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Excerpt

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role decision

AMSTERDAM COURT

private law department

Roll call decision of 31 July 2024

in the 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 J.D. Edixhoven of Amsterdam,

at

1. the foreign-law company

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 limited liability company

ASV AUTOMOBILE COMPANIES 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 limited liability company

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 limited liability company

JOB 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 NORTH 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 COMPANIES B.V.,

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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. SOUTH-LIMBURG B.V.,

based in Heerlen,

22. the private limited liability company

HEDIN AUTOMOTIVE 1M B.V.,

(formerly STERN 1M 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 AUTOMOTIVE B.V.,

based in Apeldoorn,

Advocate Mr B. Kemp of Amsterdam,

D e d a g e,

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 be jointly 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 roll call decision dated 12 June 2024, it was stipulated that Mercedes would be allowed to take a deed on the roll of 26 June 2024 and a pre-trial hearing would be held on a date (then) yet to be determined, on which occasion the plaintiffs would be allowed to respond to that deed.

1.2. Mercedes deeded on 26 June 2024.

1.3. By email message dated 8 July 2024, the Registrar wrote to the parties, so far as relevant here, as follows:

"Following the rolling decision of 12 June last, Mercedes entered a deed on 26 June last. On behalf of SDEJ and Car Claim, Mr Edixhoven objected to this deed by letter dated 30 June last on the grounds that it is too voluminous and discusses issues beyond the court's question.

By letter dated 5 July, Mercedes requested that an external party make both a recording and a verbatim transcript of the pre-trial hearing at its expense. It further announced the presence of a German lawyer on behalf of Mercedes, interpreters and some interested parties and asked whether the room space would be adequate for this purpose.

The court rejected the request to refuse or partially disregard Mercedes' deed. While Mercedes has not strictly limited itself in its deed to answering the questions raised, it also discusses issues relating to the grounds on which the court's order under section 22 Rv is based. Mercedes correctly signals that no party debate has yet taken place on those grounds. The court will still provide an opportunity for that, starting with a response on this point from SDEJ and Car Claim at the pre-trial hearing."

1.4. A single pre-trial hearing was held on 12 July 2024, the minutes of which will be filed.

2 The review

In the Car Claim case

Productions 143-151 of Car Claim

- 2.1. Mercedes objected prior to the pre-trial hearing - and again at that hearing - to the fact that Car Claim brought in exhibits 143-151 by deed without any explanation, so that it was not clear to it what purpose those exhibits served. Car Claim responded by stating that the productions were largely known to Mercedes. Moreover, it pointed out that this was in response to the court's email message of 8 July 2024.
- 2.2. Article 2.9 of the National Rules of Procedure for Civil Subpoena Cases at the Courts provides, inter alia, the following:

"The pleading to which these exhibits and supporting documents are attached shall state the number and relevance of the document to the proceedings, and shall also identify the relevant passages in those documents.

A summary of the submissions with a brief indication of their content shall also be provided."

It can be inferred from this provision that even if a party brings only productions into the proceedings, it must make clear to the other party and the court the relevance of those productions.
- 2.3. The court does not consider the lack of an explanation of the productions brought into the proceedings to be such a serious breach of the due process that the productions should be disregarded. However, the adversarial principle does require that Mercedes and the Partners still be allowed to respond to the productions. The Car Claim case will be referred to the roll for that purpose.

In both cases

Who assesses whether IMI exists in a civil case

- 2.4. Mercedes argued that the regulation in the Emissions Regulation, seen against the background of the regulation of type approvals as a whole, means that the Dutch civil court is not entitled to its own judgment on the question whether or not there is a prohibited/illegal manipulation device (hereinafter also referred to as IMI) in vehicles for which the type approval was issued by the competent authority in another member state. Since the type approval took place in Germany, it is up to the German administrative court to ultimately rule on this, Mercedes said. The prohibition on double review precludes the Dutch civil court from independently determining whether IMI exists.
- 2.5. In Mercedes' view, it cannot be deduced from the ECJ's ruling in C-145/20, ECLI:EU:C:2022:572 (DS v Porsche Inter Auto and Volkswagen) that even if a type approval has been granted, the existence of an IMI must be assessed independently and the civil court must make its own assessment. The CJEU was not asked who should establish the presence of IMI. The CJEU has not ruled on that to date.

