

The first judgment in Spain on the “Volkswagen case” rejects the return of a car

Ainara Rentería Tazo

Senior Associate, Gómez-Acebo & Pombo

The Court of First Instance of Torrelavega (Cantabria) has given the first ruling in Spain in response to a claim brought by a Volkswagen vehicle purchaser against the manufacturer and official dealer thereof, seeking the rescission of the sale and purchase contract and the buy-back of the vehicle affected by software distorting NOx emissions data.

In this ruling, the Judge rejects the claim using, in our opinion, sound legal judgment that is shared by the majority of our country's legal scholars. Akin responses can be seen in neighbouring countries sharing a similar legal system, as is the case of Germany, where to date eight claims for rescission of sale and purchase contracts in connection with the Volkswagen case have been rejected on grounds analogous to those set out in the Torrelavega Court's decision and which we briefly discuss below.

However, a German court (in Munich, to be exact) has recently given a first judgment upholding the rescission of the sale and purchase contract and the consequent return of the car and reimbursement of the purchase price. Such an outcome would only be possible in Spain if the claimant could prove that, in his specific case, the requirement of conforming to the advertised emissions was instrumental in the decision to purchase the vehicle.

As a general rule, the issue in establishing whether the purchase of the vehicle should be rescinded and the price returned pivots on whether (i) there is intentional misleading on the part of the seller (“malicious intent”) or vitiated intention on the part of the purchaser as sufficient basis for rescission of

the contract, (ii) there is a material breach of contract that could support the aforementioned rescission; or (iii) there is “non-conformity”, with vehicle emissions being higher than those advertised and consumer and user protection legislation providing for the repair, replacement, price reduction or rescission of the contract.

As for intentional misleading by the seller, in the circumstances examined by the Court of Torrelavega, the Judge states that the seller, official dealer of Volkswagen in Torrelavega, was unaware of the existence of “malicious” software, so the aforementioned misleading does not apply.

Regarding the vitiated intention and the “vehicle's non-conformity”, one must consider to what extent conformity with the advertised emissions was decisive in the claimant's decision to purchase the vehicle. In this regard, the rules on consumer and user protection assume that the products are “in conformity” if the unfulfilled advertised conditions have not decisively influenced the decision to purchase the product. In these particular cases, since any diesel vehicle emits polluting gases regardless of the level of emissions, it does not appear that this can be regarded as a determining factor in the purchaser's decision. If it had been decisive in his intention, it seems that the purchaser would have chosen other alternatives that are less polluting than diesel vehicles. As for the mistake that should be regarded as relevant, our case law provides that such should rest on the essential conditions of the product and in this case the essential condition is that the vehicle is roadworthy, which it continues to be.

The same rationale applies in rejecting the rescission for material breach, since in these cases such rescission is justified only when the defective good is not fit for the purpose for which it was intended. As we have just seen, this is not the case given that the vehicles are still roadworthy.

In addition, assuming non-conformity to the specific levels of NOx emissions can be proven to be of special relevance for the purchaser, according to consumer and user protection legislation, the seller would be required to perform a "repair, replacement, price reduction or rescission of the contract", but the choice of one or other remedy would depend on the seriousness of such non-conformity. In this regard, the legislation provides that the aedilician remedy must not be disproportionate, and in this case the alternative vehicle repair already being implemented by Volkswagen would be the least onerous type of remedy.

As for the price reduction and rescission of the contract, our consumer and user protection legislation provides that the consumer can only choose one of these remedies when the repair or replacement cannot be demanded or where such repair or replacement has not been carried out within a reasonable time limit.

Aside from the possibility of "repair" "on reasonable terms" provided by Volkswagen for affected vehicles (as stated in the Torrelavega Court decision), in this case there is no actual redressable "loss" for the purchaser, since a ban on the movement of these vehicles has not been passed, nor has there been an administrative decision determining the return of any grants received.

In conclusion, only if the repair of the "defect" does not take place on "reasonable terms", or if the repair causes any loss to the purchaser (e.g., because through the repair there has been a change in the characteristics of the vehicle which could be deemed decisive, such as in engine power, increased fuel consumption, etc.), can the seller and manufacturer be held liable. There is, as follows from the judgment, a report issued by the Federal Traffic Bureau of the Federal Republic of Germany that states that the post-repair vehicle is in conformity with the limits and other requirements concerning pollutant emissions and durability of emission control systems, and shows no variations in maximum power, torque and noise emissions. If the purchaser could prove intentional misleading (malicious intent) by the seller (which does not seem to be the case here), in addition to loss, the purchaser would have a claim against the seller.

For further information please visit our website at www.gomezacebo-pombo.com or send us an e-mail to: info@gomezacebo-pombo.com.

Barcelona | Bilbao | Madrid | Valencia | Vigo | Brussels | Lisbon | London | New York