ECLI:NL:RBAMS:2024:6884

Authority	Amsterdam Court
Date of decision	13-11-2024
Date of publication	19-11-2024
Case number	C/13/686493 / HA ZA 20-697
Areas of law	Law of obligations Special
characteristics	First instance - plural Interim ruling
Content indication	Mass tort case. The court must assess whether there are prohibited manipulation devices (so-called tampering software) in diesel engines. This is not the exclusive jurisdiction of the Kraftfahrzeug Bundesambt or the German administrative courts for the claims at issue in these proceedings. Adjusted order under Art 22 Rv to clarify contentions regarding the presence of manipulation devices. To this end, the court asks a number of questions.
Findings	Rechtspraak.nl

Excerpt

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judgment

AMSTERDAM COURT

private law department

Judgment of 13 November 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,

9. the private limited liability company

VAN DRIEL AUTOBEDRIJF B.V.,

established 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.,

established in Alkmaar ,

17. the private limited liability company

LOUWMAN MB B.V.,

based in The Hague ,

18. the private limited liability company

AGAM B.V. (formerly Mercedes-Benz Dealer Bedrijven B.V.), based in

s-Gravenhage ,

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., also as general successor in title to Beheersmaatschappij Wüst B.V., which in turn was general successor in title to Auto Wüst Dordrecht B.V., Auto Wüst Hellevoetsluis B.V. and Auto Wüst 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, 5, 9 to 12 and 14 to 24 will hereinafter be collectively referred to as the Partners.

1 The conduct of proceedings

1.1. The conduct of the proceedings is evidenced by:
- the interlocutory judgment of 17 April 2024, ECLI:NL:RBAMS:2024:3630, which contains an order under section 22 of the Code of Civil Procedure (Rv),
- Mercedes and Partners' request for a pre-trial hearing,
- Roll call decision of 12 June 2024, ECLI:NL:RBAMS:2024:3631,
- Mercedes' deed after roll call decision of 12 June 2024,
- the minutes of the single pre-trial hearing held on 12 July 2024 and the documents mentioned therein,
- The rolling decision of 31 July 2024, ECLI:NL:RBAMS:2024:5486,
- SDEJ's bill of information order, with exhibits,
- Car Claim's deed release information order,
- Mercedes' deed after roll call decision of 31 July 2024, with exhibits,
- the deed of release of additional exhibits and continuation third stage of Partners,
- The act of statement of additional production, by SDEJ,
- the deed of release production, of Car Claim,
- Mercedes's deed release productions 129 and 130,
- the deed of release of additional exhibits, by the Partners.

1.2. In the roll call decision of 31 July 2024, ECLI:NL:RBAMS:2024:5486, the court referred the case to the roll for deed of all parties ruling on

1) The question of who assesses in a civil case whether there is an illegal manipulation device (hereinafter IMI);

2) the outline of an amended order to be issued under section 22 Rv;

3) the question of whether or not a general closing question thereby goes beyond the bounds of the legal dispute. Mercedes and the Partners were also allowed to comment on Car Claim's Exhibits 143-151.

1.3. Car Claim joined SDEJ in its deed and requested that SDEJ's deed in its case be considered repeated and interposed.

1.4. With regard to questions 1 and 3 mentioned under 1.2, the Partners refer to Mercedes' position and contentions in this regard in its deed.

1.5. The court discusses below each of the questions raised in the rolling decision in the light of the deeds taken by the parties and - to the extent relevant to this decision - the exhibits submitted.

2 Who assesses whether IMI exists in a civil case

The position of SDEJ and Car Claim

2.1. SDEJ and Car Claim argue that the civil court has jurisdiction to rule that there is an IMI. To this end, they argue the following.

- The civil court is not bound by the judgments of the administrative court, either in the Netherlands or in Germany. Dutch law applies to these proceedings, and therefore Dutch

civil procedural law. A core principle of Dutch procedural law is the free evidence doctrine (Article 152 Rv); the court is free to value evidence. Even if a decision of the administrative court has formal legal force, only the legal validity and legality of the decision applies, but not the substantive considerations underlying the decision.

- Some of the KBA decisions (not even all) involve an order to Mercedes Benz Group AG to develop a software update for certain vehicles and to remove IMIs. The operative part contains no determination of what functionality would constitute an IMI or why. Waiting for the opinion of the Verwaltungsgericht does not make sense for this reason either.
- In its judgment of 24 July 20231 , the Bundesgerichtshof ruled in a case of sjoemeldiesel That the civil court should not stay the case pending the opinion of the administrative court because **(i)** it does not involve proceedings between the same parties,
(ii) the judgment to be expected from the administrative judge does not concern the civil lawfulness of the function in question, but the correctness of the contested administrative act,
(iii) a civil assessment of the legality of a manipulation device does not defeat the purpose of type approval.

- Union law does not provide for restrictions on the free theory of evidence. The principle of procedural autonomy is limited only by the principles of effectiveness and equivalence. No limitation can be derived from the type-approval system. That would require a specific provision, but there is none.
- Mercedes' reliance on the prohibition of double review does not stand up because the judgment of the civil court does not interfere with the emissions type-approval system. A judgment in civil proceedings on damages in relation to IMIs has no implications for the emissions type-approval system, including the validity of type-approval authority decisions.
- From the Inter Auto judgment2 , the court correctly inferred that it was the duty of the civil court is to pass judgment on the (il)legality of manipulation devices. Indeed, in this judgment, the CJEU gave an opinion on the illegality of certain features (including a thermal window and an altimeter) after the civil court asked for clarification on this.
- Mercedes argues that it would not be possible to infer from this judgment that the civil court would have jurisdiction over a judgment on the matter. The CJEU would not have ruled on it until now. However, the ECJ did not need to, as this competence follows from the systematics of European law.
- In his opinion, the A-G appoints the jurisdiction of the referring civil court even explicitly. On the assumption that an IMI is present, he writes: "it is for the referring court to ascertain whether that assumption is justified".
- The court asked whether it was conceivable that a vehicle with an IMI registered in the country of origin has been type-approved, may not be kept off the roads in other countries, while on the other hand, it may be considered, in summary, as not meeting the requirements for type-approval. Until the introduction of Regulation 2018/858, the monitoring of emissions approvals was the exclusive competence of the national authority that had granted the type approval. The introduction of Regulation 2018/858 introduced a split between type-approval authorities and supervisory authorities. If both tasks are placed in one body then strict Chinese walls should be implemented. In the Netherlands, the Inspectorate for the Environment and Transport (ILT) is the competent regulator. The Dutch regulator ILT is not well placed to meet its mandatory test quota due to capacity problems. That circumstance underlines the need for civil enforcement.
- The question of whether the decision of the authority that issued a type approval (or administrative law rulings thereon) is binding in civil disputes between buyers and sellers as to whether an IMI is present in a vehicle SDEJ and Car Claim deem negative in the foregoing.
- On the court's question of how to determine in civil proceedings whether an IMI is present and what the legal consequences of this are, SDEJ and Car Claim reply that this determination is made on the basis of available evidence such as expert findings,

findings of type-approval authorities (with free evidentiary force) and information to be provided by the defendants on the nature of built-in IMIs. In determining the legal consequences, the general principles of Dutch law, as well as the relevant case law of the CJEU, such as, for example, the QB Mercedes judgment, can be relied upon.3

2.2. In response to Prof Dörr's report submitted by Mercedes below, SDEJ and Car Claim argue that the validity of the type approval is not at issue in the civil proceedings, so that they also do not violate type approval law. They further point out that in DS v Porsche Inter Auto and Volkswagen, the CJEU "overruled" the CBA's view.

