

# ECLI:NL:GHAMS:2024:2242

Authority	Amsterdam Court of Appeal
Date of decision	13-08-2024
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Case number	200. 313.944/01
Areas of law	Civil law
Special features	Appeals Interim ruling
Content indication	Collective action SDEJ/VW c.s. relating to vehicles with diesel engines that SDEJ claimed did not and still do not comply with Euro 5 and Euro 6 emission standards due to a prohibited manipulation device. This judgment answers two questions, namely: 1) Does the Dutch court have jurisdiction over the claims against the Car Manufacturers? and 2) Which collective action regime applies, Article 3:305a (old) of the Civil Code or the Act on Settlement of Mass Damages in a Collective Action (WAMCA)?
Findings	Rechtspraak.nl

## Excerpt

### AMSTERDAM COURT OF APPEAL

civil and tax law department, Team I

case number : 200.313.944/01

Case and role number District Court of Amsterdam : C/13/686493 / HA ZA 20-697

### judgment of the plural civil chamber of 13 August 2024

regarding

#### **DIESEL EMISSIONS JUSTICE FOUNDATION,**

based in Amsterdam,

Appellant, also respondent in the cross-appeal, lawyer:

Q.L.C.M. Bongaerts, Amsterdam,

at

legal entities under foreign law

1. **VOLKSWAGEN AKTIENGESELLSCHAFT,**

based in Wolfsburg, Germany,  
respondent, also appellant in the incidental appeal, lawyer:  
M.H.C. Sinninghe Damsté, Amsterdam,

and **[the other 66 defendants]**

The appellant will be referred to as SDEJ. Respondents 1, 4 and 5 are collectively referred to as VW c.s. and each as VW, Skoda and Seat. Interested parties 2 and 3 are referred to as Audi and Porsche. Interested parties 1 to 5 are collectively referred to as the Car Manufacturers. Respondent 7 is referred to as the Importer. Respondents 8 to 67 are collectively referred to as the Dealers.

## **1 The case in brief**

SDEJ brought collective claims against the Automobile Manufacturers, the Importer and the Dealers in relation to vehicles with diesel engines that SDEJ claimed did not and still do not meet Euro 5 and Euro 6 emission standards due to a prohibited manipulation device.

This judgment answers two questions, namely:

1. Does the Dutch court have jurisdiction over the claims against the Car Manufacturers? and
2. Which collective action regime applies, Article 3:305a (old) of the Civil Code or the Law on Handling of Mass Damage in a Collective Action (WAMCA)?

## **2 The case on appeal**

By summons dated 29 June 2022, SDEJ appealed against a judgment of the District Court of Amsterdam, delivered under the above case and role number, between SDEJ as plaintiff and the defendants as defendants.

The parties subsequently submitted the following documents:

- statement of objections, with exhibits;
- statement of reply also statement of grievances in cross-appeal by the Motor Manufacturers;
- Importer's reply memorandum;
- memorandum of reply from Dealers;
- response in incidental appeal with production.

The appeal in the case against the respondent 6 (Robert Bosch GmbH) has been struck out.

The parties had the case explained at the oral hearing on 16 May 2024 on the basis of speaking notes which they submitted, SDEJ by Mr Bongaerts aforementioned and Mr J.D.

Edixhoven, of the Amsterdam Bar, VW et al. represented by Sinninghe Damsté, and B.T. Klinger and D.V. Bondarchuk, both of the Amsterdam Bar, Audi represented by Knigge, and P. Sluiter, of the Rotterdam Bar, Porsche represented by Heemskerk, of the Rotterdam Bar, and M.E. Bulten, of the Rotterdam Bar, and K.I.M. Bondarchuk, of the Rotterdam Bar. Heemskerk aforementioned and R. Dufour, of the Hague Bar, the Importer by Sweerts aforementioned and M.E. Bulten and K.I.M. van Leusden, both of the Amsterdam Bar, and the Dealers by De Rooij aforementioned and G. Creijghton, of the Amsterdam Bar.

Finally, judgment was sought.

SDEJ moved that the court of appeal set aside the judgment under appeal insofar as it concerns sentences 5.30-5.31 and the operative part under 6.2 with a stipulation that Article 3:305a (new) BW and Title 14A Rv as amended and introduced with the WAMCA shall apply to these proceedings and the claims made therein, and with a decision, enforceable by way of provision, on the costs of proceedings.