- 2.6. SDEJ pointed out that Mercedes had previously argued that a decision of the German administrative court would not bind the Dutch court. At the hearing, Mercedes stated that it had changed its mind.
According to SDEJ, the ban on double review does not envisage civil enforcement, nor is administrative review reserved solely to the CBA and subsequent objection and appeal bodies. Moreover, waiting for the German court would take too long.
- 2.7. It was announced at the pre-trial hearing that this issue will have to be further explored in a deed exchange. The court hereby requests the parties to address the following questions.
1. What significance does it have that the DS v Porsche Inter Auto and Volkswagen judgment involved a temperature window, which, according to paragraph 39 of the CBA, was a permissible manipulation device, while the CJEU does not refer the questioning court to the CBA's assessment, but, in the operative part under 2, provides the criteria by which it can be determined whether or not the temperature window is a permissible manipulation device?
 2. Is it conceivable that a vehicle fitted with a prohibited manipulation device and type-approved in its country of origin may not be banned from the roads in other Member States, while on the other hand it may be considered that this vehicle does not offer the quality which is normal for goods of the same type and which consumers may reasonably expect?
 3. Is the decision of the type-approval authority (or administrative law judge thereof) binding in civil disputes between buyers and sellers as to whether a prohibited defeat device (IMI) is present in a vehicle? And if so, does the civil court decide what the legal consequences are? If not, in what way should it be determined in civil proceedings whether or not a prohibited manipulation device is present and what are the legal consequences thereof?

Limits of the legal battle

- 2.8. Mercedes argues that the court is not at liberty to ask questions about functionalities that were not raised in the proceedings, because doing so would take it outside the bounds of the legal dispute. For the same reason, it objects to an open-ended closing question about possible manipulation tools other than the previously explicitly identified functionalities.
- 2.9. SDEJ has argued that the subject matter of the legal dispute is whether prohibited manipulation devices are present in Mercedes' vehicles and therefore the court's questioning does not go beyond the bounds of the legal dispute. It therefore considers an open final question justified.
- 2.10. If, after the deed change, the court stands by the premise that it must make its own assessment as to whether prohibited manipulation devices are present, it will adjust the order granted under section 22 Rv in the light of the debate on that issue after the interlocutory judgment of 17 April 2024. The possible outlines are outlined below. The parties will be allowed to respond to them in their record to be taken and will then also be able to address the question of whether or not such a modified order would go beyond the bounds of the legal dispute.
- 2.11. In the rolling decision of 12 June 2024, the court asked Mercedes the following questions:

*"Is Mercedes free - also in view of the Certificate of Conformity to be issued for each vehicle - 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?"*

2.12. In response to the first question, Mercedes argues that it is free to market vehicles with a particular emissions type approval and 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, as long as:

- i. this does not involve a different 'vehicle type in terms of emissions': or
- ii. the deviation is covered by a modification ('revision' or 'extension') of the emission type approval (where a 'revision' is reflected only in the documentation of the emission type approval and an 'extension' is also reflected in the emission type approval number).

2.13. In doing so, Mercedes notes that a distinction should be made between vehicles with emission standards Euro 5, 6a or 6b on the one hand ("Old Generation") and vehicles with emission standards Euro 6c, 6d-TEMP or 6d on the other hand ("New Generation"). In Old Generation, an emissions type approval could cover vehicles that could differ between themselves in terms of weight, engine and vehicle characteristics. This is detailed in Mercedes' deed.

The hardware and software of the emission control system needed to be listed only in outline, or not at all, in Appendix 3 of Annex I to Regulation (EC)

692/2008. Therefore, manufacturers were free to market vehicles under an emissions type approval with hardware and software different from the hardware and software in the tested vehicle, Mercedes said.