Mercedes' position

2.3. According to Mercedes, the civil court has no jurisdiction to rule on the question of whether IMI exists. It argues the following.

The approval procedure for the authorisation of motor vehicles within the EU in initially the Framework Directive and now the Framework Regulation is fully harmonised within the EU. Once approved, a vehicle should be authorised throughout the EU based on the principle of mutual recognition. If, in civil proceedings, courts could (re)assess the correctness of relevant decisions of the competent regulator or impose different emission requirements on approved vehicles, this would go against the maximum harmonisation explicitly pursued by the EU legislator.
The 2007 Emissions Regulation aimed to harmonise emission requirements for type approval according to the system established to ensure the free movement of goods. The essence of this system maintained by the 2018 Framework Regulation is to ensure free access of type-approved vehicles to other European member states based on the passport mechanism. Under that mutual recognition of type-approvals, no (additional) assessment of a vehicle's compliance with emission requirements takes place at national level. Under the Framework Directive, the power to determine whether vehicles met emission requirements rested exclusively with the approval authority of the Member State of origin. EU type-approval is granted by the approval authority of the country of origin. Under the Framework Regulation, this has changed as the "market surveillance authority" has been created as a new enforcement body. The powers of the market surveillance authority are regulated in the Framework Regulation. In the Netherlands, only the ILT (and before that the RDW), as the market surveillance authority designated in the Netherlands, has the power to ban Involved Vehicles with CBA type approval from the road. Only if a vehicle is nevertheless found not to comply with the applicable regulations (or poses a serious danger) can the free marketability of that vehicle be restricted. The system of the Framework Directive and Framework Regulation prescribes in detail under which conditions and according to which procedures the correctness of a type approval can be challenged, and the way in which measures can be taken to bring vehicles into compliance with emission requirements. Beyond this restriction provided for in the Framework Regulation, however, approved motor vehicles cannot be banned from the road. On the fully harmonised regime laid down in the Framework Regulation, Member States may not issue additional rules, including through (for example) civil court rulings.

According to the recital preceding the framework directive, single market rules should be transparent, simple, consistent and effective, providing legal certainty and clarity for both businesses and consumers.

The prohibition of double review means that civil courts are not at liberty to duplicate the review of the CBA. Products that have already been examined and assessed on the basis of harmonised procedures provided for in Union rules for gaining access to European markets may not be subject to re-evaluation in another Member State.

2.4. According to Mercedes, a relevant decision of the CBA as the competent authority is therefore binding in civil disputes between buyers and sellers as to whether a vehicle contains an IMI. In this

procedure, the dictum of the following four types of decisions of the CBA relating to the Vehicles Affected should be taken as a starting point:

i. emissions type approvals, the dictum of which is that relevant vehicles do not contain IMI;

ii. IMI-related recall orders, the dictum of which is that the vehicles in question do contain IMI;

iii. approvals of mandatory software updates following a recall order, the dictum of which is that vehicles as updated no longer contain an IMI; and

iv. the approvals of the voluntary software updates, the dictum of which is that vehicles as updated do not contain IMI.

2.5. According to Mercedes, if an IMI is present according to the CBA, it is left to the internal legal order of the Member States to determine what civil law consequences are attached to it, see the ECJ ruling in QB v Mercedes.4

"Consequently, the answer to the fifth and sixth questions must be that European Union law must be interpreted to the effect that, in the absence of relevant provisions of European Union law, it is for the Member State concerned to lay down, in its national law, the rules governing compensation for damage actually caused to the purchaser of a vehicle fitted with a prohibited manipulation device within the meaning of Article 5(2) of Regulation No 715/2007, such compensation being proportionate to the damage suffered."

2.6. According to Mercedes, the ECJ ruling in DS v Porsche Inter Auto and Volkswagen5 does not alter the foregoing. In that case, the referring court wanted to find out from the CJEU whether the temperature window installed by Volkswagen with a software update could be a permissible manipulation device under the exception of Article 5(2)(a) Emissions Regulation and, if not, how consumers are protected against such an impermissible device under Directive 1999/44/EC. The CJEU ruled that a temperature window, which under normal circumstances must operate for most of the year to protect the engine from damage or failure and to ensure the safe operation of the vehicle, cannot fall under the exception of Article 5(2)(a) of the Emissions Regulation. In addition, the CJEU ruled that a vehicle equipped with such an unauthorised manipulation device does not possess the quality which is normal for goods of the same type and which consumers may reasonably expect (even if the vehicle still has a valid type-approval), so that the seller is then not entitled to rely on the rebuttable presumption of evidence of Article 2(2) of Directive 1999/44/EC.

2.7. According to Mercedes, the CJEU did not rule on the binding effect of relevant decisions of the competent supervisor under the Framework Directive and Framework Regulation. Nor has the referring court referred any questions to the CJEU in that regard. The questions that had been submitted concern the interpretation of the exception of the Emissions Regulation and Directive 1999/44/EC. The CJEU provides further guidance for assessing whether a manipulation device falls within the exception of Article 5(2)(a) of the Emissions Regulation and what this means for the consumer's position vis-à-vis the seller under Directive 1999/44/EC. The CJEU does not rule that it is then for the referring court to make that assessment. The only thing that can be inferred about a division of labour from the judgment is that the CJEU, referring to the Advocate General's Opinion and the consistent case-law of the CJEU referred to by the Advocate General, ruled that it cannot itself make fact-finding and findings of fact in preliminary ruling proceedings, because the competence to do so lies with the national court.

The CJEU ruled on the factual assumption as submitted by the referring court that there was an IMI about which the CBA had not been informed and that the CBA would not have granted the type approval if it had been.

According to Mercedes, the ECJ ruling in DS v Porsche Inter Auto and

Volkswagen cannot be inferred that the court is free to (re)assess independently the correctness of relevant decisions or impose different emission requirements on approved vehicles in violation of the exhaustively harmonised regime of the Framework Directive and Framework Regulation.

2.8. Mercedes submitted an opinion by Prof Dörr. Conclusions 1 and 2 concur with Mercedes' argument as presented under 2.3. Conclusions 3 and 4 read as follows.

"3. Thus, as a general rule (), national courts, in proceedings under civil law, are precluded from calling into question the regulatory content of a valid EC type-approval to the effect that a vehicle put on the market under a valid EC type-approval contained a prohibited defeat device.

4. The European Court of Justice in Case C-145/20 did not take anything away from the described binding effect of EC/EU type-approvals granted by the competent authority of an EU Member State. As in Case C-100/21 (para. 84) the Court rather implied that the competent type-approval authority will take appropriate action when it recognizes the non-compliance of an approved vehicle type in reaction to the interpretative guidelines developed by the ECJ, notably in 2022. In neither Case C-100/21 nor C-145/20 did the ECJ imply that civil courts may interfere with the specific procedures and requirements set out in Directive 2007/46/EC."

Position of the Partners

2.9. The Partners concur with Mercedes' position and further submitted the following.

2.10. With regard to the question raised in the rolling decision at para 2.7(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 can be considered that this vehicle does not offer the quality which is normal for goods of the same type and which the consumer can reasonably expect?"

argue that the system of Article 2(2) of the Consumer Sales Directive differs from Article 7:17 of the Civil Code. Article 2(2) of the Consumer Sales Directive creates a rebuttable presumption. If the conditions of that provision are not met, it only means that the seller cannot rely on the presumption of proof of Article 2(1) when assessing whether the good is in conformity with the contract. If the conditions of paragraph 2 are not met, it does not mean that a good is therefore non-conforming.