The car manufacturers moved as an incidental appeal that the Court of Appeal should set aside the judgment under appeal insofar as it assumed jurisdiction over claims for the benefit of the Outer Amsterdam Purchasers against the car manufacturers, and declare that the District Court of Amsterdam did not yet have jurisdiction to hear those claims against the car manufacturers. On the main appeal, the Car Manufacturers argued that the court should uphold the contested judgment, with a provisionally enforceable decision on costs.

The claims of the Importer and the Dealers seek that the court should uphold the contested judgment with, enforceably, a decision on the costs of the proceedings.

In the cross-appeal, SDEJ moved that the court of appeal uphold the judgment under appeal insofar as the court had assumed jurisdiction therein, with a decision, enforceable by operation of law, on the costs in the cross-appeal.

### **3 Facts**

Under 2. of the judgment under appeal, the court established the facts which it took as its starting point. In summary, and supplemented where necessary by other facts, the facts amount to the following.

3.1. SDEJ was incorporated on 1 July 2019. Article 2(1) of its articles of association reads, in so far as relevant, as follows:

*"The purpose of the foundation is to promote and pursue the interests of the Victims (...), including but not limited to:*

*a. representing the interests of Victims worldwide in connection with the Claim;*

*b. Promoting the interests of Defendants and representing Defendants in legal proceedings within the Netherlands ();*

*c. obtaining and distributing financial compensation for (part of) the damage the Victims (...) claim to have suffered;*

*d. representing the collective interests of Victims in () legal proceedings within the Netherlands () such as civil () proceedings, ();*

*e. anything related or conducive to the above, all in the broadest sense;*

*all to the extent deemed appropriate by the board."*

In the articles of association, the following definitions shall apply:

*Victims: "all natural persons, or legal persons under private or public law, or their legal successors who have been directly or indirectly harmed or injured in any way whatsoever by the acts or omissions of the Entities and Policies () on which the Claims are based, in the broadest sense of the word".*

*Claim: "complaints, demands and claims by the Complainants and/or the Foundation in the interest of the Complainants, on any legal basis whatsoever, against one or more Entities and/or their Policy Holders in respect of any form of detriment, loss or damage which the Complainants claim to have suffered or to be suffering, individually or collectively as a result of fraudulent manipulation of vehicle emissions in certain test situations and the misrepresentations by the Entities as to the actual levels of such emissions, commonly known as the diesel emissions scandal, which expressly includes, but is not limited to, claims by any of the Complainants in connection with the purchase, ownership or lease of vehicles manufactured by one or more of the Entities, and claims in connection with emissions of environmentally hazardous substances."*

- 3.2. VW is organisationally linked to Audi, Porsche, Skoda and Seat. The Car Manufacturers produce vehicles. The Importer is the Dutch importer of vehicles produced by the Car Manufacturers. The Dealers sold and supplied vehicles (new or used) produced by the Car Manufacturers to car users. They also provided vehicles produced by the Car Manufacturers to car users who had leasing agreements with a leasing company regarding those vehicles (new or used).

#### **4 Review**

- 4.1. SDEJ's collective claims relate to vehicles with diesel engines with type designations EA189, EA288 and EA897, manufactured by the Automobile Manufacturers, imported into the Netherlands by the Importer and sold and delivered by the Dealers or issued for lease, which are approved on the basis of Euro 5 or Euro 6 emission regulations, acquired or leased by Defendants during the period from 1 January 2009 to the date of the Final Judgment (hereinafter: the Vehicles). SDEJ alleges that the Vehicles were fitted with a prohibited defeat device as a result of which they did not and still do not comply with the European emissions regulations (Euro 5 and Euro 6).

SDEJ acts on behalf of (legal) persons who are or were owners of a Vehicle in the Netherlands or lease or have leased a Sun Vehicle in the Netherlands (hereinafter: the Victims). SDEJ has divided the Victims into different categories (Consumers, Business Buyers, Lessees and Lessees Buyers) and, with respect to these categories, distinguishes between Victims according to whether they still own a Vehicle and between Consumers and Business Buyers who bought their Vehicle from a Dealer or not. Debtors also include Lessees who own a Vehicle under financial lease and are not yet legal owners.

For Victims who still own a Vehicle, the claims, in brief, are for annulment, case replacement, repossession of the Vehicles and rescission or at least joint and several damages. These claims are based on tort (including unfair commercial practices and product liability), (mutual) mistake and breach of contract. For the benefit of the other Defendants, the claims, in summary, seek a joint and several order to pay damages (decrease in the value of the Vehicle, additional costs and other loss).

