has doubts as to whether that case-law is compatible with EU law.

58 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) Can the vehicle purchaser's right to compensation against the vehicle manufacturer for the negligent 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] be refused on the grounds

(a) that there was an unavoidable error on the part of the manufacturer as regards the [unlawful] nature of the act?

If the answer is yes[,]

(b) that the error as regards the [unlawful] nature of the act was unavoidable for the manufacturer because the authority responsible for EC type-approvals or for subsequent measures actually authorised the [defeat device installed in the vehicle]?

If the answer is yes[,]

(c) that the error as regards the [unlawful] nature of the act was unavoidable for the manufacturer since the vehicle manufacturer's legal interpretation of Article 5(2) of Regulation [No 715/2007] would have been confirmed by the authority responsible for EC type-approvals or for subsequent measures [in the event that a query had been made to that authority] (hypothetical approval)?

(2) Is the vehicle manufacturer who supplied a software update liable to pay compensation to the vehicle owner if the latter suffers a loss or damage as a result of a prohibited defeat device within the meaning of Article 5(2) of Regulation [No 715/2007] installed with the software update?

(3) Is it compatible with EU law if, in the case of a right to compensation against the vehicle manufacturer for the negligent 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,]

(a) the purchaser of the vehicle must allow the offsetting of the benefits derived from the use of the vehicle against the amount of compensation in their claim for "*minor* compensation", where the benefits derived from the use, together with the residual value, exceed the purchase price paid less the amount of compensation[;]

(b) the vehicle purchaser's claim for "*minor* compensation" is limited to a maximum of 15% of the purchase price paid?'

Consideration of the questions referred

The first question

59 According to the Court's settled case-law, in the procedure provided for in Article 267 TFEU, which provides for cooperation between national courts and the Court, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to decide the case before it. To that end, the Court may find it necessary to take account of provisions of EU law to which the national court has not referred in its questions. The fact that a national court has, formally speaking, worded a question referred for a preliminary ruling with reference to certain provisions of EU law does not prevent the Court from providing that court with all the points of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to them in its questions. In that regard, it is for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision referring the questions, the points of EU law which require interpretation, having regard to the subject matter of the dispute (judgment of 26 September 2024, *Luxone and Sofein*, C-403/23 and C-404/23, EU:C:2024:805, paragraph 47 and the case-law cited).

60 In the present case, it is common ground that the disputes in the main proceedings concern the right to compensation of CM and DS vis-à-vis Volkswagen for the loss or damage suffered as a result of the presence, in their respective vehicles, of unlawful defeat devices, within the meaning of Article 5(2) of Regulation No 715/2007, and the possibility, for that vehicle manufacturer, to

rely, as a ground for exemption from its liability in that respect, on the hypothetical approval of the vehicles, which would constitute an unavoidable error as regards the unlawfulness of that device.

61 It must be stressed that it follows from the case-law resulting from the judgment of 21 March 2023, *Mercedes-Benz Group (Liability of manufacturers of vehicles fitted with defeat devices)* (C-100/21, 'the judgment in *Mercedes-Benz Group*', EU:C:2023:229, paragraph 91), that the purchaser of a motor vehicle equipped with a defeat device has, under 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, a right to compensation from the manufacturer of that vehicle where that device has caused loss or damage to that purchaser.

62 In those circumstances, it must be found that, by its first question, the referring court is asking, in essence, 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, must be interpreted as precluding, in the context of an action for compensation brought by the purchaser of a motor vehicle for loss or damage caused by the presence in that vehicle of an unlawful defeat device, within the meaning of that Article 5(2), the vehicle manufacturer from being able to rely, as a ground for exemption from its liability in that respect, on the existence of an unavoidable error as regards the unlawfulness of that device on account of the fact that EC type-approval of that device or of the vehicle equipped with it was granted by the competent national authority, or that that authority, had it been asked to do so by the manufacturer, would have confirmed that manufacturer's legal assessment as regards the alleged lawfulness of the defeat device concerned.