Article 7:17 paragraph 2 of the Dutch Civil Code describes the situations when a good does not conform to the contract. This is therefore a fundamental difference from Article 2(2) of the Consumer Sales Directive, which precisely defines when it is presumed that a good does comply with the contract.

2.11. The Partners discuss the OS v Porsche Inter Auto and Volkswagen judgment. There, the CJEU held that - in brief - Article 2(2)(d) of the Consumer Sales Directive should be interpreted as meaning that a vehicle falls within the scope of Regulation (EC) no. 715/2007 if the vehicle: "does not offer the quality which is normal for goods of the same type and which consumers may reasonably expect, if this vehicle, although having a valid EC type-approval and thus being permitted to be used in road traffic, is equipped with a manipulation device the use of which is prohibited under Article 5(2) of this Regulation."

According to Partners, it follows from the said judgment that if the

conditions of Article 2(2) of the Consumer Sales Directive6 the good is not presumed to correspond to the contract. In other words, the seller can

thus not invoking the presumption of evidence under Article 2(2) of the Consumer Sales

Directive. Thus, the Court of Justice did not rule that - in short - a

Volkswagen vehicle with an illegal manipulation device is non-compliant.

The ECJ ruled in OS v Porsche Inter Auto and Volkswagen on the interpretation of a provision in the context of the Consumer Sales Directive (with the sanction: loss of the presumption of conformity). This interpretation must be seen in that context and cannot be applied one-to-one in another context - Dutch national law (with as a sanction: non-conformity) - be applied. This will have to be decided in more detail in the third phase, Partners said.

Also relevant is the update, in case of any non-conformity of the Vehicles involved, the seller (here: the Partners) will have to be given the opportunity to rectify the alleged non-conformity.

For normal use, admission to the road is sufficient; the NO emission values of a vehicle, or the settings of the engine software that affect these values, do not play a significant role in the buyer's normal use and expectations, Partners said.

The court's opinion

2.12. The Framework Directive and the Framework Regulation, as is also evident from Mercedes' argument as reproduced in section 2.3, aim to harmonise the rules on the admission of vehicles to the road. The fact that the approval procedure for the admission of motor vehicles is fully harmonised within the EU therefore means that civil courts may not reach a different opinion when it comes to the question of whether a vehicle can be admitted to the road. To this extent, Mercedes's argument as set out in section 2.3 can be accepted.

However, that question is not at issue in these proceedings. The claims of SDEJ and Car Claim do not seek to prohibit the vehicles in question from being used on the road. Their claims concern other questions, such as whether Mercedes, by placing vehicles with IMIs on the Dutch market, is acting unlawfully towards the purchasers of those vehicles and whether, by selling those vehicles, the Partners have sold property that does not conform to the contract.

2.13. Unlike Mercedes states in 2.4, the opinion of the CBA is only binding on the civil court as far as the question of whether a vehicle can be admitted to the road is concerned. Therefore, it is not only in the case where the CBA has found that an IMI is present for the civil court to determine the civil law consequences thereof, but if a claim has a scope other than assessing whether a vehicle can be admitted to the road (as in this case, see below at 2.12), it should independently assess the question whether an IMI is present.

2.14. The DS/Porsche Inter Auto and Volkswagen judgment7 considered, inter alia, the following.

38 DS brought an action in Revision before the Oberster Gerichtshof (Supreme Federal Court for Civil and Criminal Cases, Austria), the referring court, submitting in support that the vehicle in question was defective, since the conversion system constituted a prohibited manipulation device within the meaning of Article 5(2) of Regulation No 715/2007. According to DS, the software update had not remedied this defect, so that as a result of this update, the value of the vehicle was in danger of decreasing and damage was in danger of occurring.

39 Porsche Inter Auto and Volkswagen argue that the thermal window is a manipulation device permissible under Article 5(2) of Regulation 715/2007. The CBA shares this view.

40 The referring court considers that the conversion device is a prohibited manipulation device within the meaning of Articles 3(10) and 5(2) of Regulation No 715/2007. In any event, the vehicle in question was defective within the meaning of § 922 ABGB because the CBA had not been informed about that manipulation device.

41 In that context, the referring court doubts whether, having regard to the obligation to supply a vehicle not fitted with such a defeat device, the v e h i c l e in question w a s non-compliant within the meaning of Directive 1999/44. If that i s the case, it is necessary, in his view, to examine whether that vehicle was still equipped with a prohibited defeat device after the software update that activated the exhaust gas recirculation system and to clarify the legal consequences if such a defect r e m a i n e d after the software update.

42 More specifically, the referring court wonders, first, whether, if the vehicle in question, despite having been granted EC type-approval, is equipped with a manipulation device which may not be used under Article 3(10) and Article 5(2) of Regulation No 715/2007, that vehicle offers the quality which is normal for goods of the same type and which consumers may reasonably expect within the meaning of Article 2(2)(d) of Directive 1999/44, and must therefore be presumed to be in conformity with the contract.

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55 Consequently, Article 2(2)(d) of Directive 1999/44 must be interpreted as meaning that a vehicle which does not comply with the requirements of that Article 5 does not offer the quality and performance which are normal for goods of the same type and which consumers may reasonably expect, given the nature of those goods within the meaning of that Article 2(2)(d).

56 As the Advocate General o b s e r v e d in paragraph 149 of his Opinion, that interpretation is not affected by the fact that the type of vehicle in question has been granted EC type-approval allowing it to be driven on the road. Indeed, Directive 2007/46 deals with the situation in which it is discovered only after that approval that a construction part of a vehicle is unlawful, for example, having regard to the requirements of Article 5 of Regulation No 715/2007. Thus, Article 8(6) of this directive provides that the approval authority may withdraw the approval of a vehicle. In addition, it follows from the first and third sentences of Article 13(1) of that d i r e c t i v e that when a manufacturer notifies a Member State which has granted EC type-approval of an amendment to the particulars appearing in the information package, that Member State may decide, in consultation with the manufacturer, if necessary, that a new EC type-approval must be granted.

57 This appears to be the case in the present case, since it appears from the decision for reference that the CBA had originally approved the vehicle type at issue in the main proceedings without having been informed of the conversion system. Moreover, it appears from this decision that, had the CBA been aware of this system, it would not have granted EC approval of this vehicle type.

58 Consequently, the answer to the first question must be that Article 2(2)(d) of Directive 1999/44 is to be interpreted as meaning that a motor vehicle falling within the scope of Regulation No 715/2007 does not offer the quality which is normal for goods of the same type and which consumers may reasonably expect if, although it has a valid EC type-approval and is therefore authorised to be used in road traffic, it is equipped with a manipulation device the use of which is prohibited under Article 5(2) of that regulation."

2.15. The QB/Mercedes ruling8 considered the following.

"66. By its first question and its second question, to which a joint answer must be given, the referring court seeks in essence to ascertain whether Articles 18(1), 26(1) and 46 of the Framework Directive, read in conjunction with Article 5(2) of Regulation No 715/2007, must be interpreted as protecting, in addition to general interests, the particular interests of an individual purchaser of a motor vehicle vis-à-vis its manufacturer where that vehicle is equipped with a prohibited manipulation device within the meaning of the latter provision.