A 'revision' of a type approval occurred when data in the information package provided with the application for an emission type approval had changed.

Most software and hardware changes for Old Generation vehicles

did not require a modification of the information package. Therefore, a revision did not result in a different type-approval number. Under the Framework Directive, an 'extension' occurs when data in the information package has changed AND:

- a. additional inspections or new tests are necessary;
- b. any information on the EC type-approval certificate, with the exception of its attachments, has changed;
- c. under the regulatory acts applicable to the approved vehicle type, new requirements come into force.

A revised emission type-approval certificate was then issued with an extension number.

2.14. Which emission strategies a vehicle applies follows from the software programme and calibrations. but these strategies were not defined anywhere in the past, according to Mercedes. Nor was there any need or reason to do so - given the limited information requirements in the legislation and the usual practice at the time.

2.15. For New Generation vehicles, Regulation (EU) 2016/646 of 20 April 2016 introduced the requirement to provide detailed information to the type-approval authority on a vehicle's 'base emission strategy ("BES")' and 'auxiliary emission strategy ("AES")'. Almost all New Generation vehicles have been type-approved on the basis of AES/BES documentation provided.

Manufacturers must now inform the relevant type-approval authority about changes to the hardware and software of the emission control system to the extent that they are modifications lead to changes in the AES/BES documentation. This usually leads to a 'revision' of the type approval.

Even if vehicles are considered by emission type approval and 'extensions' thereof, there may be significant variations between vehicles in terms of the

installed hardware and software of the emission control system. This will have an effect on the certificate of conformity.

- 2.16. The order as issued by the court in the judgment of 17 April 2024 would, according to Mercedes, mean that the questions would have to be answered by parameter set, which would result in approximately 2,600 groups of vehicles, with each parameter set having to be manually checked for the presence of the intended calibrations in the 35,000 to 45,000 parameters programmed, followed by emission tests to determine the extent to which the calibration, in combination with the physical properties of the vehicle, reduces the effectiveness of the emission control system. This is practically impossible, according to Mercedes.
- 2.17. With regard to the Citan model with an engine developed by Renault and the X-Class with an engine developed by Nissan, Mercedes argues that it does not have the software calibrations of the relevant emission control systems.
- 2.18. Mercedes' explanation of the possibilities of marketing vehicles with different hardware and software for the emission control system within a given emission type approval was not disputed by SDEJ and Car Claim. The court's assumption that vehicles with the same emission type approval are equipped with identical hardware and software does not appear to be correct. This also means that bringing the type approvals into the equation is irrelevant to the assessment and cannot be used as an ordering principle either. This will in any case have to lead to an amended order under Section 22 Rv.
- 2.19. However, SDEJ did contest, also on behalf of Car Claim, that Mercedes could not comply with the court order because it would be practically impossible to do so. According to claimants, Mercedes' argument boils down to the fact that it would not have properly documented for any of its cars up to and including Euro 6b exactly what software strategies it would have installed. However, Mercedes can be expected to have its records in order. Moreover, the plaintiffs dispute that Mercedes would not know which manipulation tools it has installed.
- 2.20. The practical enforceability of the order as granted can be disregarded, as the court will grant an amended order. The parties may address in their deed whether an order with the features as below is practicable.

Reduced operation versus effectiveness of emission control system

- 2.21. Mercedes argues that the mere fact that a certain functionality leads to a reduced performance of a certain component of the emission control system in certain circumstances does not mean that the effectiveness of the emission control system (as a whole) is reduced, e.g. if another component is enabled correctly in the given circumstances.
- 2.22. This can be included when answering the questions to be asked.

Principles of order ex art 22 Rv

- 2.23. Still correct is the court's premise that there are functionalities in the software of at least some of the vehicles that could affect the effectiveness of the emission control system and thus potentially be a prohibited manipulation device. These are at least the functionalities that the CBA is investigating (or has investigated) or that were grounds for the CBA to issue a recall. They are additionally at least those functionalities that may affect the effectiveness of the emission control system that have been found in third-party investigations of vehicles marketed by Mercedes.