63 In that regard, it should be recalled that 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, protect the specific interests of the individual purchaser of a motor vehicle against the manufacturer of that vehicle where that vehicle is equipped with a prohibited defeat device, within the meaning of the latter provision (the judgment in *Mercedes-Benz Group*, paragraph 88).

64 Thus, it is apparent from those provisions that an individual purchaser of a motor vehicle has, against 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 (the judgment in *Mercedes-Benz Group*, paragraph 89).

65 It is therefore for the Member States, under Article 46 of Directive 2007/46, to determine the penalties applicable for infringement of the provisions of that directive. Those penalties are to be effective, proportionate and dissuasive. Likewise, in accordance with Article 13(1) of Regulation No 715/2007, Member States are to lay down the provisions on penalties applicable for infringements of the provisions of that regulation. The penalties provided for are to be effective, proportionate and dissuasive (the judgment in *Mercedes-Benz Group*, paragraph 90).

66 In those circumstances, as stated in paragraph 61 of the present judgment, it follows from 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, that the 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 loss or damage to that purchaser (the judgment in *Mercedes-Benz Group*, paragraph 91).

67 In the absence of provisions of EU law governing the detailed rules under which purchasers of such a vehicle may obtain compensation, it is for each Member State to determine those rules (see, to that effect, the judgment in *Mercedes-Benz Group*, paragraph 92).

68 That being said, national legislation which makes it, in practice, impossible or excessively difficult for the purchaser of a motor vehicle to obtain adequate compensation for the loss or damage caused to him or her by the infringement, by the manufacturer of that vehicle, of the prohibition laid down in Article 5(2) of that regulation would not be compatible with the principle of effectiveness (the judgment in *Mercedes-Benz Group*, paragraph 93).

69 In particular, the conditions under which a vehicle manufacturer may rely on an unavoidable error as regards the unlawfulness of the defeat device in order to be exempt from any liability in that respect cannot be such as to make it practically impossible or excessively difficult for the purchaser of a vehicle fitted with that device to obtain such compensation.

70 According to the order for reference, the vehicle manufacturer concerned has the possibility, pursuant to the judgment of the Bundesgerichtshof, of being exempt from all liability by relying on and demonstrating the existence of an unavoidable error as regards the unlawfulness of the defeat device fitted to the vehicle at issue, which excludes negligence on its part and, consequently, a right to compensation for the purchaser of that vehicle.

71 It is apparent from the information before the Court that the reliance on an unavoidable error as regards the unlawfulness of the defeat device is considered, according to the national case-law, to be an exceptional ground for exemption from liability for negligence on the part of the vehicle manufacturer.

72 Furthermore, as the referring court explains, that unavoidable error as regards the unlawfulness of a defeat device fitted to the vehicles, such as those at issue in the main proceedings, may be usefully relied upon by the vehicle manufacturer when that error is due to the fact that EC type-approval for the type of vehicle concerned has been granted by the competent authority.

73 In the first place, it should be borne in mind that, under Article 5(2) of Regulation No 715/2007, the use of defeat devices that reduce the effectiveness of emission control systems is to be prohibited. However, there are three exceptions to that prohibition, which must be interpreted strictly (see, to that effect, the judgment in *Mercedes-Benz Group*, paragraphs 60 and 61).

74 Pursuant to Article 5(2)(a) to (c) of Regulation No 715/2007, that prohibition does not apply where ‘the need for the device is justified in terms of protecting the engine against damage or accident and for safe operation of the vehicle’ (point (a)), where ‘the device does not function beyond the requirements of engine starting’ (point (b)), or where ‘the conditions are substantially included in the test procedures for verifying evaporative emissions and average tailpipe emissions’ (point (c)).

75 In the present case, it is apparent from the order for reference that the vehicles at issue in the main proceedings were equipped with an unlawful defeat device, within the meaning of Article 5(2) of Regulation No 715/2007.