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83 However, it cannot be ruled out that a vehicle type which has b e e n granted EC type-approval allowing it to be used on the road was initially approved by the approval authority without that authority having been informed of the software referred to in paragraph 24 of this judgment. In that regard, the Framework Directive a d d r e s s e s the situation where it is discovered only after that approval that a construction part of a v e h i c l e i s unlawful, for example, having regard to the requirements of Article 5 of Regulation No 715/2007. Thus, Article 8(6) of this framework directive provides that this authority may withdraw the approval of a vehicle. Moreover, it follows from the first and third sentences of Article 13(1) of this framework directive that when a manufacturer notifies a Member State which has granted EC type-approval of an amendment to the particulars appearing in the information package, that Member State may decide, in consultation with the manufacturer, if n e c e s s a r y , that a new EC type-approval is to be granted (see, to that effect, Judgment of 14 July 2022, Porsche Inter Auto and Volkswagen, C145/20, EU:C:2022:572, paragraph 56). Finally, Article 30(1) of this framework directive provides that if a Member State which has g r a n t e d EC type-approval finds that there is a failure to conform to the vehicle type it has approved, it shall take the necessary measures, including, where appropriate, the withdrawal of type-approval, to ensure that vehicles in production conform to that t y p e .

84 Consequently, the fact that a motor vehicle is fitted with a manipulation device which was discovered to be prohibited only after EC type-approval of that vehicle may affect the validity of that approval and, by extension, that of the certificate of conformity which is deemed to certify that that vehicle, if it belongs to the series for which type-approval was granted, complied with all the regulatory acts at the time of production. Having regard to the rule set out in Article 26(1) of the Framework Directive, such a prohibited instrument may, in particular, create uncertainty as to the possibility of registering, selling or putting into service that vehicle, and ultimately result in damage to the purchaser of a vehicle fitted with a prohibited manipulation device."

2.16. It is clear from these recitals that in DS v Porsche Inter Auto and Volkswagen, the CJEU was asked to rule not on whether civil courts may rule on the admission of vehicles to the road, but on the meaning of the Emissions Regulation in assessing the conformity of a sold vehicle. There is therefore no question of the civil court imposing "different emissions requirements" on approved vehicles as part of that assessment. The referring court had to assess whether a vehicle that was equipped with an IMI before the update and was subsequently equipped with a temperature window (which, according to the CBA, is a permissible manipulation device) complied with the agreement.

2.17. The court considers it unlikely that if the CBA's opinion on the temperature window *in assessing conformity* were binding on the civil court, the CJEU would not consider it in answering the questions raised.

Indeed, the answer to the first question should then have been that a vehicle offers the quality which is normal for goods of the same type and which consumers may reasonably expect, if that vehicle has a valid EC type-approval and can therefore be used in road traffic, even if it is equipped with a manipulation device the use of which is prohibited under Article 5(2) of this regulation. However, the CJEU correctly answers the first question that non-conformity can exist despite a valid type-approval.

2.18. That the CJEU did not expressly rule that it is then for the referring court to make that assessment (whether IMI exists) is i r r e l e v a n t . Indeed, the referring court will have to decide further on the conformity of the v e h i c l e in the light of the CJEU's judgment, and that will require it to establish whether that vehicle " *is equipped with a manipulation device the use of which is prohibited under Article 5(2) of this Regulation."*

2.19. Prof Dörr's third conclusion (see section 2.8 above) does not follow logically from the regulatory framework he correctly set out. That regulatory framework focuses on admission to the road and a general conclusion cannot be drawn from it, which includes other questions, such as those at issue in these proceedings.

2.20. The fourth conclusion is correct insofar as it states that the ECJ's ruling in DS v Porsche Inter Auto and Volkswagen9 does not alter the binding effect of a type approval. However, this binding effect relates only to admission to the road; there were no questions on that in the said judgment. The issue was not whether a vehicle can be admitted to the road but whether the vehicle meets the conformity requirement under the sales contract.

2.21. Prof Dörr rightly states that the ECJ in QB v Mercedes10 points out in paragraph 8411 that if it is subsequently found that an IMI is nevertheless present in an approved type, the competent authority can take measures, including the withdrawal of a type-approval. It is also true that it can be inferred from the judgment that the civil court may not interfere with the specific procedure prescribed by the Framework Directive. However, that is not the issue in this case either. After all, in these proceedings, the civil court is not sought to rule on type approval or admission to the road, but on the alleged illegality of placing vehicles with IMI on the market vis-à-vis buyers of those vehicles and the alleged non-conformity of those vehicles. The court therefore considers Prof Dörr's conclusions irrelevant to this case.

2.22. In conclusion, the court is not bound by the formal legal force of the administrative decisions on the admission of the vehicles in question to the road, but is required, in the context of the actions brought, to assess independently whether the vehicles in question are equipped with IMIs.

2.23. The difference alleged by the Partners between the Consumer Sales Directive and Section 7:17 of the Civil Code and, building on this, the Partners' interpretation of the DS/Porsche Inter Auto and Volkswagen judgment are irrelevant to the question of who judges whether IMI exists. The correctness of their contentions will be further adjudicated on the merits of the case.

3 Outline of an order under section 22 Rv

Wrongly attributed recognition

3.1. Mercedes argues that the court wrongly attributed to it that it would have acknowledged that there would be manipulation devices in its vehicles, but that they would not be prohibited. According to Mercedes, its position to date is that the vehicles in question do not contain a manipulation device and only if it were to be ruled otherwise would they be justified.

3.2. This is incorrect. See Partial Statement of Reply 'Phase 2', on admissibility and applicable law in SDEJ v Mercedes, No 191 and in Car Claim v Mercedes No 210 (the sentence in square brackets appears only in the statement in the latter case):

"Functionalities that made the EGR degree dependent on, among other things, temperature have always been industry standard: all car manufacturers have applied them to diesel vehicles with an EGR. This also applies to Mercedes-Benz Group AG. Whether a temperature-dependent modulation of the EGR degree can be considered an IMI must be assessed by national courts and depends on many factors including the calibrations. [Precisely this dependence on the calibrations is also emphasised by the CJEU in its judgments]."

Mercedes has thus acknowledged that it applies a temperature window.12 It can be inferred from the judgment cited at 4.8 that this is a manipulation device. It disputes that it is an IMI. Whether it is, the court will have to assess. It is true, however, that Mercedes has not otherwise acknowledged the presence of other manipulation devices in its vehicles. For other manipulation instruments, therefore, the court will have to assess whether they are present and, if so, whether they are prohibited or not.

The position of SDEJ and Car Claim on the injunction under Art. 22 Rv

3.3. SDEJ states in margin number 253 of the summons in response to Ir. Domke's study:

"The investigation reveals a staggeringly complex and sophisticated emissions deception involving - as far as the Foundation has been able to establish so far - at least eight Illegal (SCR and EGR) Manipulation Instruments. Each of these Illegal Manipulation Instruments significantly reduces the overall efficiency of the system in real driving conditions. As a result of Daimler's subterfuge, these Illegal Manipulation Instruments are only operational outside the NEDC test cycle."
In margin 403 of the summons, SDEJ argues as follows.
"The Foundation requires the provision of certain information and underlying

evidence and asks the Court to use its power to give instructions on this point (art. 22 Rv). In the Foundation's view, an accurate specification of the Affected Vehicles in which one or more Illegal Manipulation Instruments are located and the operation of these Illegal Manipulation Instruments, whether or not they have been engaged, concerns the (factual) core of the Claims of Defendants. Only with that information located in the domain of Daimler (and/or the Importers) can they shape their claims. That makes the equality of arms principle guaranteed by Article 6 ECHR at issue here."

3.4. Car Claim joined SDEJ's subpoena in margin numbers 17, 47 and 79 of its subpoena.

3.5. In their deed, SDEJ and Car Claim discussed several IMIs they believe were found in Mercedes' vehicles. They argue that Domke and Heitz's investigations show that several IMIs are present in all the vehicles examined, which collectively cause the performance of the emission control system outside the test to be less than within it.

