role decision ORiGINEEk

AMSTERDAM COURT

private law department

Roll call decision of 12 June

2024 in joined 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,
Advocate Mr L.C.M. Berger, Amsterdam,

at

1. the company incorporated under
foreign law MERCEDES-BENZ GROUP AG,
based in Stuttgart, Germany,
3. the private limited liability company MERCEDES-
BENZ NEDERLAND 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 Vijfhuizen,
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 BEDRIJYEN 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 **AUTOMOTNE IM** B.V.,
(formerly STERN 1M B.V.),
based in Utrecht,
23. the private company with limited liability VAN MOSSEL MB B.V.,
based in Rotterdam,
24. the private limited liability company WENSINK AUTOMOTIVE B.V.,
based in Apeldoorn,
Advocate Mr B. Kemp of

Amsterdam, d a t 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.

1. The conduct of proceedings

1.1. By judgment of 17 April 2024, the cases were referred 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 that judgment under 2.13.

1.2. Subsequently, the court received the letters and e-mail messages mentioned in the Registrar's e-mail message dated 7 June 2024.

1.3. The registrar's e-mail message announced that a roll call decision would be issued today.

2. The **review**

Court hearing

2.1. As stated in the e-mail message of 7 June 2024, a pre-trial hearing of up to one half-day session will be ordered. The purpose of this will be (i) to make such arrangements with the parties or give them such instructions pursuant to Section 19 of the Dutch Code of Civil Procedure that the parties and the court have all relevant information at their disposal prior to the substantive hearing and (ii) to discuss anything else that may be of importance for the proper conduct of the further proceedings.

The order under section 22 Rv

2.2. The CJEU ruled as follows in its judgment of 17 December 2020, C-693/18, ECLI:EU:C:2020:1040 (Manipulation device in diesel engines):

*"1) Article 3(10) of Regulation (EC) No 71572007 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 the*

access to repair and maintenance information should be interpreted as meaning that software embedded in or interacting with the engine management system is a "structural component" within the meaning of this provision, to the extent that the software acts on the operation of the emission control system and reduces its efficiency.

2) Artf'kel 3(10) of Regulation No 715/2007 is to be interpreted as meaning that the term "emission control system" within the meaning of that provision covers both the technologies and the so-called exhaust after-treatment strategy which limit emissions ex-post - that is, after their formation - and the technologies and strategy which, like the exhaust gas recirculation system, limit emissions ex-ante - that is, during their formation.

3) Article 3(10) of Regulation No 715/2007 must be interpreted as meaning that an instrument which recognises parameters linked to the conduct of the approval procedures provided for in that regulation, with the aim of improving the performance of the emission control system during those procedures in order to obtain the approval of the vehicle, constitutes a 'defeat device' within the meaning of that provision, even if such an improvement may also be sporadically observed under normal conditions of use.

4) Article 5(2)(a) of Regulation no. 715/2007 must be interpreted as meaning that a defeat device, such as that at issue in the main proceedings, which systematically improves the performance of the vehicle emission control system during the type-approval procedures in order to comply with the emission limits laid down by that regulation and thereby obtain the type-approval of those vehicles, cannot fall within the exception to the prohibition of such devices laid down in that provision, which relates to the protection of the engine against damage or accidents and to the safe operation of the vehicle, even though the device helps to prevent ageing or fouling of the engine."

2.3. The CJEU in its judgment of 14 July 2022, C-128/20, ECLI:EU:C:2022:570 **(GSMB** Invest/Auto Krainer) ruled as follows:

"(1) Article 3(10) of Regulation (EC) No . 715/2007 of the EuFopean 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, read in conjunction with Article 5(1) thereof must be interpreted as meaning that an instrument which ensures compliance with the emission limits laid down by that regulation only at an outside temperature of between 15 and 33 degrees Celsius and at a driving height of less than 1 000 metres constitutes a 'defeat device' within the meaning of Article 3(10) thereof.

(2) Article 5(2)(a) of Regulation No 715/2007 must be interpreted as meaning that a manipulation device which ensures compliance with the emission limits laid down in that regulation only at an outside temperature of between 15 and 33 degrees Celsius and at a driving height of less than 1 000 metres cannot fall within the exception to the prohibition on the use of such devices laid down in that provision merely because that device uses components such as the exhaust gas recircul£ftf*'evalve, the exhaust gas recirculation cooler and the particulate filter for*

diesel vehicles unless it is demonstrated that the sole purpose of the device is to prevent acute risks of engine damage or failure due to a malfunction of one of these components which would create an actual hazard while driving a vehicle equipped with that system. In any event, a manipulation device which, under normal traffic conditions, should function for most of the year in order to protect the engine ïe *from damage or accidents and to ensure the safe operation of the vehicle, cannot fall within the exception provided for in Article 5(2)(a) of Regulation No 715/2007."*

2.4. The CJEU ruled as follows in the judgment of 14 July 2022, C-134/20, ECLI:EU:C:2022:571 (IR/Volkswagen):

[1 and 2: similar to the judgment mentioned in the previous recital].