76 Since none of the exceptions referred to in points (a) to (c) of that provision apply to the defeat devices at issue, which is a matter for the referring court to ascertain, a vehicle manufacturer which fits such devices to its vehicles consequently cannot rely on lawful conduct in the light of that provision.

77 In the second place, it should be noted that 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 that directive and of the regulatory acts listed in Annex IV or XI thereto.

78 EC type-approval thus corresponds to a compliance standard for a large number of vehicles. It constitutes an indication that the design of the type of vehicle considered, including the defeat device installed, complies with the applicable provisions and requirements mentioned in the previous paragraph.

79 It follows from the Court's case-law that it cannot be ruled out that a vehicle type covered by an EC type-approval allowing that vehicle to be driven on the road may, initially, be approved by the competent approval authority without the presence of the unlawful defeat device having been disclosed to it. In that respect, Directive 2007/46 envisages the situation in which the unlawfulness of an element of design of a vehicle, for example in the light of the requirements of Article 5(2) of Regulation No 715/2007, is discovered only after that approval has been granted. In such a case, Article 8(6) of that directive provides that that authority may withdraw the approval of a vehicle. Furthermore, it follows from the first and third sentences of Article 13(1) of that directive that, where a manufacturer informs a Member State which has granted EC type-approval of a change in the information package, that Member State may, where necessary, decide, in consultation with the manufacturer, that a new EC type-approval is to be granted. Lastly, Article 30(1) of that directive provides that, if a Member State which had granted an EC type-approval found a lack of conformity to the vehicle type it had approved, it is to take the necessary measures, including, where appropriate, the withdrawal of that type-approval, to ensure that the produced vehicles were brought into conformity with that type (the judgment in *Mercedes-Benz Group*, paragraph 83 and the case-law cited).

80 Consequently, the unlawfulness of a defeat device equipped in a motor vehicle, discovered after the grant of EC type-approval for that vehicle, is capable of calling into question the validity of that approval and, by extension, the validity of the certificate of conformity intended to certify that that vehicle, belonging to the series of the type approved, complied with all regulatory acts at the time of its production (the judgment in *Mercedes-Benz Group*, paragraph 84).

81 It follows that EC type-approval of a vehicle fitted with a defeat device does not necessarily mean that the competent national authority has confirmed the manufacturer's assessment of the vehicle concerned as regards the alleged lawful nature of that device. In any event, such approval, or even a hypothetical approval, cannot exempt that manufacturer from its obligation to compensate the purchaser of the vehicle concerned for any loss or damage caused by the presence of that device in his or her vehicle.

82 To accept that the EC type-approval of a vehicle fitted with a defeat device could constitute a ground for exemption from liability for the vehicle manufacturer would, as a consequence, make it impossible or excessively difficult for the purchaser of that vehicle to obtain adequate compensation for the loss or damage caused to him or her by the infringement, by the manufacturer of that vehicle, of the prohibition set out in Article 5(2) of Regulation

No 715/2007, which would be contrary to the principle of effectiveness. To retain such a ground for exemption would imply that the right to adequate compensation would be obstructed in all cases in which the vehicle concerned conforms to the approved type, even if it is common ground that that vehicle is equipped with an unlawful defeat device.

83 In the light of all the foregoing considerations, the answer to the first question is that 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, must be interpreted as precluding, in the context of an action for compensation brought by the purchaser of a motor vehicle for loss or damage caused by the presence in that vehicle of an unlawful defeat device, within the meaning of that Article 5(2), the vehicle manufacturer from being able to rely, as a ground for exemption from its liability in that respect, on the existence of an unavoidable error as regards the unlawfulness of that device on account of the fact that EC type-approval of that device or of the vehicle equipped with it was granted by the competent national authority, or that that authority, had it been asked to do so by the manufacturer, would have confirmed that manufacturer's legal assessment as regards the alleged lawfulness of the defeat device concerned.