3.6. The court does not address this now; it will be addressed at the substantive hearing.

Mercedes and Partners' position

3.7. In the interlocutory order of 17 April 2024, the court, according to Mercedes, suddenly and without the request of any party, reversed the aforementioned order and thereby deviated from the previously determined procedural order. With the order granted under Section 22 Rv, the court intended to examine 'facts' not alleged by the plaintiffs. The court also based its decision on facts that had not come to the court's attention in this case but in proceedings between other parties. In doing so, it went beyond the bounds of the legal dispute. According to Mercedes, Domke and Heitz's studies, which relate only to some specific vehicles, say nothing about other vehicles.

3.8. Mercedes points out that the basic principle is that the civil court is non-liable and it is up to the parties to determine the nature and scope of the dispute. The judge can only ask for an explanation of certain factual contentions. He may not issue an order to answer a legal question or take a legal position. The judge may not assist in litigation or assist one of the parties.

3.9. The Partners also expressed similar views. They point out that the court may only base its decision on facts that have come to its knowledge in the proceedings. It expressly follows from the legislative history of Section 149 Rv that information obtained by a judge from another (al

or unrelated) lawsuit has heard, should not be part of the judge's decision. The fact that in some cases the judge takes a more active direction (and to that extent is less 'passive') does not mean that the judge is allowed to step outside the boundaries of the legal dispute for the purpose of ascertaining the truth, Partners said.

3.10. According to Mercedes, the crux of the dispute is not whether 'Mercedes' vehicles contain IMIs, but whether the plaintiffs' contentions about (in their view) IMIs occurring in the Vehicles Involved can ultimately be established in accordance with the rules of procedural law and those factual contentions can then support the plaintiffs' claims. The contention that 'Mercedes' vehicles contain IMIs is not a factual contention but first and foremost a question of law. The court is not free to order Mercedes to take a position on what is to be understood by an IMI.

3.11. Both Mercedes and Partners point out that the court should pay close attention to the differences between the cases pending before it regarding IMIs. The court should not ask questions about functionalities (so-called 'postheating' and 'hot restart') that were not raised in the party debate in these proceedings.

3.12. Mercedes considers an injunction under Section 22 Rv premature now, as it has not yet filed a statement of reply. The Partners also consider the injunction premature on that ground.
To the extent that the court bases the premise that there could be IMIs in the Affected Vehicles on the studies by Domke and Heitz, which relate only to some specific vehicles, Mercedes argues that those studies say nothing about other vehicles, and that Mercedes has not yet been given the opportunity to substantively explain that the conclusions of those studies are incorrect.

3.13. According to Mercedes, there is no ground for an injunction under Section 22 Rv in relation to vehicles covered by emission standards 6c, 6d-TEMP or 6d. For emission standard 6c, this is disputed by SDEJ and Car Claim. Mercedes argues that the court could at most order Mercedes to further clarify its claim that no Affected Vehicles with emission standard Euro 6c are the subject of a CBA recall order.

3.14. The Partners question whether the results of an order under Section 22 Rv will actually be useful to the proceedings. It occurs to the Partners that more

(unclassified) information will actually cloud the debate between parties more than

clarify. They further argued that the proposed order is very time-consuming and costly if it would result in 2600 groups of vehicles having to be subjected to an actual investigation.

Car Claim's productions 129 and 130

3.15. According to Mercedes, SDEJ and Car Claim put forward productions 129 and 130 "to address Mercedes objections about the party debate". Sufficiently concrete contentions about Mercedes vehicles they still do not take (their explanations of the reports are almost entirely about Renault vehicles). With this, they are making a last-minute attempt to still "take contentions that should then serve as the basis for an order under section 22 Rv". That attempt may not succeed.

It is contrary to due process that Mercedes is now faced with these reports without sufficient

opportunity to study and analyse them.

The deed merely lists features found in Renault vehicles; this is not sufficiently concrete in relation to the claimants' assertion that Mercedes vehicles would contain IMIs. There is nothing to show that the functionalities mentioned in the Heitz Renault report are also

found in Mercedes vehicles with an OM607 engine (or any other Involved Vehicle). Insofar as the note discusses functionalities, the note describes precisely in what ways the OM607 in the 2015 Mercedes-Benz 180 under investigation is superior to, and therefore different from, the Renault K9Ks from the Heitz Renault report.

3.16. The Partners requested that SDEJ's supplementary submissions 129 and 130 be disregarded in an Article 22 Rv order, on the grounds that it obscures party debate.

The court's opinion

3.17. Under Section 22 Rv, the court is authorised at any stage of the proceedings to order the parties or one of them to explain certain contentions. This was also already requested by SDEJ in its summons (see under 3.3). This is a discretionary power, from which it follows that the court is also free to amend an order it has previously made.

3.18. The fact that the defendants in this case have not yet filed a statement of reply does not make an order under Section 22 Rv premature. The plaintiffs' submissions, in combination with the investigations by Domke and Heitz, provide sufficient grounds for an injunction and the court will need to have the necessary information in time for a meaningful hearing on the merits. Moreover, the response to be made gains relevance if it can also discuss the results of the Article 22 order. Answering the court's questions under Section 22 Rv in no way impairs Mercedes' ability to challenge Domke and Heitz's conclusions in its reply to be adopted.

3.19. Mercedes and the Partner rightly argue that the court should decide this case on its own merits. The court will do just that.

3.20. Mercedes and the Partners also rightly argue that the court should stay within the bounds of the rule of law. The court will also do so.
The passage from SDEJ's subpoena (to which Car Claim has joined) quoted at 3.3 above shows that SDEJ relies on a complex and sophisticated emissions deception, stating that its investigation shows that "at least eight Illegal (SCR and EGR) Manipulation Instruments" were found. It cannot be inferred from this that it wishes to limit its claims to those eight manipulation instruments.
In its application for an order under Article 22, it states:
In the Foundation's view, an accurate enumeration of the Affected Vehicles in which one or more Illegal Manipulation Instruments are located and the operation of these Illegal Manipulation Instruments, whether engaged or not, concerns the (actual) core of the Claims of Victims.
This shows that unlike Mercedes argues - the core of the dispute is whether IMIs are present in Mercedes' vehicles. The dispute is not limited to the IMIs found by the claimants in the Vehicles Involved on examination according to them.

3.21. Car Claim filed Exhibits 129 and 130 shortly before the pre-trial hearing. This prompted the court to give Mercedes and Partners the opportunity to respond to them by deed. Given the relevance of the productions to the proceedings, the court did not refuse the productions.
A response that can be limited to what relevance these reports have to the Article 22 order to be issued does not require a counter-expertise. Mercedes and the partners can have a counter-expertise carried out prior to the substantive hearing if they so wish. Accordingly, there has been no violation of due process.

3.22. That Mercedes used Renault engines in some of the vehicles in question is not in dispute. SDEJ and Car Claim argue that Mercedes' OM607 engine matches Renault's K9K-

engine and they put into evidence a Heitz report on the Renault K9K engine. SDEJ and Car Claim also put in evidence a comparison of the two engines, stating that the Renault engines used by Mercedes contain some of the same manipulation tools, albeit that the calibration regularly differs. However, production 130 does not show that the functionalities present in the K9K engine that Heitz claims are manipulation tools are absent in the OM607 engine, with one exception: the planned obsolescence function. Therefore, the court will not raise any questions about that.
The court therefore considers both productions relevant for a Section 22 Rv order to be issued. Contrary to the Partners' contention, they do not cloud the party debate, because they precisely name (possible) IMIs very concretely and the party debate is about that.
The effect of these two productions is that functionalities identified by SDEJ and Car Claim in Renault engines that are also used by Mercedes (in modified form) as (possible) IMIs belong to the legal dispute at least from the moment these reports were brought into the proceedings. Whether it was different before that is no longer relevant.

