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Press and Information

Advocate General's Opinion in Case C-693/18
CLCV and Others (defeat device on a diesel engine)

According to Advocate General Sharpston, a device that adjusts upwards the operation of the emission control system of diesel engine vehicles during the approval testing of those vehicles is a 'defeat device' prohibited by EU law

The objective of slowing down the aging or the clogging-up of the engine does not justify the use of such a device

Company X is a car manufacturer that markets motor vehicles in France. That company allegedly placed on the market vehicles fitted with software capable of distorting the results of approval tests as regards the emission of pollutant gases, such as nitrogen oxides (NOx).

Following disclosures in the press, the Parquet de Paris (Prosecutor's Office, Paris, France) conducted an investigation which resulted in the launch of a judicial investigation in respect of Company X. That company is alleged to have deceived the purchasers of diesel engine vehicles as to the essential qualities of those vehicles and the controls carried out before they were placed on the market.

The vehicles in question were fitted with an exhaust gas recirculation (EGR) valve. The EGR valve is one of the technologies used by vehicle manufacturers to control and reduce final NOx emissions. It involves a system which redirects part of the engine exhaust gases to the inlet, that is to say, the point of entry of air supplied to the engine, in order to reduce final NOx emissions.

Before being placed on the market, those vehicles were subject to vehicle approval tests conducted in a laboratory using the New European Driving Cycle, the technical parameters of which are predefined (temperature, speed etc). The purpose of those tests is, among other things, to verify the level of NOx emissions and the observance of the limits set by Regulation (EC) No 715/2007[1] in that regard. The emissions of the vehicles in question were therefore not analysed under normal driving conditions.

An expert's report, prepared in the context of the judicial investigation procedure, found that the vehicles in question were fitted with a device that allowed the phases of the approval procedure to be detected and the operation of the ERG system to be adjusted in order to observe the regulatory ceiling for emissions. Conversely, in conditions other than those of the approval tests, namely in normal conditions of vehicle use, that device leads to the (partial) deactivation of the EGR system and, as a result, to an increase in NOx emissions. The expert further stated that if the operation of the EGR system in actual traffic had been consistent with that during the approval tests, those vehicles would have produced up to 50% less NOx. However, maintenance work on those vehicles would have been more frequent and more costly on account, among other things, of the engine clogging up more quickly.

The Vice-President responsible for instructing the tribunal de grande instance (tribunal judiciaire) de Paris (Regional Court, Paris, France) has doubts as to whether the vehicles in

[1] 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 (€5 and €6) and on access to vehicle repair and maintenance information (OJ 2007 L 171, p. 1).

question comply with the requirements of Regulation No 715/2007 and, in particular, whether the device referred to above is lawful.

The regulation expressly prohibits the use of defeat devices that reduce the effectiveness of the emission control system under normal conditions of vehicle use.

The national court decided to refer the matter to the Court of Justice seeking clarifications, in particular with regard to the definition and the scope of the concepts of 'emission control system' and 'defeat device'.

In today's Opinion, Advocate General Eleanor Sharpston states at the outset that the concept of 'defeat device', referred to in Article 3(10) of Regulation No 715/2007, 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'.

Advocate General Sharpston examines the concept of 'emission control system' in order to determine whether it covers only technologies and strategies that reduce emissions downstream (after their formation) or whether, on the contrary, it also encompasses technologies and strategies which, like the ERG system, reduce emissions upstream (during their formation). Company X argued in favour of a restrictive interpretation, limiting the scope of that concept to technologies and strategies operating solely downstream.

Based on her analysis of the provisions of Regulation No 715/2007 and particularly in the light of the environmental protection and air quality improvement objectives within the EU, Advocate General Sharpston concludes that **the concept of 'emission control system' includes technologies, strategies and mechanical or software-based components which allow emissions (including NOx) to be reduced upstream, like the ERG system, as well as those which treat them and reduce them downstream, after their formation.**

As regards the concept of 'defeat device', Advocate General Sharpston takes the view that **a device that detects any parameter connected to the conduct of the approval procedures for the purposes of activating or adjusting upwards, during those procedures, the operation of any part of the emission control system, and thus obtaining approval of the vehicle, is a 'defeat device'**, even if the upward adjustment of the operation of that emission control system can also occur occasionally when the exact conditions triggering it arise by chance under normal conditions of vehicle use.

Lastly, Advocate General Sharpston notes that under Regulation No 715/2007 the use of defeat devices that reduce the effectiveness of emission control systems is prohibited, but may be authorised in exceptional circumstances, for example 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'.

She states, however, that that exception must be interpreted strictly.

In that regard, according to the Advocate General, that exception is limited to protecting the engine against the occurrence of immediate and sudden damage (and not against more long-term effects such as wear and tear or depreciation).

She states that, under Regulation No 715/2007, it is for car manufacturers to ensure that vehicles observe the regulatory limits on emissions, for the duration of their normal operation. This means that those vehicles must operate safely, while observing those limits. Although it cannot be ruled out that the operation of an emission control system may negatively influence (in the long term), the durability or reliability of the engine, that fact cannot justify deactivating that system during the normal operation of that vehicle, under normal conditions of use, with the sole aim of protecting the engine against aging or its progressive clogging-up, on pain of rendering that regulation redundant.

The Advocate General therefore takes the view that **only immediate risks of damage which affect the reliability of the engine and cause that vehicle to present a real danger when it is driven may justify the presence of a defeat device**.

Advocate General Sharpston thus considers that **the objective of slowing down the aging or the clogging-up of the engine does not justify the use of a defeat device**.

She also states that it is for the national court to establish whether the device in question comes within the parameters of that exception.

However, the Advocate General observes that, according to the expert instructed by the national court, the ERG system 'does not damage the engine' but may reduce the engine's performance with use and cause it to clog up more quickly, leading to 'more frequent and more costly' maintenance work. In the light of that finding in the expert's report, the Advocate General takes the view that **the defeat device in question does not appear to be necessary to protect the engine against damage or accident and to ensure safe operation of the vehicle**.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

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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