The second question

84 By its second question, the referring court asks whether, as a general rule, the vehicle manufacturer which supplied a software update is liable to pay compensation to the vehicle owner if the latter has suffered loss or damage as a result of an unlawful defeat device, within the meaning of Article 5(2) of Regulation No 715/2007, installed with that software update.

85 However, it is apparent from the information before the Court that that question seeks to determine, more specifically, whether the fact that an unlawful defeat device was already installed at the time when the EC type-approval of the vehicle fitted with it was granted, or, by contrast, was only granted after that date, has, pursuant to Article 4(1) and Article 5(2) of Regulation No 715/2007 and Article 10(1) of Regulation No 692/2008, an impact on the right to compensation of the purchaser of the vehicle concerned who has suffered that loss or damage, as provided for by EU law.

86 In view of those clarifications and in the light of the Court's case-law referred to in paragraph 59 of the present judgment, it is necessary to reformulate the second question with the result that the referring court is asking, in essence, whether Article 4(1) and Article 5(2) of Regulation No 715/2007 and Article 10(1) of Regulation No 692/2008 must be interpreted as requiring that the purchaser of a vehicle have a right to compensation vis-à-vis the vehicle manufacturer where that purchaser has suffered loss or damage due to an unlawful defeat device, within the meaning of Article 5(2) of Regulation No 715/2007, installed by that manufacturer by means of a software update after the grant of EC type-approval for that vehicle.

87 In that regard, it is not apparent either from the wording of Article 5(2) of Regulation No 715/2007, which provides that the use of defeat devices that reduce the effectiveness of emission control systems is prohibited, subject to certain exceptions, or from that of Article 3(10) of that regulation, which defines the concept of a 'defeat device', that a distinction must be made according to whether such a device is installed at the stage of production of a vehicle or only after that vehicle has been put into service, in particular, following a repair, within the meaning of Article 3(2) of Directive 1999/44, to assess whether the use of that device is prohibited (judgment of 14 July 2022, *Volkswagen*, C-134/20, EU:C:2022:571, paragraph 88).

88 That interpretation is supported by the context in which those provisions of Regulation No 715/2007 are set and the objective pursued by the latter (judgment of 14 July 2022, *Volkswagen*, C-134/20, EU:C:2022:571, paragraph 89).

89 First, as regards the context of those provisions, it should be noted that, in accordance with the second sentence of the first subparagraph of Article 4(1) of that regulation, manufacturers are to demonstrate that all new replacement pollution control devices requiring type approval which are sold or put into service in the European Union are type approved under that regulation and its implementing measures. The second subparagraph of Article 4(1) thereof states that that obligation includes respecting the emission limits set out in Annex I to that regulation and the implementing measures referred to in Article 5 thereof (judgment of 14 July 2022, *Volkswagen*, C-134/20, EU:C:2022:571, paragraph 90).

90 When acquiring a vehicle model of a type that has been approved and is, therefore, accompanied by a certificate of conformity, an individual purchaser can reasonably expect that Regulation No 715/2007, and, inter alia, Article 5 thereof, has been complied with in respect of that vehicle (the judgment in *Mercedes-Benz Group*, paragraph 81 and the case-law cited).

91 In addition, under Article 10(1) of Regulation No 692/2008, 'the manufacturer shall ensure that replacement pollution control devices intended to be fitted to EC type-approved vehicles covered by the scope of Regulation [No 715/2007] are EC type-approved, as separate technical units within the meaning of Article 10(2) of Directive [2007/46], in accordance with Article 12, Article 13 and Annex XIII to this Regulation' (judgment of 14 July 2022, *Volkswagen*, C-134/20, EU:C:2022:571, paragraph 91).

92 It follows from those provisions of Regulations No 715/2007 and No 692/2008 that pollution control devices must comply with the obligations laid down by Regulation No 715/2007, whether they are installed from the outset or after a vehicle's entry into service (judgment of 14 July 2022, *Volkswagen*, C-134/20, EU:C:2022:571, paragraph 92).