"(3) Article 5(1) and (2) of Regulation no. 715/2007, read in conjunction with Article 3(10) of that regulation, must be interpreted as meaning that the circumstance that a manipulation device within the meaning of the latter provision was installed after the entry into service of a vehicle, by' way of repair within the meaning of Article 3(2, of 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 is irrelevant for the purpose of determining whether the use of that device is prohibited under Article 5(2)."*

2.5. The CJEU ruled as follows in the judgment of 14 July 2022, C-145/20, ECLI:EU:C:2022:572 (DS v Porsche Inter Auto and Volkswagen):

"The Court(Grand Chamber) declares for justice.

1) Article 2(2)(d) of 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 must be interpreted as meaning that a motor vehicle falling within the scope of 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, does not attain the quality which is normal for goods of the same type and which consumers may reasonably expect if, although that vehicle has a valid EC type-approval and is therefore authorised to be used on the road, it is fitted with a defeat device the use of which is prohibited by Article 5(2) of that regulation.*

2) [similar to the decision under 2 in Judgments of 14 July 2022, C-128720 and C-134/20, ECLI:EU:C:2022:570 and 571]

3) Article 3(6) of Directive 1999/44 must be interpreted as meaning that a lack of conformity consisting in the fact that a vehicle f'5 *equipped with a manipulation device the use of which is prohibited by Article 5(2) of Regulation No 715/2007 cannot be classified as a defect 'of minor importance', even if the consumer would have bought that vehicle even if the presence of that manipulation device and its operation had been known to him."*

2.6. The court deduces from the aforementioned decisions of the CJEU that even if a type-approval has been granted, a separate assessment must be made as to whether there is a prohibited manipulation device. That assessment is in any case necessary to assess whether the vehicle in question offers the quality which is normal for goods of the same type and which consumers may reasonably expect. A vehicle with a prohibited manipulation device does not meet that standard and this is not a minor defect. The assessment of whether there is one or more prohibited manipulation devices is at issue in these cases insofar as the claims are against the Partners because a claim is made against them that the delivered vehicle does not conform to the contract. But the question whether or not prohibited manipulation devices are present will also have to be assessed in this case in order to decide the tort claims against Mercedes.

2.7. The purpose of the order made in the interlocutory judgment of 17 April 2024 at 2.9-2.13.6 is to clarify the following questions for each diesel vehicle marketed by Mercedes in the Netherlands during the relevant period:

- does this vehicle contain one or more manipulation devices? if so, in what way do they affect the operation of the emission control system?
- what is the justification for this; is this a prohibited manipulation tool or not?

2.8. In doing so, the court assumed that after a type approval (indeed, what is meant here is the emission type approval, not the vehicle type approval), only vehicles equipped with an emission control system corresponding to the emission control system as present in the vehicle submitted for inspection are put on the market. Hence, the court's question referred to type approvals.

2.9. The court understands from Mercedes' letter that, according to Mercedes, vehicles with the same emission type approval do not have to have the same hardware and software as far as the emission control system is concerned. Therefore, a classification by emission type approval does not make sense, Mercedes argues. It suggests discussing at the pre-trial hearing what might be a sensible classification.

2.10. This raises the following questions:

1. Is - also in view of the Certificate of Conformity to be issued for each vehicle - Mercedes free to market vehicles with a particular emissions type approval and to fit them with hardware and software that differs from the hardware and software that was present in the tested vehicle on the basis of which the emissions type approval was granted? If so, under which provision(s) is this permitted?

2. If emission type approval does not provide a meaningful classification, what alternative classification would be useful in order to answer the questions listed in 2.7 above?

2.11. Mercedes raised questions about the various functionalities mentioned in the order issued under Section 22 Rv, some of which, according to her, were not addressed in the party debate. These functionalities have been mentioned in other cases, so it seems appropriate to the court to explicitly ask about them in this case as well. This makes no difference, as the final question asks about all manipulation tools not yet mentioned. To the extent that a functionality is not present, the question can easily be answered no.

2.12. Mercedes also seeks clarification on whether it is expected to do more than explain the emission strategies that the CBA identified as IMI. The answer to this can be inferred from paragraph 2.9 of the judgment of 17 April 2024: *"In addition, the court needs further information in order to be able to rule on the admissibility of the manipulation-instruments."* The court will not and cannot rely on the CBA's assessment because - as can be inferred from the case-law of the CJEU - the court will have to make its own judgment on the presence and admissibility of manipulation tools.' This requires the court to know what manipulation tools are present and how they work so that their admissibility can be assessed.