Finally, they could be functionalities not known to the CBA and also not found in third-party studies. 2.24. Also, the purpose of an amended injunction remains the same as the purpose of the injunction granted in the interlocutory judgment of 17 April 2024 at 2.9-2.13.6, namely 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 defeat devices that reduce the effectiveness of the emission control system within the meaning of Article 2(10) of the Emissions Regulation?
- If so, is a ground present as mentioned in Article 5(2) of the Emissions Ordinance, so that the prohibition given there does not apply?

Alternative format

- 2.25. Regarding the court's second question, namely what alternative classification might be useful, Mercedes replied that this classification should be based on individual functions with their calibrations. This is also in line with Mercedes' working method with the CBA. The series of vehicles that are equipped with an (identical) IMI according to the CBA should be the first starting point for a classification of vehicles. Mercedes detailed this proposal in its deed.
- 2.26. SDEJ, also on behalf of Car Claim, objects to this proposal on the grounds that Mercedes does not want to provide information on functions not listed by the CBA or interest groups. There is no reason for such a curtailment. Mercedes knows exactly what manipulation tools it built in, SDEJ and Car Claim said. SDEJ also included a proposal in its pleading presented at the hearing.
- 2.27. SDEJ's proposal chooses as a starting point the recall flags in Mercedes' records. Mercedes should provide insight into what parameters were decisive in assigning a recall flag and what search criteria Mercedes applied to do so. The further proposal builds on this. Deviating from Mercedes' proposal (and the court's order in the 17 April 2024 ruling), SDEJ proposes to also ask about the functions that Mercedes modifies in a recall and how this change the operation of the emission control system.
- 2.28. Assuming that the court will have to assess the functionalities (which has not yet been decided, see paragraphs 2.4-2.7), an order taking the functionalities as the starting point is obvious. There is no substantial difference with the approach proposed by SDEJ; the functionalities labelled IMI by the CBA lead to a recall and thus to a recall flag.
- 2.29. In these proceedings, SDEJ seeks, inter alia, a declaratory judgment that the affected vehicles do not comply with the agreement. If there is an IMI, it is therefore relevant whether or not this has been or can be remedied with an update. Therefore, the court will also ask questions about updates.
- 2.30. The outline of a revised order under Section 22 Rv could therefore be:
1. Questions aimed at gaining an overview of the functionalities found in one or more of the Mercedes vehicles investigated by the CBA or other researchers that may be a manipulation tool.
 2. Questions aimed at getting an overview of the different calibrations of each of those functionalities,

3. For any combination of functionality and calibration: whether any of the cases listed in Article 5(2) of the Emissions Regulation, namely cases where a manipulation device is not prohibited, occur.

4. If an update is available: which functionalities and/or calibrations will be removed and/or modified and a description of the functionalities and their calibrations in the situation after the update.

5. Questions aimed at getting an overview of the vehicles in which this functionality and its various calibrations occur.

2.31. In this regard, the court notes that to the extent Mercedes has marketed vehicles whose engines were produced by Renault or Nissan, it bears responsibility as the manufacturer for complying with the Emissions Regulation. This means that Mercedes can be expected to obtain the information it needs to comply with the order from Renault or Nissan if necessary.

2.32. The parties will have an opportunity to comment on these outlines of a revised order.

SDEJ and Car Claim are given the opportunity (partly in response to the expert reports already filed) to state the functionalities found on examination of Mercedes vehicles that may be a prohibited manipulation device.

Final question

2.33. The parties differ on the admissibility of an open final question. In the court's preliminary opinion, it does not thereby step outside the bounds of the legal dispute, as the core of the dispute is whether IMIs are present in Mercedes' vehicles.

It can be assumed that Mercedes, as the manufacturer, knows in every detail which emission control system is fitted in each of the vehicles produced. SDEJ and Car Claim do not have access to that data. Therefore, Mercedes can be expected to provide sufficient factual data to justify its challenge (to the effect that there are no IMIs) in order to provide the claimants with leads for possible proof. In that light, there can also be no objection to an order under Section 22 Rv, even if that would have the effect of requiring Mercedes to report a functionality that has not been previously discussed between the parties, but which could potentially be an IMI. The parties may respond to this preliminary judgment in their deed.