- 4.2. The court assumed jurisdiction over the collective claims of SDEJ still at issue on appeal and held the WAMCA inapplicable. The

Car manufacturers challenge Dutch court's jurisdiction over claims brought against them. SDEJ argues that the WAMCA is applicable.

- 4.3. SDEJ has announced a claim amendment in respect of Vehicles with EA897 engines. The court assumes the claims as they stand now because SDEJ has not amended its claim.

*Jurisdiction over claims against the Automobile Manufacturers*

- 4.4. The rules of international jurisdiction are of public policy. Jurisdiction must be established before it can be given to further (substantive) assessment of the collective action. The court must therefore (also) assess ex officio whether the District Court of Amsterdam has jurisdiction to hear SDEJ's claims. That must be done in this case on the basis of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (OJEU 2012, L 351/1, Regulation Brussels I-bis). The provisions of this regulation must be interpreted autonomously according to its system and objectives, the starting point being that the rules of jurisdiction must be highly predictable. The court will follow the case-law of the Court of Justice of the European Union (CJEU) on this regulation and its predecessors: Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (EEX-Vo) and the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1979, C 59) (EEX Convention) in those cases where the provisions of the regulation to be applied are identical to those of its predecessors. The court will take into account not only the contentions of SDEJ, but also the available data on the legal relationship actually existing between the parties and the contentions of VW et al (see HR 23 March 2019, ECLI:NL:HR:2019:443, para 4.1.4). However, there is no need to take evidence at the jurisdictional determination stage with regard to disputed facts (see CJEU 16 June 2016, ECLI:EU:C:2016:449 (Universal Music), paragraphs 44-45).

- 4.5. Regulation Brussels I-bis has no specific jurisdictional basis or applications of the (special) jurisdictional rules relating to collective actions. The parties rightly assume that Articles 7(2) and 8(1) Regulation Brussels I-bis are the only possible jurisdictional bases for the claims against the Car Manufacturers.

*Article 8(1) Brussels I-bis Regulation*

- 4.6. Article 8(1) Brussels I-bis Regulation provides, in order to avoid irreconcilable judgments in separate proceedings, that where there is more than one defendant, the defendant may be sued in the courts for the domicile of one of them, provided that the claims are so closely connected that the proper administration of justice requires their simultaneous trial and determination. The purpose of this rule of jurisdiction is to facilitate the proper administration of justice, to minimise parallel proceedings and thus to avoid the risk of irreconcilable judgments resulting from separate proceedings. Since this rule of jurisdiction derogates from the main rule of Regulation Brussels I-bis that the courts of the defendant's domicile have jurisdiction (Article 4), it must be interpreted narrowly. That interpretation may extend only to the cases expressly provided for in that regulation (see, inter alia, CJEU 20 April 2016, ECLI:EU:C:2016:282 (Profit Investments SIM), paragraph 63). Decisions cannot already be considered incompatible on the basis of a divergence in the resolution of the dispute; to that end, moreover, it is required that that divergence occurs in the context of the same situation, in fact and in law (see, inter alia, Profit Investments SIM, paragraph 65).

- 4.7. The court sees no reason to stay the case pending the answers to the preliminary questions raised by this court on 19 September 2023 (ECLI:NL:GHAMS:2023:2570) concerning the

interpretation of Article 8(1) Brussels I bis Regulation. Questions included whether this provision directly, setting aside Articles 99 to 110 of the Dutch Code of Civil Procedure, designates both the internationally and relatively competent court and whether, when applying this provision, only one defendant can act as anchor defendant. At this state of affairs, where the questions have not yet been answered, the court assumes the most limited interpretation of Article 8(1) Brussels I-bis Regulation with regard to the issues at stake. The court of appeal assumes that this provision, setting aside Articles 99 to 110 of the Dutch Code of Civil Procedure, directly designates both the internationally and relatively competent court and that, when applying this provision, only one defendant can act as anchor defendant. The court sees no reason to ask further preliminary questions on Article 8(1) Brussels I-bis Regulation.

4.8. A number of defendants are domiciled in the district of Amsterdam. One of them having its domicile there (see Art. 63 Regulation Brussels I-bis) may act as an anchor defendant when applying Art. 8(1) Regulation Brussels I-bis. Jurisdiction under Art. 8(1) Regulation Brussels I-bis requires that the claims against the Car Manufacturers each have a close connection within the meaning of this provision with the claims against the anchor defendant.

4.9. The said requirement of a close connection is met, in the court's opinion, without necessarily answering the question of which specific Dealer domiciled in Amsterdam is an anchor defendant.

