

# VOHIIIS

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AMSTERDAM COURT

private law department

## Judgment of 17 April 2024

In the cases C/13/686493 / HA ZA 20-697

of

the foundation

**DIESEL EMISSIONS JUSTICE FOUNDATION**,

Based in Amsterdam, e i

s e r e s,

L.C.M. Berger, lawyer, Amsterdam, against

1. the company incorporated under foreign law MERCEDES-BENZ GROUP AG, based in Stuttgart, Germany,
3. the private limited liability company **MERCEDES-BENZ NETHERLANDS B.V.**, based in Nieuwegein, Advocate Mr J.S. Kortmann of Amsterdam,
4. the private company with limited liability ASV AUTOMOBIELBEDRIJYEN B.V., based in Veghel,
5. the private limited liability company AUTO KÖKCÜ B.V., based in V ~~ijhuizen~~
6. the private limited liability company AUTO WÜST DORDRECHT B.V., Based in Oud-Beijerland,
7. the private limited liability company **AUTO WÜST HELLEVOETSLUIS B.V.**, Based in Oud-Beijerland,
8. the private limited liability company AUTO WÜST B.V., Based in Oud-Beijerland,
9. the private company with limited liability VAN DRIEL AUTOBEDRIJF B.V., based in Liempde,
10. the private limited liability company LOUWMAN MB G B.V., based in The Hague,

11. the private limited liability company LOUWMAN MB R B.V.,  
based in The Hague,
12. the private limited liability company AUTOSERVICE VAN DEN AKKER B.V.,  
based in Uden,
14. the private company with limited liability BAAN TWENTE B.V.,  
based in Zuna, municipality of Wierden,
15. the private limited liability company COR MILLENAAR B.V.,  
based in Amstelveen,
16. the private limited liability company GOMES NOORD HOLLAND B.V.,  
based in Alkmaar,
17. the private limited liability company LOUWMAN MB B.V.,  
based in The Hague,
18. the private limited liability company MERCEDES-BENZ **DEALER** BEDRIJVEN B.V.,  
based in The Hague,
19. the private limited liability company SMEETS M.B. EINDHOVEN B.V.,  
based in Heerlen,
20. the private limited liability company SMEETS M.B. VENLO B.V.,  
based in Heerlen,
21. the private limited liability company SMEETS M.B. ZUID-LIMBURG B.V.,  
based in Heerlen,
22. the private limited liability company HEDIN AUTOMOTIYE IM B.V.,  
(formerly STERN I M B.V.), based in Utrecht,
23. the private limited liability company VAN MOSSEL MB B.V.,  
based in Rotterdam,
24. the private limited liability company WENSINK AUTOMOTIYE B.V.,  
based in Apeldoorn,  
Advocate first M.H.C. Sinninghe Damsté, then C.W.M. Lieveerse, now mr. B. Kemp, Amsterdam,

d a g e d,

and

C/13/695611 / HA ZA 21-60 of

the foundation  
**CAR CLAIM FOUNDATION**,  
based in Rotterdam, e i  
s e r e s,  
Advocate Mr P. Haas of Rotterdam,

at

the aforementioned defendants.

Stichting Diesel Emissions Justice will hereinafter be referred to as SDEJ, Stichting Car Claim will hereinafter be referred to as Car Claim. Defendants 1 and 3 will hereinafter jointly be referred to as Mercedes. Defendants 4 to 12 and 14 to 24 will hereinafter be collectively referred to as the Partners.

The cases will also be separately called the SDEJ case and the Car Claim case below named.

## **1. The conduct of proceedings**

### In both cases

- 1.1. On 24 January 2024, an interlocutory judgment (the interlocutory judgment) was rendered.
- 1.2. A restorative and supplementary judgment was issued on 20 March 2024.

### In the SDEJ case

- 1.3. The interlocutory judgment held that SDEJ was admissible in its claims, except to the extent that paragraphs 10.6.13-10.6.28 rule otherwise.
- 1.4. The case has been referred to the roll of 17 April 2024 for decision on continuing proceedings. Any further decision has been stayed.

### In the Car Claim case

#### *The financing agreement*

- 1.5. By the interlocutory judgment, Car Claim was given the opportunity to still fully comply with the previously given instructions (including the provision of the financing agreement without any parts rendered illegible, except for the budget). Car Claim was further given the opportunity to delete from the financing agreement some parts of the financing agreement (which (possibly) contradict the rules to be applied), in consultation with CF ND Car, or at least to amend them in such a way that the court's objections would be overcome. Finally, Car Claim has been given the opportunity to let the court know whether it will enter into such a

amendment to the financing agreement has been agreed and to bring that amendment into question by deed.