The 6c, 6d-TEMP and 6d vehicles

2.34. According to Mercedes, the CBA has not issued a recall order in respect of any New Generation vehicle (Euro 6c- 6d-TEMP and 6d). SDEJ and Car Claim have never claimed that any New Generation vehicle contains an IMI. Moreover, using the AES/BES documentation, the CBA has fully tested whether these vehicles contain a manipulation device and, if so, whether there is justification for this. These vehicles can therefore be disregarded, according to Mercedes.

2.35. If the injunction in respect of New Generation were to be upheld, Mercedes argues that it has compelling reasons not to disclose the documents relating to it (section 22(2) Rv), as the information is business confidential. It will therefore seek an injunction against disclosure (section 28(1)(b) Rv).

2.36. SDEJ argues that the overviews of the number of vehicles flagged for recall by Mercedes itself show that these include 6c vehicles. There is therefore no reason to exclude the 6c vehicles from the order under Section 22 Rv.

2.37.

Mercedes has claimed that none of its 6c vehicles are covered by a recall. SDEJ disputes that, based on the recall flags. At this stage, that can be left open. If the order under Section 22 Rv were to be shaped as shown under 2.30, to the extent that there are manipulation devices in the 6c vehicles, Mercedes will have to declare them. In that case, it is possible that the answers to the follow-up questions (in brief, the questions on the calibrations and on the justification of the manipulation device) will provide business-sensitive information. In that case, Mercedes may invoke the rule in section 22(2) Rv and request a communication ban as provided for in section 28 Rv. There is no reason to make a decision on this at this stage.

Joint submissions by SDEJ and Car Claim; exhibits filed

2.38. The cases are heard together. From the fact that sometimes one of the claimants states that it takes a certain position also on behalf of the other claimant, it can be deduced that claimants consult with each other and coordinate their input or divide tasks. Claimants also sometimes refer to each other's productions.

The court will consider the positions taken by the plaintiffs and productions brought into the proceedings as valid in both cases unless the parties expressly state otherwise.

Further proceedings

2.39. The matter is now referred to the roll for each of the parties to take a deed. The parties will not be given an opportunity for a reply deed. The court will then decide whether to uphold and (if upheld) modify the order under Section 22 Rv. It is agreed with the parties that thereafter, if the court upholds an order under section 22 Rv (whether amended or not), after Mercedes has complied with it, SDEJ and Car Claim will be given an opportunity to supplement and update their subpoena, after which Mercedes and the Partners will be able to file a reply brief. An oral hearing will then take place. The court has already indicated that this will not be before the second quarter of 2025. At the moment, the further course of these proceedings is not sufficiently certain to actually schedule a hearing already. As soon as this is in sight, dates of prevention will be requested.

2.40. Any further decision will be stayed.

3 The decision

The court:

- 3.1. refers the matter to the roll of **28 August 2024** for deed on the part of Mercedes and the Partners responding to Car Claim's Exhibits 143-151 (see paragraph 2.3 above);
 - refers the cases to the roll of **28 August 2024** for deed by all parties stating
 - 1) the question of who assesses whether IMI exists in a civil case (see paragraphs 2.4- 2.7);
 - 2) the outline of an amended order to be issued under section 22 Rv (see paragraph 2.30 above);
 - 3) the question of whether or not a general final question thereby goes beyond the bounds of the legal dispute (see section 2.33);

In addition, the claimants may respond in their deed, if they so wish, to what has been considered under 2.38;

3.2. refers the cases back to the Plenary Chamber for further consideration and decision from the time the said acts were taken;

3.3. reserves any further decision.

This roll call decision was issued by R.H.C. Jongeneel, assisted by A.A.J. Wissink, Registrar, and pronounced in public on 31 July 2024.