2.13. Mercedes seeks confirmation that it may limit its statement of reply and answer to the injunction granted under Section 22 Rv to those vehicles whose interests the court found bundleable.

The court considered the following in the judgment of 24 January 2024:

"10.6.9. The parties further debated whether and, if so, which "Affected Vehicles" (diesel vehicles covered by the collective claims of SDEJ and Car Claim) would also be "Affected Vehicles" (diesel vehicles with an IMI). In this context, the recalls ordered (well) by the CBA and the objections and appeals lodged against them by Mercedes-Benz Group AG were discussed, among other things. With regard to the ***series*** *of (engines of) diesel vehicles with IMIs, as identified by the CBA, the presence of II IIs can (as long as it has not been ruled otherwise on appeal) be assumed. Thus, there is bundling of the interests involved in' the* ***actions*** *brought which can promote efficient and effective legal protection for the benefit of interested parties. The purchasers* ***and lessees*** *of those diesel vehicles are in the same factual* ***position and*** *have an interest in collective action on their behalf. Moreover, in assessing whether IMI exists, it is possible to differentiate by (for example) type of vehicle, model and/or uf't version. The argument that many thousands of software versions and calibrations have been used for the various diesel vehicles and vehicle types does not preclude bundling, as it is apparently the case that the CBA has identified* ***series of*** *vehicles equipped with (the same) IMI. The owners7lessees of all vehicles* iif'I *such a* ***series*** *are thus in an equal* ***position*** *and their interests* r u *therefore bundleable."*

[1] See ECJ EU 14 July 2022, ECLI:EU:C:2022:572, answering the first question.

From this consideration, it can be inferred that the defence that many thousands of software versions and calibrations were used for the different diesel vehicles and vehicle types, so that the interests are not bundleable, has been rejected because the CBA recalls make it clear that **at least** series of vehicles were equipped with the same IMI according to the CBA. However, it cannot be inferred from this that bundleability is limited to vehicles recalled by the CBA. Bundleability applies to all vehicles equipped with the same manipulation device. Hence, the answer to the questions raised by the court also relates to all diesel vehicles marketed by Mercedes in the Netherlands during the relevant period. In other words, Mercedes may submit its conclusion of reply and the answers to Art. 22 injunction is not limited to the vehicles that are the subject of a recall by the CBA, it covers all diesel vehicles placed on the market during the relevant period, examining which of those vehicles are fitted with the same manipulation device and whether or not it is a permissible manipulation device.

2.14. Mercedes further argued that it has generally disputed that manipulation tools are present, but that if anything, those manipulation tools are justified. In this regard, the court notes that at least when discussing the coolant temperature control functionality (see, inter alia, Partial Statement of Reply 'Phase 2', on Admissibility and Applicable Law in Car Claim, no 117), Mercedes noted that, according to the CBA, this was a permissible functionality in some cases and an impermissible one in others. This at least recognised the presence of a manipulation device in certain cases, although indeed Mercedes consistently disputes that this would be an impermissible manipulation device.

Choral procedure

2.15. In the e-mail message dated 7 June 2024, the parties were asked to state their absences for the month of July 2024 on today's roll. The date of the pre-trial hearing will be communicated by e-mail as soon as possible.

2.16. The cases will be referred to the roll on 26 June 2024 for the taking of a deed by Mercedes to answer the questions as mentioned under 2.10; the plaintiffs will be able to respond to this at the pre-trial hearing and may use pleading notes for this purpose, which will be added to the file.

2.17. The cases are referred to the single-member chamber for the pre-trial hearing. Mr R.H.C. Jongeneel will be appointed as examining magistrate. During the pre-trial review, there will be no opportunity for the parties to present their arguments; the pre-trial review will serve only to discuss the further course of the proceedings. Insofar as no agreement can be reached with the parties on the further course of the proceedings, the supervisory judge will take all decisions necessary for the proper conduct of the proceedings, pursuant to article 19 paragraph 2 Rv. The cases will then be referred back to the full court for further hearing and decision.

2.18. Any further decision will be stayed.

3. The **decision**

The court:

<u>in both cases</u>

3.1. refers the matters to the roll of 26 June 2024 for the taking of a deed by Mercedes to answer the questions listed under 2.10;

3.2. refers the cases to the single-member chamber for a pre-trial hearing;

3.3. Appoints R.H.C. Jongeneel as supervisory judge;

3.4. reserves any further decision.

This roll call decision was issued by mr. R.H.C. Jongeneel, mr. N.C.H. Blankevoort and mr. M.L.S. Kalff, Judges, assisted by A.A.J. Wissink, Registrar, and pronounced in public on 12 June 2024.