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Supreme Court decides on Dieselgate and rules of evidence

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Only weeks after the first decision on the emissions scandal, another panel of the Supreme Court had to deal with related issues (for more information see "[Supreme Court rules on diesel emissions scandal](#)").⁽¹⁾ This time, it was the rules of evidence in the Dieselgate-scenario that proved particularly difficult.

Facts

The plaintiff had bought an Audi Q5 with the Volkswagen diesel engine type EA 189 EU5, which had installed the deactivation device qualified as a defect by the European Court of Justice (ECJ). The built-in "switching logic" caused the engine's exhaust gas purification to only function when the car was on the test bench.

Due to the VW diesel scandal, software updates had been installed in countless cars equipped with this engine by the VW Group by order of the German registration authorities. The update removed the previous, prohibited switch-off device and replaced it with a new deactivation device that only allowed exhaust gas purification in a so-called "thermal window" between 15° Celsius and 33° Celsius.

This software update was also installed in the plaintiff's vehicle. The plaintiff sued, nonetheless, and requested the cancellation of the purchase contract (ie, the repayment of the purchase price minus an adequate user fee) and offered the return of the vehicle. He justified this by claiming that the software update, due to the "thermal window", was also an inadmissible deactivation device and that further repairs could not be carried out without disadvantages for the plaintiff. It was expected that further repairs would lead to increased fuel consumption, increased pollutant emissions and a lower resale price. In contrast, the plaintiff had initially sought to purchase a car with low fuel consumption and low pollutant values.

The defendant car dealership objected that the car was safe and roadworthy, had all the necessary permits and, due to the software update, no longer contained an inadmissible deactivation device, even if the exhaust gas purification system only functioned within a "thermal window" between 15° Celsius and 33° Celsius. The software update would neither cause poorer engine performance, nor reduced durability and thus did also not reduce the market value of the vehicle. Therefore, the plaintiff had not suffered any damage or disadvantage, and, consequently, his claims were unwarranted.

Court of first instance

The court of first instance dismissed the claim. It concluded that the original switch-off device was inadmissible, but that this defect had been remedied by the software update. The court of first instance was also unable to find that the software update had caused any disadvantages for the plaintiff in terms of engine performance or increased fuel consumption. In particular, it had remained unclear what concrete negative effects the software update should have had on exhaust gas purification. On this issue, the evidentiary proceedings remained unclear.

Court of Appeal

The Court of Appeal referred the case back to the trial court to gather further evidence. It held that the necessity of a software update was in itself a defect, regardless of whether a vehicle was technically safe and ready to drive. Therefore, the defendant dealer had to prove that the improvement by way of the software update was in fact such and that new defects did not arise. If the court of first instance found that it is unclear whether such new defects occurred as a result of the software update, this outcome of the evidence presented would work to the disadvantage of the defendant dealer. The defendant then would have failed to meet its burden of proof. Hence, the vehicle was still considered to be defective and the claim was justified in principle.

However, due to its erroneous interpretation of the law, the court of first instance had also not made sufficient findings on the calculation of the purchase price sought by the plaintiff and the counterclaim (user fee) brought by the defendant dealer. For this reason, in the opinion of the Court of Appeal, the proceedings had to be supplemented on these points.

Although the Supreme Court agreed that the case must now be returned to the court of first instance, their rationale brought yet another U-turn.

Supreme Court

The court of first instance had assumed that the plaintiff did not meet his burden of proof regarding defects and improvements, the Court of Appeal took the exact opposite view, and the Supreme Court clarified the following.

- The burden of proof for the existence of a defect lies with the buyer. The plaintiff met this burden of proof. The defendant dealer did not deny that the vehicle was defective at the time of purchase due to the prohibited, built-in deactivation device.
- The buyer is, therefore, entitled to request repair. In this specific case, the repair was carried out by means of the software update.

- In the case of repair, however, the seller bears the burden of proof that the alleged defect no longer exists. This is specifically true where there is no longer a prohibited deactivation device installed in the vehicle. However, the trial court had not gathered any evidence in this respect.
- The plaintiff bears the burden of proof that the repairs had led to new defects. The Court of Appeal was wrong, therefore, according to the Supreme Court, to place this burden of proof on the defendant dealer.
- The plaintiff did not succeed in proving that the software update led to negative effects on consumption, performance, acceleration, overall mileage or durability. The corresponding negative findings of the court of first instance are to his detriment, not defendant's, as the Court of Appeals had opined.
- It also remained unclear whether the software update had not led to yet another prohibited deactivation. Both parties had asserted that the exhaust gas purification only works during the "thermal window" between 15° Celsius and 33° Celsius. The defendant dealer had admitted as much. The contrary findings of the court of first instance are, therefore, irrelevant. Additionally, it had recently been clarified by the ECJ⁽²⁾ that a deactivation device that prevents exhaust gas purification during most of the year is in any case impermissible. In this scenario it is no longer relevant as to whether the device might also be necessary to protect the engine from damage.
- However, there is no evidence available on the issue of the time periods per year during which the deactivation device would switch off purification, and the proceedings must, therefore, be supplemented by the court of first instance. Without this evidence, it is unclear whether or not the car is still defective, even though it had been "repaired" through installation of the software update.

Comment

It is surprising that three courts reach completely different results in connection with very fundamental questions of the law of evidence. For this reason, the Supreme Court's clarifications are all the more important, and they are also relevant for subsequent proceedings. This case is also special in that the plaintiff had not claimed (unlike the plaintiff in the first Dieselgate proceedings) that, due to the prevailing outside temperatures in Austria, the "improved" defeat device would be active for the majority of the year. In this case, this meant that there was still a prohibited deactivation device (ie, a defect).

Following the Supreme Court's opinion, it will be up to the defendant dealer to prove at the court of first instance that the "improved" deactivation device was not active most of the year. If they cannot do so, the defendant will be deemed to not have met their burden of proof that a defect has been adequately remedied, and the plaintiff will win his case.

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Endnotes

(1) OGH 27 June 2023, 1 Ob 149/22a.

(2) Judgment C-145/20, *Porsche Inter Auto and Volkswagen*.