1.6. Car Claim subsequently filed a deed of submission financing agreement, with exhibits.

1.7. Given the opportunity to do so, Mercedes subsequently filed a deed declaring amended financing agreement.

1.8. Given the opportunity to do so, the Partners concurred with the contents of Mercedes' deed.

## **2. The further assessment**

### In the Car Claim case

2.1. As announced in the interlocutory judgment, the admissibility of Car Claim will now be decided.

2.2. Car Claim, in accordance with the court's instructions, filed the entire (amended) financing agreement. It dropped articles 14.3 and 18.1, thus meeting the court's objections. According to Car Claim, article 20 of the financing agreement was unaffected and it did not amend that article.

2.3. Mercedes rightly notes that although the court, in paragraph 11.28(f) of the interlocutory judgment, mentions Article 20 of the Jitaiicieriig Agreement as a provision to be objected to, it was referring to Article 20 of the dee/nemingsovereenkomst and the Partners had also objected to it.

2.4. It can be left open whether this should have been clear to Car Claim; the court sees no reason to declare Car Claim inadmissible now in view of the court's own mistake in not adapting article 20 of the participation agreement. However, the court assumes that Car Claim will modify article 20 of the participation agreement and confirm this to the court and the parties prior to the oral hearing on the merits. To that extent, admissibility is conditional.

2.5. Mercedes points out that in the version of the financing agreement previously in dispute, Article 21 was largely blacked out and consisted of 14 paragraphs. The version of clause 21 now brought into dispute is significantly shorter and consists of eight paragraphs. According to Mercedes, by amending Article 21 and now bringing the amended provision into the proceedings instead of the original one, Car Claim acted contrary to the court's instructions and Article 21 Rv.

2.6. The court recognises that Car Claim is apparently not bringing the black-lacquered version into the proceedings but a modified version. It was free to do so. Paragraph 11.29 of the interlocutory judgment had considered:

*"The court notes that if the passages rendered unreadable to date contain provisions that impair Car Claim's independent position vis-à-vis its litigation funder or ariderally violate the guarantee requirement, no further remedy will be offered and in that case those provisions will lead to inadmissibility of Car Claim."*

In view of this recital, Car Claim was free to amend the provisions it brought into the proceedings in such a way that it could reasonably assume they would be admissible. An obligation to bring the blacklisted provisions into the proceedings unchanged and thus a prohibition on amending them cannot be inferred from the quoted recital.

2.7. In conclusion, Car Claim is also admissible in its claims, except to the extent otherwise decided in paragraphs 10.6.13-10.6.28. This admissibility of Car Claim is conditional, in that Car Claim provides the confirmation referred to in paragraph 2.4 in due time.

#### In both cases

#### **Joint**

2.8. With that, the issue is the ex officio joinder of the Car Claim case with the SDEJ case announced in paragraph 15.3 of the interlocutory judgment. To that end, it will now be decided.

#### *Orders under section 22 Rv*

2.9. The court has already considered in paragraph 10.6.10 of the interlocutory judgment that Mercedes must provide (updated) information on recalls and the objections and appeals against them. The roll call to comply with this has not yet taken place. In addition, the court needs further information to judge the admissibility of the manipulation devices present in the vehicles in question. To date, the court understands Mercedes' position to mean that although manipulation devices are present, they are necessary and therefore cannot be considered prohibited manipulation devices. In order to assess the correctness of that position, it will first have to be established what manipulation instruments are present and then assess whether these are admissible.

2.10. The basic premise of the European regulations is that a manufacturer presents a type that he intends to build in series for inspection, so that it can be determined whether this type meets the requirements of the Emissions Regulation' and then, after type approval, copies of this type are placed on the market. The court will therefore take the granted type approvals as a starting point and assume that the vehicles corresponding to these type approvals are similar to each other at least in terms of compliance with the Emissions Regulation and therefore have identical hardware and software

<sup>1</sup> 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

as far as the emission control system is concerned. Therefore, the starting point is that if the type submitted for inspection includes a defeat device (i.e. *a structural element that measures temperature, vehicle speed, engine speed, acceleration, intake depression or other parameters to actuate, modulate, delay or deactivate a component of the emission control system so as to reduce the effectiveness of the emission control system*), it is the same defeat device in each instance of the type in question.

Always to be assessed is the permissibility of a defeat device, namely whether or not it has the effect of *reducing the efficiency of the emission control system under conditions that can be expected during normal vehicle use* and whether any of the exceptions in Article 5(2) of the Emissions Regulation apply.

2.11. The court orders Mercedes, pursuant to the provisions of Section 22 Rv, to bring into the proceedings at the time of the statement of defence: all type approvals within the meaning of the Emissions Regulation as issued to it for diesel-engined vehicles marketed in the Netherlands in the period 2009-2019.

If the type approval (excluding annexes) consists of more than 25 pages, the pages showing: to which type the type approval refers, which engine type is present in these vehicles and at which time the type approval was issued and by which approval authority shall suffice. If the total number of pages of all type approvals exceeds 500, electronic submission will suffice.