The allegation levelled against the Automobile Manufacturers of unlawful manipulation of the Vehicles is not directed against the anchor defendant, but the merits of the claims against the anchor defendant depend (in part) on the merits of this allegation. This is not altered by the potentially occurring differences in, inter alia, the allegations, legal bases, consequences and regimes. The admissibility of the claims against the Automobile Manufacturers and the anchor defendant further requires answering common questions of fact and law, for example, the question of the Vehicles' failure to comply with the emissions regulations, the factual and legal consequences thereof and whether those factual consequences have since been adequately remedied. Further, the Anchor Defendant is held jointly and severally liable with the Automobile Manufacturers in connection with a number of allegations made jointly or interrelated to them for the entire damages of all Victims for which SDEJ is (still) defending in these proceedings.

It follows that the same situation, factual and legal, is sufficiently at issue. Joint consideration of the claims against the Auto Manufacturers and the anchor defendant will prevent different courts from having to answer the same questions in this regard and (may) give conflicting decisions.

This close connection between the claims against the Anchor Defendant and those against the Automobile Manufacturers is not limited to that part of SDEJ's constituency that bought or leased a Vehicle in Amsterdam, as the Automobile Manufacturers claim. The joint and several liability underlying the claims concerns the entire damages of all the Victims for which SDEJ is (still) defending in these proceedings and there are common facts and questions of law for all the Victims that have nothing to do with where the Vehicle was purchased or the specific circumstances of the case surrounding a purchase or lease.

Joint consideration of the claims against the Auto Manufacturers and the anchor defendant will prevent different judges from having to answer the same questions in this regard and (may) give conflicting decisions.

For the Car Manufacturers, it was foreseeable that they could be sued in Dutch courts, including the Amsterdam court. Indeed, they had to take into account that they could be summoned before a court of a member state in which the vehicles they manufactured were marketed.

In so far as the admissibility of the claims against the anchor defendant would be relevant to the determination of jurisdiction under Article 8(1) Regulation Brussels I-bis this court has referred a question on this to the CJEU (see ECLI:NL:GHAMS:2023:2570) and should it be assumed that this article cannot be applied in the event of insufficient substantiation of the

claim against the anchor defendant, in the present case, in view of the substantiation of its claims given by SDEJ, there is no obstacle therein to assuming jurisdiction.

- 4.10. In conclusion, the Amsterdam District Court has jurisdiction to take cognisance of the claims against the Car Manufacturers pursuant to Art. 8(1) Regulation Brussels I- bis. It may be left open whether the Amsterdam District Court also has jurisdiction under art. 7(2) Regulation Brussels I-bis.

*Applicable collective action regime*

- 4.11. With the introduction of the WAMCA, Art. 3:305a of the Civil Code, which regulates the bringing of collective claims, was amended and new procedural provisions for such claims were added in Title 14A Rv. The relevant transitional law for Article 3:305a of the Civil Code is laid down in Article 119a paragraph 2 of the New Civil Code Transition Act (hereinafter: ONBW). This provision contains an exception to the main rule of immediate effect (Art. 68a ONBW), according to which Art. 3:305a (old) Civil Code continues to apply to collective claims brought after 1 January 2020 "insofar as the legal claim relates to an event or events that took place before 15 November 2016." The transitional law applicable to Title 14A Rv introduced by the WAMCA means that this title applies to lawsuits brought on or after 1 January 2020 and relating to an event or events that took place on or after 15 November 2016 (art. III under 2 WAMCA).

The amendments to the BW and the Rv introduced by the WAMCA are *i n s e p a r a b l e*. In view of this, and because the WAMCA transitional law makes an exception to the principle of immediate effect of amendments to the BW and the CoC, the WAMCA does not apply to collective claims that relate (exclusively) to an event or events that took place before 15 November 2016 (cf. HR 11 March 2022, ECLI:NL:HR:2022:347, para 3.1.4). This is consistent with the legal certainty sought by the WAMCA transitional law and the prevention of proceedings concerning the same event(s) under different collective action regimes.

To determine whether there was an event or events that took place exclusively before or from 15 November 2016, SDEJ's assertions and the defendants' challenges must be taken into account. Evidence is therefore not at issue; an indication based on the parties' contentions is sufficient (cf. HR 11 March 2022, ECLI:NL:HR:2022:347, para 3.1.4).

