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Judgments of the Court in Cases C-128/20 | GSMB Invest, C-134/20 | Volkswagen and C-145/20 | Porsche Inter Auto and Volkswagen

Software in diesel vehicles which reduces the effectiveness of the emission control system at normal temperatures during most of the year constitutes a prohibited defeat device

Since such a vehicle default is not minor, rescission of the sale contract in respect of the vehicle is not, in principle, precluded

Purchasers of Volkswagen vehicles fitted with software that reduces the recirculation of a vehicle's pollutant gases according to, among other things, the temperature detected are requesting that the Austrian courts annul sales contracts they concluded between 2011 and 2013.

According to the information provided by those courts, that software ensures compliance with the limits laid down at EU level for emissions of nitrogen oxide (NO_x) only when the outside temperature is between 15 and 33 °C ('the temperature window'). Outside of that window, the rate of exhaust gas recirculation (EGR) reduces in a linear way down to zero, which leads to those limits being exceeded.

That temperature window results from a software update in the vehicles at issue carried out by Volkswagen with a view to replacing software prohibited under EU law. The German Federal Office for Motor Vehicles had authorised that update, having concluded that it did not constitute a prohibited defeat device.

The Austrian Supreme Court, the Regional Court, Eisenstadt, and the Regional Court, Klagenfurt, referred a number of questions to the Court concerning the lawfulness of such a temperature window and the rights available to purchasers, in so far as they are consumers, under the EU law in force at the time of the facts in the case.

By today's judgments, the Court finds that **a device which ensures compliance with the NO_x emission limits only in the temperature window does in principle constitute a defeat device prohibited under Article 5(2) of Regulation No 715/2007**.¹

The Court points out, in that regard, first, that ambient temperatures below 15 °C are to be considered as normal within the territory of the European Union. Second, emission limits laid down at EU level must be observed even where those temperatures are significantly below 15 °C. Accordingly, software such as that at issue reduces the effectiveness of the emission control system under conditions of normal use.

For that reason, the mere fact that that device contributes to protecting separate engine parts such as the EGR

¹ 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).

valve, the EGR cooler and the diesel particulate filter does not make it lawful.

That may not be the case if it were established that that device strictly meets the need to avoid immediate risks of damage or accident to the engine, caused by a malfunction of one of those parts, **of such a serious nature as to give rise to a specific hazard when a vehicle fitted with that device is driven.** Such a 'need' exists only where, at the time of the EC type-approval of that device or the vehicle equipped with it, no other technical solution makes it possible to avoid such risks. **It is for the referring courts to verify whether that is the case for the defeat device with which the vehicles in question are equipped.** Nevertheless, the Court notes, in that context, that the sole aim of protecting the engine against clogging up and ageing does not justify the installation of a defeat device.²

In any event, even if there were such a need as the one outlined above, **the defeat device is prohibited if, under normal driving conditions, it operates during most of the year.** Indeed, accepting such a device may lead to the exception being applied more often than the prohibition and would therefore result in a disproportionate infringement of the principle of limiting NOx emissions.

Further, the Court states that the fact that a defeat device was installed after a vehicle was put into service is irrelevant for the purposes of assessing whether the use of that device is prohibited.

As regards the rights of consumers where they have purchased goods that are not in conformity with the sale contract, the relevant EU rules applicable at the time of the facts, namely Directive 1999/44,³ provided that the consumer may require the seller to repair the goods or to replace them, unless this is impossible or disproportionate. It is only if the consumer is entitled to neither repair nor replacement or if the seller has failed to complete one of those remedies within a reasonable time or without significant inconvenience to the consumer that the consumer may require an adequate reduction of the price or the rescission of the contract. However, rescission is precluded if the goods' lack of conformity is minor.

In that regard, the Court finds that a vehicle does not show the quality which is normal in goods of the same type and which the consumer can reasonably expect, and therefore is not in conformity with the contract, where, although it is covered by a valid EC type-approval and may, consequently, be used on the road, that vehicle is fitted with a prohibited defeat device.

Furthermore, **such a lack of conformity cannot be classified as 'minor'**, even if, assuming that the consumer was aware of the existence and operation of that device, that consumer would nevertheless still have purchased that vehicle. Consequently, rescission of that contract is not, in principle, precluded.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The full text and the résumé of the judgments ([C-128/20](#), [C-134/20](#) and [C-145/20](#)) is published on the CURIA website on the day of delivery.

Press contact: Jacques René Zammit ☎ (+352) 4303 3355

² See, in that regard, judgment of 17 December 2020, *CLCV and Others (Defeat device on diesel engines)*, [C-693/18](#), (see Press Release [No 170/20](#)).

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).

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