3.23. Unlike Mercedes, the court does not read into article 22 Rv that the explanation to be requested by the court should only relate to *factual* statements. This restriction would also be incomprehensible in view of the court's task, since the court must arrive at an opinion on both the facts and the law on the basis of the party debate, the latter if necessary with the addition of legal grounds, and may ask the parties at the hearing questions about the legal consequences which, in their opinion, must be attached to the facts. It is impossible to see that, in the context of Section 22 Rv, the court would not be free to ask the parties to explain their contentions insofar as they concern the legal positions of the parties. Mercedes does, however, correctly argue that the proper place for this is the statement of reply.

3.24. The Partners fear that the order to be issued will not be useful and will cloud the debate between the parties. The court does not share that fear and, on the contrary, considers the information to be provided to be essential to achieve a substantive hearing where judgment can be reached on the basis of the relevant facts. The Partners further fear that the intended order would be very time-consuming and costly if it would result in 2,600 groups of vehicles having to be technically investigated. However, whether and to what extent technical investigations are necessary can only be decided after a substantive hearing of the case. In any case, this cannot now be an argument for abandoning the proposed order under Section 22 Rv.

4 The open-ended final question

4.1. In the interlocutory judgment of 17 April 2024, an order was made under section 22 Rv, consisting of a number of questions, the last of which reads as follows:

2.13.6. *F. Other manipulation devices*

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?

4.2. The rolling decision of 31 July 2024 considered the following:

2.33. *The parties differ on the admissibility of an open final question. In the court's preliminary view, it does not thereby step outside the bounds of the legal dispute, because 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 was not previously discussed between the parties, but which could potentially be an IMI. The parties may respond to this preliminary judgment in their deed."

The court now discusses the parties' responses to this preliminary judgment.

The position of SDEJ and Car Claim

4.3. According to SDEJ and Car Claim, an open final question is justified. Their claims boil down to Mercedes or Partners being liable to the injured parties because the affected vehicles contained IMIs and otherwise failed to comply with the Emissions Regulation. They have already now substantiated this claim in detail. It is then up to Mercedes to contest this substantiated claim.

SDEJ and Car Claim consider Mercedes' contention that this question would not deal with the facts to be incorrect. Indeed, in the proposed open final question, the court does not ask Mercedes to give a legal qualification of the manipulation devices it applied within the meaning of Article 5(2) of the Emissions Regulation, but only to state factually which "other than the previously mentioned construction parts that reduce the efficiency of the emission control system were applied in the Affected Vehicles". Whether those structural components are prohibited or permitted is something the court will judge for itself in the next stage.

Nor is it the case that the court would take on too active a role with the ex Section 22 Rv order. The Section 22 Rv order is entirely within the bounds of the legal dispute. The plaintiffs argue, inter alia, that Mercedes fitted the Affected Vehicles with IMIs. Within this framework, the court may (and should) actively determine the relevant facts in the context of establishing the truth.

Nor does the order under Section 22 Rv violate the limitations of Section 24 Rv. Mercedes defends itself by claiming that its vehicles would not contain IMIs, so the legal dispute extends also to whether IMIs are present. The court must examine whether Mercedes' contention is correct and therefore whether IMIs are present in the Affected Vehicles indeed no IMI is present. Therefore, an assessment of only the IMIs already described by the plaintiffs is not sufficient to establish the defence of Mercedes to assess.

Article 22 Rv does not require the court to ask only "closed questions". Nor does such a restriction follow from the legislative history. The legislator intended the introduction of Section 22 Rv to serve the purpose of ascertaining the truth. That interest dictates that "all facts relevant to the decision should come to the surface". Thus, the court has broad authority to assess what information is needed to assess the claims.

Mercedes knows exactly which manipulation devices it built in. Plaintiffs and the court do not know. The court therefore rightly considers that Mercedes can be expected to provide sufficient factual information to substantiate its objection (to the effect that there is no question of IMIs) in order to provide the plaintiffs with starting points for possible (further) proof. Against this background, there can be no justified objection to an injunction under Section 22 Rv, even if that injunction would have the effect that Mercedes would have to report a functionality that was not previously discussed between the parties but might be an IMI.

Mercedes is also obliged to plead the facts fully and truthfully (art. 21 Rv), SDEJ and Car Claim said.

Mercedes and Partners' position

4.4. Mercedes argued against the open final question, apart from the objections to the injunction under Section 22 Rv in general, already mentioned above, that it orders Mercedes to take a legal position on what should be understood as an IMI. According to Mercedes, it cannot be forced to take a legal position.

4.5. The Partners argue that the court is co-proceeding with an open final question on the side of SDEJ and Car Claim. SDEJ and Car Claim have to date taken few concrete contentions when it comes to the presence of IMIs in the Affected Vehicles. Where SDEJ and Car Claim have done so, those contentions relate to (i) vehicles covered by the CBA's recall orders or the Heitz or Domke report or (ii) information that is not (yet) part of the litigation file in these proceedings. The intended, unfocused questions of the amended Rv injunction relate to facts unrelated to the contentions of SDEJ and Car Claim mentioned under (i). This also applies in particular to the open closing question. Furthermore, this open closing question is not a factual question but, according to the Partners, involves a legal qualification.

The court's opinion

4.6. Van Mercedes is not ordered, either in the originally proposed questions or in the questions formulated in this judgment, to take a legal position on whether its manipulation instruments can be considered IMIs. The judgment on whether IMIs exist is for the court. However, Mercedes is asked for clarification on its contention that while a refrigerant temperature window is applied, there are otherwise no manipulation instruments, and if there are any that they are permitted. In the first place, the court would like a factual explanation of that assertion, given the studies brought into the proceedings by SDEJ and Car Claim, which show that the investigators found several manipulation instruments in the vehicles investigated.
While Mercedes states that this study only applies to the vehicles investigated, it

since the vehicles in question are mass-produced vehicles, it can at least be assumed that a number of affected vehicles other than those under investigation also contain the same manipulation devices. Thus, the investigations are not just relevant to the vehicles under investigation.

4.7. In addition to this statement of fact (namely whether functionalities are present that meet the definition of manipulation device in the Emissions Regulation), a legal proposition also needs to be further explained, namely the proposition that to the extent manipulation devices are present, they are justified. Thereby, the contention that it is a permissible manipulation device will have to be explained by explaining why, according to Mercedes, the manipulation device thus calibrated is permissible, given the criteria set out in Article 5(2) of the Emissions Regulation. The verdict on this is ultimately up to the court.

4.8. The temperature window as was at issue in the CJEU's ruling in DS v Porsche Inter Auto and Volkswagen13 provides clear guidance on how the court should reach its judgment. The temperature window is a manipulation device because outside a certain temperature range, it modulates, slows down or disables the emission control system, thus reducing the efficiency of the emission control system. According to the quote below, the effectiveness is reduced if the established emission limits are not met. Therefore, Mercedes' argument that an emission control system always regulates the various components of that system depending on the circumstances is not valid, as it is such a regulation that the effectiveness is reduced.
However, whether it is also an IMI will depend, on the one hand, on the concrete calibration and, on the other, on whether the system is justified within the meaning of Article 5(2) Emissions Regulation in view of that calibration. In doing so, the CJEU provided a clear framework in the judgment, by answering the second question as follows.