- 4.12. The common denominator of SDEJ's collective claims is that all of SDEJ's allegations, partly *b a s e d* on different legal foundations, against the Car Manufacturers, the Importer and *t h e* Dealers relate to Vehicles put into circulation in the Netherlands that were allegedly equipped with emission control software (an alleged manipulation device) as a result of which they did not and still do not comply with the applicable emission regulations. The court therefore identifies the *e n t r y* into circulation in the Netherlands of Vehicles equipped with an alleged manipulation device as the event(s) to which SDEJ's collective claims relate. The court therefore does not endorse the event determined by the court, namely the development of the emission control software. The event(s) advocated by SDEJ, including the reprogramming of said software, concern the continuation or failure to remove the alleged damage resulting from the putting into circulation in the Netherlands of Vehicles that do not *c o m p l y* with the emission regulations. To designate this (also) as the event(s) relevant for application of the transitional law would lead to a conflict with the legal certainty intended by the transitional law.

- 4.13. When applying Section 119a(2) ONBW to SDEJ's collective claims, a distinction should be made between Vehicles subject *t o* the Euro 5 and Euro 6 emission standards, respectively. The Euro 5 standard applied until September 2015. Thereafter, the Euro 6 standard applied. It is not in dispute that Vehicles with EA189 engines were only subject to the Euro 5 standard and that such Vehicles were not on or after

15 November 2016 were put into circulation in the Netherlands. The party pleadings provide no, or at least insufficient, indication that Vehicles with EA288 and EA897 engines to which the Euro 5 standard applied were put into circulation in the Netherlands on or after 15 November 2016. SDEJ's choice to bring collective claims in one proceeding in relation to Vehicles produced over a long period of time in which different emission requirements (Euro 5/Euro 6) apply cannot result in collective claims in relation to Vehicles for which there is no or insufficient indication that they were put into circulation in the Netherlands on or after 15 November 2016 being brought under the WAMCA regime. This is inconsistent with the legal certainty intended by the legislator with Art. 119a(2) ONBW. Insofar as SDEJ's collective claims relate to Vehicles brought into circulation in the Netherlands to which the Euro 5 standard applicable until September 2015 applied, they therefore only relate to events that took place before 15 November 2016 and are governed by Art. 3:305a (old) BW. This regime therefore applies to SDEJ's collective claims in relation to Vehicles with EA189 engines and Vehicles with EA288 and EA897 engines to which the Euro 5 standard applied.

4.14. The party discussion provides sufficient evidence that Vehicles with EA288 and EA897 engines subject to Euro 6 standards were also put on the road in the Netherlands on and after 15 November 2016. The collective claims relating to these Vehicles therefore do not relate (exclusively) to event(s) prior to 15 November 2016. The WAMCA applies to them. This is in line with the premise of the WAMCA that all claims relating to the same event(s) are concentrated in one collective action proceeding, the legislator's intention to prevent simultaneous application of different regimes to collective actions concerning the same event(s) and the legal certainty sought by the legislator, which implies, inter alia, that (potential) defendants can expect to be confronted with a collective action to which the WAMCA applies in relation to events that did not or did not exclusively take place before 15 November 2016.

4.15. In conclusion, to the extent that SDEJ's collective claims relate to Vehicles with EA189 engines and Vehicles with EA288 and EA897 engines to which the Euro 5 standard applies, they are governed by Article 3:305a (old) of the Civil Code. To the extent that SDEJ's collective claims relate to Vehicles with EA288 and EA897 engines to which Euro 6 standards apply, they are governed by the WAMCA. The applicability of different regimes can undeniably lead to litigation complications. However, that is the consequence of merging into one collective action claims relating to distinguishable events that did and did not occur exclusively before 15 November 2016.

#### *Final sum*

4.16. The judgment under appeal cannot stand. There is no interest in separate consideration of the grievances and the defences. The parties have not yet given their (sufficient) opinion on the continuation of the proceedings, including the question whether referral back to court is appropriate. The parties will be given the opportunity to express their views on this at a pre-trial hearing, which will be held on 24 September 2024 for the sake of smooth progress. If they so wish, the parties may set out their views in a short document (of up to five pages) no later than 10 working days before that hearing.

4.17. The court reserved any further decision.

## **5 Decision**

The court:



5.1. orders a pre-trial hearing to be held on 24 September 2024, at 10 am, for the purpose described in paragraph 4.16;

5.2. reserves any further decision.

This judgment was delivered by Messrs L. Alwin, J.W.M. Tromp and M.C. Bosch and pronounced in public by the presiding judge on 13 August 2024.