2.12. Pursuant to the provisions of Section 22 Rv, the court orders Mercedes to explain its claim that a prohibited manipulation device has not been used in any of the vehicles in question and to answer the following questions for each type approval separately in the statement of reply and/or the accompanying exhibits. The previous questions as raised in the previous interlocutory judgment regarding the status of objection and appeal proceedings have been incorporated into the questions below and therefore these questions no longer need to be answered separately.

The court instructs Mercedes to clearly present these answers in the conclusion of a word or a production to be attached, preferably in an Excel summary. To the extent that answers to questions do not conveniently fit into an Excel overview, references to a separate document may be used. If the same answer is given to questions in different type approvals, reference may be made to a previously given answer.

If the total number of pages of this statement exceeds 200 or if the statement cannot be printed out at maximum A3 size, it will suffice to submit this note electronically only.

2.13. The questions to be answered by type approval are as follows.

2.13.1. *A. General*

1. Which type does the type approval refer to?
2. What engine type is present in these vehicles?
3. On what date was the type approval issued?

4. By which inspection body?
5. Which standard (Euro 5 or one of its variants Euro 6) applies to this type approval?
6. How many vehicles of this type have been sold in the Netherlands?
7. Has a recall been ordered for this type by the testing authority due to a banned manipulation tool?
  - a. If so, what changes took place in the update?
  - b. Was the order of the inspection authority objected to and/or appealed and, if so, what is the outcome or status of that objection/appeal.
8. Has there been a voluntary recall for this type to change the settings of the exhaust control system?  
If so, what changes took place in the update?

2.13.2. B. *Temperature window*

1. In vehicles complying with this type approval, is a temperature window applied?
2. If so,
  - a. What are the settings of this temperature window? At what temperature is the operation of the emission control system reduced or completely disabled?
  - b. Does this apply to the entire emission control system?
  - c. If question b is answered no, at what temperature does each of the individual components present (such as the EGR valve, the LNT (Lean NOx Trap), the SCR (Selective Catalytic Reduction), the post-heating, the particulate filter and any other parts of the emission control system) shut down or reduce their operation?
  - d. What justification is there for this?

2.13.3. C. *Hot restart*

1. Have the vehicles complying with this type approval been fitted with a 'hot restart' function, i.e. a hardware and software setting that causes the emission control system to react differently when starting a cold engine than when starting a hot engine?
2. If so,
  - a. According to this setting, when is a cold start and when is a hot start?
  - b. What differences in setting are there between cold start and hot start in terms of the operation of the emission control system?
  - c. What justifies this difference?

2.13.4. *D. Speed*

1. Do the vehicles complying with this type approval have a hardware and software setting that causes the emission control system to be reduced or inactive at certain speeds?
2. If so,
  - a. At what speed is the emission control system reduced active and to what extent, and at what speeds is it completely disabled?
  - b. What is the justification for that?

2.13.5. *E. Postheating*

1. Do vehicles complying with this type approval have a 'postheating function'?
2. If so,
  - a. Is it part of the emission control system?
  - b. Is this function active at every temperature or is this subject to a temperature window? (in the latter case, please refer to the answers to question B2).

2.13.6. *F. Other manipulation tools*

1. Are any structural components (hardware or software), other than those listed above, present that measure temperature, driving speed, engine speed, acceleration, intake depression or other parameters to actuate, modulate, delay or render inoperative any component of the emission control system to reduce the effectiveness of the emission control system?
2. If so,
  - a. at what value of the listed parameter(s) is the operation of the emission control system reduced or disabled?
  - b. What is the justification for this?

*General comment on the justification of a manipulation device*

2.14. Mercedes is invited, if it believes that a manipulation device is present but justified, to explicitly address the requirements for such justification set out by the ECJ, see CJEU 14 July 2022, ECLI:EU:C:2022:570 (GSMB v Auto trainer).

*The rest of the procedure*

2.15. Notwithstanding paragraph 15.5 of the interlocutory judgment, the cases will be referred to the roll for reply of Mercedes and the



Partners. In doing so, Mercedes should also comply with the order issued under Article 22 as mentioned in 2.13 above. After these claims have been filed, the court will determine the further course of the proceedings. In doing so, it will again consider what was considered in paragraph 15.5 of the interlocutory judgment.

2.16. Any further decision will be stayed.

### 3. The decision

The court:

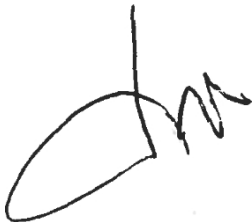
in both cases

3.1. joins Car Claim case with SDEJ case;

3.2. refers the case to the roll of 10 July 2024 for response by Mercedes and Partners respectively, with Mercedes also having to comply with the order made under section 22 Rv as mentioned in 2.13 above;

3.3. reserves any further decision.

This judgment was rendered by R.H.C. Jongeneel, N.C.H. Blankevoort and M.L.S. Kalff, judges, assisted by A.A.J. W issink, registrar, and pronounced in public on 17 April 2024.



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