"Article 5(2)(a) of Regulation no. 715/2007 must be interpreted as meaning that a defeat device which ensures, in particular, compliance with the emission limits laid down by that regulation only at an outside temperature of between 15 and 33 degrees Celsius may be justified under that provision only on condition that it is demonstrated that the sole purpose of that device is to prevent acute risks of engine damage or defects resulting from the malfunctioning of a component of the exhaust gas recirculation system in such a way as to create an actual hazard while driving a vehicle equipped with that system. In any event, a defeat device which, under normal traffic conditions, should function for most of the year in order to protect the engine from damage or defects 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."

Indeed, this shows that only an acute hazard may lead to a temporary regulation of the emission control system in which the limits set out in the Emissions Regulation are not met, and thus a system that leads to that consequence for most of the year under normal traffic conditions is not permissible.

4.9. There is no question of co-prosecution on the part of SDEJ and Car Claim (as the Partners accuse the court of doing), given the broad wording of SDEJ's request (which Car Claim joined) to order Mercedes to provide information under section 22 Rv, see the quote from the summons cited at 3.3 above.

4.10. The Partners' contention that the questions would be unrelated to the contentions of SDEJ and Car Claim was already incorrect in the proposed order under Section 22 Rv, because the contentions of SDEJ and Car Claim generally imply that Mercedes applied IMIs. The order to be granted in this judgment will further join the contentions of SDEJ and Car Claim by asking for the investigation reports contained in the summons and in the investigation reports they brought into the proceedings

mentioned functionalities. In addition, the open-ended final question is maintained.

4.11. The court stands by its preliminary judgment. The open final question serves to gain insight into all the facts relevant to the assessment. Mercedes is the only party in possession of all data on the engine control software applied; it will therefore have to explain its challenge by bringing all the factual data requested into the proceedings. The fact that this involves asking about manipulation tools whose existence is not yet known to SDEJ and Car Claim does not mean that the court is out of bounds. SDEJ and Car Claim did not take the position that only the manipulation instruments they mentioned were relevant to the assessment, nor that, on examination, they were able to discover all manipulation instruments.

5 Amended order under section 22 Rv

5.1. The court, in the rolling decision of 31 July 2024, gave the parties an opportunity to respond to a revised order to be issued under Section 22 Rv according to the following outline:

1. Questions aimed at getting 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.

Position of SDEJ and Car Claim

5.2. SDEJ and Car Claim argue that the studies show that the same or similar IMIs are applied per engine type. Therefore, a classification/clustering by engine types, broken down by emission class, is obvious. In addition, the court and parties should have insight into the CBA's decisions and Mercedes should provide insight into the manipulation devices that are not (yet) the subject of recalls. They also suggest ordering Mercedes to provide insight into the criteria Mercedes used to determine whether or not a car falls within the scope of a measure or investigation by the CBA or another regulator.

She elaborated on these questions in her deed.

Mercedes position

5.3. In general, Mercedes believes that the outlined outline of any order to be issued could be workable. The extent to which the questions in the final order can be answered or are admissible will depend on the specific questions included in the order.

On the first question, she notes that it should be about functionalities that the CBA has concluded are IMIs. As for the other studies, they should be functionalities raised by Domke and Heitz.
As for the second question, Mercedes argues that questions in this category can be workable, under

more dependent on the number of vehicles in respect of which Mercedes has to answer such questions and the time it is given to do so.

On the third question, Mercedes argues that this would order it to take a legal position. That is not what an order under section 22 Rv is for. Mercedes considers that such questions should be addressed in the phase 3 response.

Regarding question 4, Mercedes states that it can clarify whether the functionalities criticised by the CBA, SDEJ and Car Claim were removed by the software update or not. However, SDEJ and Car Claim did not make any concrete statements about functionalities in the software updates.
On the contrary, Domke concludes that all the IMIs he alleged were removed with the software update. An injunction on the functionalities in the software updates is therefore not at issue. Moreover, the software updates were extensively examined by the CBA and found to be approved. Thus, there is also no reason to subject the software updates to further scrutiny in these civil proceedings.

With regard to question 5, Mercedes argues that for the question of whether the functionalities criticised by SDEJ and Car Claim could potentially qualify as IMI, it is irrelevant in which specific Covered Vehicles those criticised functionalities appear.

The court's opinion

Introductory considerations

5.4. Instead of applying type approval as the ordering principle, engine type will be used as the ordering principle.

The court will explicitly ask about all functionalities mentioned in these proceedings. The court maintains an open-ended closing question.

A distinction will be made between questions that Mercedes will have to answer by separate act and questions it can answer in its conclusion of reply.

Only after answering the question whether manipulation devices are present and, if so, which ones can be considered IMIs, will Mercedes have to specify in which affected vehicles those IMIs are present. This part will not now be included in the order to be issued.

The questions need only be answered for emission classes 5 and 6 to 6c.

5.5. With regard to Mercedes' contentions regarding the updates, the court considers the following.

SDEJ and Car Claim did not take the position that the software update removed all IMIs, although the calibrations were adjusted, see margin numbers 359, 362 and 377 of the SDEJ subpoena, to which Car Claim joined.

That the software updates have been extensively examined and agreed by the CBA could possibly be taken into account in the assessment, if Mercedes provides relevant evidence on that point.
Because the court in the context of the proceedings in these cases

filed claims will have to reach its own judgment, a possible approval of an update by the CBA cannot automatically lead to the judgment that no IMIs are present after the update.

Amended order under section 22 Rv

5.6. The foregoing leads to the following revised order under Section 22 Rv. The court orders Mercedes to answer the following questions to explain its contention that (except for the refrigerant temperature window) no manipulation devices are present and that if anything, they cannot be considered IMI.

1. Which engine types did Mercedes use in the vehicles in question during the relevant period and in which Emission Class do they fall?

Notes

The relevant period means the period from 1 January 2009 to 31 January 2019.

The vehicles in question are the diesel-engined vehicles marketed by Mercedes in the Netherlands during the relevant period.

This question serves as an introduction and is used to organise the task of manipulation tools.

If an engine type has versions applied under different emission classes, the follow-up questions are intended to be answered separately for the different emission classes. The questions need only be answered for emission classes 5 and 6 to 6c.

Engines used include those from other manufacturers.

2. Follow-up question for each of the engine types mentioned in question 1:
Which of the following manipulation tools were used in all or part of these engines:

a. an exhaust mass flow function, which measures the exhaust gas flow to initiate, modulate, decelerate or deactivate any component of the emission control system to reduce the effectiveness of the emission control system;

b. a NOx mass flow function, which measures the NOx mass flow to initiate, modulate, decelerate or deactivate a component of the emission control system to reduce the efficiency of the emission control system;

c. a temperature window, i.e. a function that measures the intake air temperature to trigger, modulate, delay or deactivate a component of the emission control system when it exceeds or falls below a specified value, thereby reducing the efficiency of the emission control system;

d. a restart function (also known as "hot restart function"), which after engine start-up measures the SCR temperature or any other temperature to trigger, modulate, delay or deactivate a component of the emission control system if it is above a certain value, thus reducing the efficiency of the emission control system;

e. a temperature window, namely a function that measures the SCR temperature to trigger, modulate, slow down or deactivate a component of the emission control system when it exceeds or falls below a certain value, thereby reducing the efficiency of the emission control system;

f. a function that measures the average consumption of AdBlue to trigger, modulate, delay or deactivate a component of the emission control system if it exceeds a certain value, thereby reducing the efficiency of the emission control system;

g. a temperature window,namely a function measuring the engine temperature or related values such as coolant temperature to trigger, modulate, delay or deactivate an emission control system component when it exceeds or falls below a specified value, thereby reducing the effectiveness of the emission control system;

h. an "Engine Hot&Idle" function, which is triggered when the engine has reached a certain temperature and it is then left idling in order to trigger, modulate, slow down or render inoperative any component of the emission control system in that situation, thereby reducing the efficiency of the emission control system

i. a speed-dependent control of the emission control system, i.e. a function that measures the speed of the vehicle in order to trigger, modulate, decelerate or deactivate a component of the emission control system when it exceeds or falls below a specified value, thereby reducing the effectiveness of the emission control system;

j. a postheating function, which switches on the glow plugs only at a certain engine temperature and air pressure as can be expected at test conditions in order to heat the NSC catalyst faster,

k. other structural components (hardware or software) that measure temperature, driving speed, engine speed, acceleration, intake depression or other parameters to trigger, modulate, delay or render inoperative any component of the emission control system, thereby reducing the effectiveness of the emission control system?