93 Secondly, allowing vehicle manufacturers to install, after the entry into service of a vehicle, a defeat device that does not comply with those obligations would be contrary to the objective pursued by Regulation No 715/2007, which is to ensure a high level of environmental protection and, more specifically, to considerably reduce NOx emissions from diesel vehicles in order to improve air quality and comply with limit values for pollution (judgment of 14 July 2022, *Volkswagen*, C-134/20, EU:C:2022:571, paragraph 93).

94 The fact that a defeat device was installed after a vehicle was put into service, in the course of a repair within the meaning of Article 3(2) of Directive 1999/44, is therefore not relevant to assess whether the use of that device is prohibited under Article 5(2) of that regulation, read in conjunction with Article 3(10) thereof (see, to that effect, judgment of 14 July 2022, *Volkswagen*, C-134/20, EU:C:2022:571, paragraph 94).

95 Irrespective of whether a defeat device was originally fitted, namely at the time of the grant of EC type-approval for that vehicle, or was fitted subsequently, that device is likely to create uncertainty as to the possibility of registering, selling or entering into service that vehicle and, ultimately, to harm the purchaser of a vehicle equipped with such a device (see, to that effect, the judgment in *Mercedes-Benz Group*, paragraph 84).

96 In the light of the foregoing, the answer to the second question is that Article 4(1) and Article 5(2) of Regulation No 715/2007 and Article 10(1) of Regulation No 692/2008 must be interpreted as requiring that the purchaser of a vehicle have a right to compensation against the vehicle manufacturer where that purchaser has suffered loss or damage due to an unlawful defeat device, within the meaning of that Article 5(2), installed by that manufacturer by means of a software update after the grant of EC type-approval for that vehicle.

The third question

97 By its third question, the referring court seeks, in essence, to ascertain whether EU law must be interpreted as precluding, first, the deduction from the amount of compensation due to the purchaser of a vehicle equipped with an unlawful defeat device, within the meaning of Article 5(2) of Regulation No 715/2007, who has suffered loss or damage caused by that device, of an amount corresponding to the benefit derived from the use of that vehicle and, secondly, a limitation of that compensation to an amount representing 15% of the purchase price of the vehicle.

98 It is important to recall that, according to the case-law referred to in paragraph 67 of the present judgment, in the absence of provisions of EU law governing the detailed rules under which purchasers of such a vehicle may obtain compensation for loss or damage caused by the unlawful defeat device fitted to that vehicle, it is for each Member State to determine those rules.

99 That being said, in accordance with the case-law cited in paragraph 68 of the present judgment, detailed rules determined by Member States which make it, in practice, impossible or excessively difficult for the purchaser of a motor vehicle to obtain adequate compensation for the loss or damage caused to him or her by the infringement, by the manufacturer of that vehicle, of the prohibition laid down in Article 5(2) thereof would not be compatible with the principle of effectiveness.

100 Subject to that proviso, it must be noted that national courts are entitled to ensure that the protection of the rights guaranteed by the legal order of the European Union, including that of the purchaser of a motor vehicle to adequate compensation for the loss or damage caused to him or her by the infringement, by the manufacturer of that vehicle, of the prohibition set out in Article 5(2) of Regulation No 715/2007, does not result in unjust enrichment of the beneficiaries (see, to that effect, the judgment in *Mercedes-Benz Group*, paragraph 94 and the case-law cited).

101 It is therefore for the referring court to ascertain whether the offsetting of the benefit derived from an advantage for the purchaser concerned in the context of the use of the vehicles or, in the present case, that of the benefit derived from the actual use of the vehicles at issue in the main proceedings ensures such adequate compensation for the purchasers concerned, if it is established that the latter have suffered loss or damage connected with the installation in those vehicles of unlawful defeat devices, within the meaning of Article 5(2) (see, to that effect, the judgment in *Mercedes-Benz Group*, paragraph 95).