Clarification: meant is a manipulation device as defined in Art. 3(10) of the Emissions Regulation 14 *. It refers to the situation before any update.*

3. Which calibration or different calibrations were applied to each of the manipulation instruments listed in question 2.

Notes:

These are calibrations in the situation prior to any update. The purpose of this question is to understand the conditions under which the manipulation device operates. For example, in the case of a temperature window: below or above which temperature a component of the emission control system is triggered, modulated, delayed or rendered inoperative, thus reducing the efficiency of the emission control system.

4. For each of the manipulation tools mentioned in question 2, is there (in combination with specific calibrations or not) any
- a recall ordered by the KBA or
- a voluntary recall or
- no recall?

5. If there is a recall (mandatory or voluntary), will the manipulation device be removed or modified in the update and, if modified, in what way?

6. For any combination of the manipulation tools listed in question 2 and the different calibrations applied to them: in Mercedes' view, do any of the cases listed in Article 5(2) of the Emissions Regulation, i.e. cases in which a manipulation tool is not prohibited, occur?

Notes

The case will be referred to the roll for deed to answer questions 1 to 5. Mercedes is free to answer question 6 at its option also in that deed or in its statement of reply.

If Mercedes considers it relevant, it is free to report on functionalities designated as IMI by the CBA the state of play in the proceedings pending on them.

6 Car Claim's productions

6.1. Mercedes responded to Car Claim's productions 143-151.

6.2.

The Partners have taken the view that Car Claim has failed to comply with its duty of directions. It will - for example, in its act yet to be taken to supplement and update the subpoena - also address the content and relevance of these documents to the

decision of Car Claim's claims should explain. If not, the contents of Exhibits 143-151 should still be disregarded as far as the Partners are concerned.

6.3. The court does not consider Car Claim's Exhibits 143-151 relevant to the present decision and will therefore not address them at this stage.
The Partners rightly pointed out that Car Claim will need to provide further clarification on these productions prior to the substantive oral hearing.

7 The SEC proceedings

7.1. The court took note of the Amsterdam court of appeal's judgments of 13 August 2024, ECLI:NL:GHAMS:2024:2245 and 22 October 2024,

ECLI:NL:GHAMS:2024:2941 in the case of Stichting Emission Claim (SEC) v Mercedes and 21 partners. These judgments ruled that the Dutch court has absolute jurisdiction and that the Amsterdam court has relative jurisdiction. It was also ruled that SEC's collective claims, insofar as they relate to Euro 5 Vehicles, are governed by Article 3:305a (old) of the Dutch Civil Code. To the extent the claims relate to Euro 6 Vehicles, they are governed by the WAMCA. The court finds that the district court erred in declaring SEC inadmissible in its collective claims relating to Euro 5 and Euro 6 Vehicles due to the lack of a timely own request for an extended summons period as referred to in Section 1018d(2) Rv.

The court referred the case back to the district court but also drafted cassation appeals.

7.2. SDEJ and Car Claim have discussed their deed with SEC and inform that SEC agrees.

7.3.The court requests SDEJ and Car Claim to inform the registrar if there is clarity on whether or not to file cassation. The developments in the SEC case are not a reason to rule differently in the present cases than decided in this judgment.

8 Effects of joinder

8.1. The court considered in paragraph 2.38 of the rolling decision that the cases will be heard jointly and that the court will consider the views expressed by the plaintiffs and submissions brought into the proceedings as applying to both cases unless the parties expressly state otherwise.

8.2. In response, the Partners pointed out that the claims and contentions of SDEJ and Car Claim to date are not entirely similar and are even contradictory in some respects. For instance, the constituencies differ and the claims differ.
The Partners would expect Car Claim and SDEJ to present their views jointly in one litigation document from now on. In the judgment of 24 January 2024, the court raised the question of the necessity and usefulness of continuing two largely similar cases side by side and expressed the expectation that the parties would enter into consultation on the matter.
The Partners ask the court to order SDEJ and Car Claim sec to bring the results of these consultations into the proceedings.

8.3. SDEJ and Car Claim have not yet been able to respond to these submissions. They will still be able to do so after Mercedes has taken its act, as they will then be given the opportunity to supplement and update their subpoenas. In doing so, the court orders them (whether or not after

claim amendment) to clarify whether there are differences in the constituencies and claims of SDEJ and Car C l a i m and, if so, which ones. If SDEJ and Car Claim each use the opportunity offered separately, they are ordered to explain the necessity and usefulness of pursuing two largely similar cases side by side. If they present their views in joint pleadings, this is not necessary.

9 Progress of proceedings

9.1. The court stands by what was noted in this regard in the roll decision of 31 July 2024 at 2.39.

10 Decision

The court

10.1. orders Mercedes to clarify its contentions by answering the questions as described and explained under 5.6 and refers the matter to the roll of **5 February 2025** for that purpose**,**

10.2. r e s e r v e s any further decision.

This roll call decision was issued by R.H.C. Jongeneel, F.L. Bolkestein and M.L.S. Kalff, Judges, assisted by A.A.J. Wissink, Registrar, and pronounced in public on 13 November 2024.

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[1] BGH 24 July 2023, Vla ZB 10/21, ECLI:DE:BGH:2023:240723BVIAZB10.21.

[2] CJEU 14 July 2022, ECLI:EU:C:2022:572, C-145/20 (DS v Porsche Inter Auto and Volkswagen).

[3] CJEU 21 March 2023, ECLI:EU:C:2023:229, C-100/21 (QB/Mercedes).

[4] ECJ EU 21 March 2023, ECLI:EU:C:2023:229, C-100/21 (QB/Mercedes), para 96.

[5] CJEU 14 July 2022, ECLI:EU:C:2022:572, C-145/20 (DS v Porsche Inter Auto and Volkswagen).

[6] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of consumer goods sales and guarantees.

[7] CJEU 14 July 2022, ECLI:EU:C:2022:572, C-145/20 (DS v Porsche Inter Auto and Volkswagen).

[8] ECJ EU 21 March 2023, ECLI:EU:C:2023:229, C-100/21 (QB/Mercedes).

[9] CJEU 14 July 2022, ECLI:EU:C:2022:572, C-145/20 (DS v Porsche Inter Auto and Volkswagen).

[10] ECJ EU 21 March 2023, ECLI:EU:C:2023:229, C-100/21 (QB/Mercedes).

[11] Prof Dörr refers to point 84, but will have meant point 83.

[12] See also Partial Statement of Reply 'Phase 2', on admissibility and applicable law in the Case SDEJ v Mercedes, No 117 and in Car Claim v Mercedes also No 117 on coolant temperature control (Kühlmittel-Sollwert-Temperaturregelung, KMST-R).

[13] ECJ EU 14 July 2022, ECLI:EU:C:2022:572, C-145/20 (DS v Porsche Inter Auto and Volkswagen).

[14] Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on the type-approval of motor vehicles with regard to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and access to repair and maintenance information.