102 In that context, the fact that a Member State makes a connection between the purchase price of such a vehicle and the amount of compensation for the loss or damage suffered by the purchaser of the vehicle concerned cannot be regarded as contrary to EU law, in so far as the assessment of the extent of that loss or damage, which occurs in the form, in particular, of the risk that that vehicle cannot be registered, sold or put into service, is linked to the purchase price.

103 In that regard, it is apparent from the order for reference that, according to the case-law arising from the judgment of the Bundesgerichtshof, the extent of the compensation for loss or damage is a matter for the trial court to assess, but it cannot be less than 5% or exceed 15% of that purchase price on grounds of proportionality.

104 According to the Court's case-law referred to in paragraph 66 of the present judgment, the determination by a Member State of such a compensation bracket, consisting of a minimum and a maximum percentage of the purchase price, with a view to fixing the amount of adequate compensation which the purchaser of the vehicle concerned must receive, cannot, as a matter of principle, be regarded as contrary to EU law either, provided that that bracket does not lead to inadequate compensation for the loss or damage suffered by the purchaser of a vehicle fitted with a defeat device.

105 In the present case, it should be noted that CM claimed payment of a sum representing 20% of the purchase price and, failing that, at least 15% of that price, whereas DS requested payment of compensation left to the discretion of that court, without that compensation being able to be less than the equivalent of 15% of the purchase price.

106 It is for the referring court to ascertain whether or not the compensation bracket referred to in paragraph 103 of the present judgment makes it practically impossible or excessively difficult for CM and DS to obtain adequate compensation for the loss or damage suffered.

107 In the light of all the foregoing considerations, the answer to the third question is that EU law must be interpreted as not precluding, first, the deduction from the amount of compensation due to the purchaser of a vehicle equipped with an unlawful defeat device, within the meaning of Article 5(2) of Regulation No 715/2007, who has suffered loss or damage caused by that device, of an amount corresponding to the benefit derived from the use of that vehicle and, secondly, a limitation of that compensation to an amount representing 15% of the purchase price of the vehicle, provided that that compensation constitutes adequate reparation for the loss or damage suffered.

Costs

108 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Fifth Chamber) hereby rules:

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 by Commission Regulation (EC) No 385/2009 of 7 May 2009, read 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 on access to vehicle repair and maintenance information,**

must be interpreted as precluding, in the context of an action for compensation brought by the purchaser of a motor vehicle for loss or damage caused by the presence in that vehicle of an unlawful defeat device, within the meaning of that Article 5(2), the vehicle manufacturer from being able to rely, as a ground for exemption from its liability in that respect, on the existence of an unavoidable error as regards the unlawfulness of that device on account of the fact that EC type-approval of that device or of the vehicle equipped with it was granted by the competent national authority, or that that authority, had it been asked to do so by the manufacturer, would have confirmed that manufacturer's legal assessment as regards the alleged lawfulness of the defeat device concerned.

2. **Article 4(1) and Article 5(2) of Regulation No 715/2007 and Article 10(1) of Commission Regulation (EC) No 692/2008 of 18 July 2008 implementing and amending Regulation No 715/2007, as amended by Commission Regulation (EU) No 566/2011 of 8 June 2011,**

   must be interpreted as requiring that the purchaser of a vehicle have a right to compensation against the vehicle manufacturer where that purchaser has suffered loss or damage due to an unlawful defeat device, within the meaning of that Article 5(2), installed by that manufacturer by means of a software update after the grant of EC type-approval for that vehicle.

3. **EU law must be interpreted as not precluding, first, the deduction from the amount of compensation due to the purchaser of a vehicle equipped with an unlawful defeat device, within the meaning of Article 5(2) of Regulation No 715/2007, who has suffered loss or damage caused by that device, of an amount corresponding to the benefit derived from the use of that vehicle and, secondly, a limitation of that compensation to an amount representing 15% of the purchase price of the vehicle, provided that that compensation constitutes adequate compensation for the loss or damage suffered.**

[Signatures]